

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 79.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

APRIL—JUNE, 1897.

ST. PAUL:
WEST PUBLISHING CO.
1897.

COPYRIGHT, 1897,
BY
WEST PUBLISHING COMPANY.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FIRST CIRCUIT.

- Hon. HORACE GRAY, Circuit Justice.
Hon. LE BARON B. COLT, Circuit Judge.
Hon. WILLIAM L. PUTNAM, Circuit Judge.
Hon. NATHAN WEBB, District Judge, Maine.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.
Hon. THOMAS L. NELSON, District Judge, Massachusetts.
Hon. GEORGE M. CARPENTER, District Judge, Rhode Island.¹
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.²

SECOND CIRCUIT.

- Hon. RUFUS W. PECKHAM, Circuit Justice.
Hon. WILLIAM J. WALLACE, Circuit Judge.
Hon. E. HENRY LACOMBE, Circuit Judge.
Hon. NATHANIEL SHIPMAN, Circuit Judge.
Hon. WILLIAM K. TOWNSEND, District Judge, Connecticut.
Hon. ALFRED C. COXE, District Judge, N. D. New York.
Hon. ADDISON BROWN, District Judge, S. D. New York.
Hon. CHARLES L. BENEDICT, District Judge, E. D. New York.
Hon. HOYT H. WHEELER, District Judge, Vermont.

THIRD CIRCUIT.

- Hon. GEORGE SHIRAS, Jr., Circuit Justice.
Hon. MARCUS W. ACHESON, Circuit Judge.
Hon. GEORGE M. DALLAS, Circuit Judge.
Hon. LEONARD E. WALES, District Judge, Delaware.³
Hon. EDWARD G. BRADFORD, District Judge, Delaware.⁴
Hon. EDWARD T. GREEN, District Judge, New Jersey.⁵
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey.⁶
Hon. WILLIAM BUTLER, District Judge, E. D. Pennsylvania.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.

¹Deceased.

²Confirmed December 15, 1896.

³Deceased.

⁴Confirmed May 11, 1897.

⁵Deceased October 10, 1896.

⁶Confirmed December 15, 1896.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.
Hon. NATHAN GOFF, Circuit Judge.
Hon. CHARLES H. SIMONTON, Circuit Judge.
Hon. THOMAS J. MORRIS, District Judge, Maryland.
Hon. AUGUSTUS S. SEYMOUR, District Judge, E. D. North Carolina.¹
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.²
Hon. ROBERT P. DICK, District Judge, W. D. North Carolina.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Carolina.
Hon. ROBERT W. HUGHES, District Judge, E. D. Virginia.
Hon. JOHN PAUL, District Judge, W. D. Virginia.
Hon. JOHN J. JACKSON, District Judge, West Virginia.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.
Hon. DON A. PARDEE, Circuit Judge.
Hon. A. P. McCORMICK, Circuit Judge.
Hon. JOHN BRUCE, District Judge, M. and N. D. Alabama.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.
Hon. EMORY SPEER, District Judge, S. D. Georgia.
Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.
Hon. JOHN B. RECTOR, District Judge, W. D. Texas.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.

SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.
Hon. WILLIAM H. TAFT, Circuit Judge.
Hon. HORACE H. LURTON, Circuit Judge.
Hon. JOHN WATSON BARR, District Judge, Kentucky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.
Hon. HENRY F. SEVERENS, District Judge, W. D. Michigan.
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio.
Hon. GEORGE R. SAGE, District Judge, S. D. Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee.
Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.

¹ Deceased.

² Confirmed May 5, 1897.

SEVENTH CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice.
 Hon. WILLIAM A. WOODS, Circuit Judge.
 Hon. JAMES G. JENKINS, Circuit Judge.
 Hon. JOHN W. SHOWALTER, Circuit Judge.
 Hon. PETER S. GROSSCUP, District Judge, N. D. Illinois.
 Hon. WILLIAM J. ALLEN, District Judge, S. D. Illinois.
 Hon. JOHN H. BAKER, District Judge, Indiana.
 Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.
 Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.

EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.
 Hon. HENRY C. CALDWELL, Circuit Judge.
 Hon. WALTER H. SANBORN, Circuit Judge.
 Hon. AMOS M. THAYER, Circuit Judge.
 Hon. JOHN A. WILLIAMS, District Judge, E. D. Arkansas.
 Hon. ISAAC C. PARKER, District Judge, W. D. Arkansas.¹
 Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.²
 Hon. MOSES HALLETT, District Judge, Colorado.
 Hon. OLIVER P. SHIRAS, District Judge, N. D. Iowa.
 Hon. JOHN S. WOOLSON, District Judge, S. D. Iowa.
 Hon. CASSIUS G. FOSTER, District Judge, Kansas.
 Hon. RENSSELAER R. NELSON, District Judge, Minnesota.³
 Hon. WM. LOCHREN, District Judge, Minnesota.⁴
 Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.
 Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.
 Hon. ELMER S. DUNDY, District Judge, Nebraska.⁵
 Hon. WILLIAM D. McHUGH, District Judge, Nebraska.⁶
 Hon. W. H. MUNGER, District Judge, Nebraska.
 Hon. ALFRED D. THOMAS, District Judge, North Dakota.⁷
 Hon. CHARLES F. AMIDON, District Judge, North Dakota.⁸
 Hon. ALONZO J. EDGERTON, District Judge, South Dakota.⁹
 Hon. JOHN E. CARLAND, District Judge, South Dakota.¹⁰
 Hon. JOHN A. MARSHALL, Judge, Utah.
 Hon. JOHN A. RINER, District Judge, Wyoming.

¹Deceased November 17, 1896.²Commissioned December 15, 1896.³Resigned May 16, 1896.⁴Commissioned May 18, 1896. Confirmed same date.⁵Deceased October 28, 1896.⁶Resigned.⁷Deceased August 8, 1896.⁸Commissioned August 31, 1896. Confirmed February 18, 1897.⁹Deceased August 9, 1896.¹⁰Commissioned December 15, 1896.

NINTH CIRCUIT.

Hon. STEPHEN J. FIELD, Circuit Justice.
Hon. JOSEPH McKENNA, Circuit Judge.¹
Hon. WILLIAM B. GILBERT, Circuit Judge.
Hon. ERSKINE M. ROSS, Circuit Judge.
Hon. WM. W. MORROW, District Judge, N. D. California.
Hon. OLIN WELLBORN, District Judge, S. D. California.
Hon. HIRAM KNOWLES, District Judge, Montana.
Hon. CORNELIUS H. HANFORD, District Judge, Washington.
Hon. THOMAS P. HAWLEY, District Judge, Nevada.
Hon. CHARLES B. BELLINGER, District Judge, Oregon.
Hon. JAMES H. BEATTY, District Judge, Idaho.
Hon. ARTHUR K. DELANEY, District Judge, Alaska.

¹Resigned.

CASES REPORTED.

	Page		Page
Addison v. Pacific Coast Milling Co. (C. C.)	459	Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co. (C. C.)	842
Advance, The, two cases (C. C. A.)	989	Aultman & Taylor Co. v. Syme (C. C. A.)	238
Aetna Life Ins. Co. v. Board of County Com'rs of Hamilton County (C. C. A.)	575	Babcock, The W. F. (D. C.)	92
Alaska Packers' Ass'n, United States v. (C. C.)	152	Babcock, American Buttonhole, Overseaming & Sewing Machine Co. v. (C. C. A.)	989
Albany Steam Trap Co. v. Worthington (C. C. A.)	966	Baker, Denton v. (C. C. A.)	189
Albert N. Hughes, The, The Lottie K. Friend v. (D. C.)	383	Baldwin, Davidson v. (C. C. A.)	95
Alene, The, Hall v. (C. C. A.)	976	Baltimore & O. R. Co., Mercantile Trust Co. v. (C. C.)	389
Alhambra Min. Co., Scheel v. (C. C.)	821	Baltimore & O. S. W. R. Co., Voight v. (C. C.)	561
Allen v. American Loan & Trust Co. (C. C. A.)	695	Barnett, Sabin v. (C. C.)	947
Allen v. Jones (C. C.)	698	Barr, McClaskey v. (C. C.)	408
Allianca, The, two cases (C. C. A.)	989	Bates County, Edwards v. (C. C.)	56
Allianca, The, Commercial Union Assur. Co. v. (C. C. A.)	989	Bauer, Johnson v. (C. C.)	954
Allianca, The, London Assur. Corp. v. (C. C. A.)	989	Bausman v. Kinnear (C. C. A.)	172
Alvena, The, Welsh v. (C. C. A.)	973	Beaconsfield, The, Sanbern v. (C. C. A.)	990
American Buttonhole, Overseaming & Sewing Machine Co. v. Babcock (C. C. A.)	989	Beck, Sullivan v. (C. C.)	200
American Freehold Land Mortgage Co. of London v. Woodworth (C. C.)	951	Becker, Hostetter Co. v. (C. C. A.)	996
American Grocery Co. v. Godillot (C. C. A.)	989	Rent, Everett Piano Co. v. (C. C.)	79
American Loan & Trust Co., Allen v. (C. C. A.)	695	Bertha M. Miller, The, (C. C. A.)	365
American Loan & Trust Co., Oregon Short Line & U. N. R. Co. v., four cases (C. C. A.)	1000	Beshears, In re (D. C.)	70
American Loan & Trust Co., Roth v. (C. C. A.)	1001	Best v. British & American Mortg. Co. (C. C.)	401
American Loan & Trust Co., Veatch v. (C. C. A.)	471	Birmingham Brass Co., Jackson v. (C. C. A.)	801
American Nat. Bank of Kansas City, Mo., Williams v. (C. C. A.)	1006	Blair, New York Electric Equipment Co. v. (C. C. A.)	896
American Steel-Barge Co., Merriitt v. (C. C. A.)	228	Blum, White v. (C. C. A.)	271
American Sugar-Refining Co. v. The Sandfield (D. C.)	371	Board of Com'rs of Lake County v. Platt (C. C. A.)	567
Anderson v. Mackay (C. C. A.)	990	Board of County Com'rs of Hamilton County, Aetna Life Ins. Co. v. (C. C. A.)	575
Anderson, California Fruit Transp. Co. v. (C. C.)	404	Borgfeldt, United States v. (C. C. A.)	953
Anderson Lumber Co. v. Greenwich Ins. Co. (D. C.)	125	Boston & M. R. Co. v. McDuffey (C. C. A.)	934
Andrews Bros. Co., Youngstown Coke Co. v. (C. C.)	669	Bowen v. Clymer (C. C. A.)	53
Appleton, Eaucabert v. (C. C. A.)	993	Bowen v. Needles Nat. Bank (C. C.)	49
Aspasia, The, Steinwender v. (D. C.)	91	Boyd, United States v. (C. C.)	858
Aspinwall v. Glenn (C. C. A.)	990	Boyd Paving & Contracting Co., Ward v. (C. C.)	390
Atlantic City R. Co., Union Switch & Signal Co. v. (C. C. A.)	1003	Boynton, United States v. (C. C.)	691
Atlantic Trust Co. v. Proceeds of The Advance (C. C. A.)	989	Branchi v. Glenn (C. C. A.)	990
Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co. (C. C.)	39	Briggs, Town of Phelps v. (C. C. A.)	1003
Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co. (C. C.)	501	British & American Mortg. Co., Best v. (C. C.)	401
		Brown v. Central Railroad & Banking Co. of Georgia (C. C.)	158
		Brown v. Ohio Val. R. Co. (C. C.)	176
		Brown v. Prince Steam Shipping Co. (C. C. A.)	990
		Brown v. Proceeds of the Seguranca (C. C. A.)	1002
		Brown, Daniel v. (C. C. A.)	993
		Brown, Excelsior Pebble Phosphate Co. v. (C. C. A.)	994
		Brown, Hayden v. (C. C. A.)	996

	Page		Page
Brunswick-Balke-Collender Co. v. Phelan		Clark, Moore v. (C. C. A.)	998
Billiard-Ball Co. (C. C. A.)	85	Clark, Pyle v. (C. C. A.)	744
Bryson v. Koons (C. C. A.)	990	Clarke v. Hopkins (C. C.)	386
Buckstaff v. Russell & Co. (C. C. A.)	611	Cleveland, C. & St. L. R. Co. v. Hawkins (C. C.)	29
Buffalo Bill's Wild West Co. v. Roser (C. C. A.)	991	Clymer, Bowen v. (C. C. A.)	53
Bull, Severs v. (C. C. A.)	1002	Cochran v. Mutual Life Ins. Co. of New York (C. C.)	46
Bunker Hill & S. Mining & Concentrating Co. v. Schmelling (C. C. A.)	263	Cockrill v. Cockrill (C. C.)	143
Bunker Hill & Sullivan Mining & Concentrating Co. v. Oberder (C. C. A.)	726	Cockrill v. Woodson (C. C. A.)	992
Burke v. Short (C. C. A.)	6	Collector of Customs of Port and District of San Francisco, Grace v. (C. C. A.)	315
Burr, United States v. (C. C. A.)	1004	Collins, United States v. (D. C.)	65
Burt v. Glenn (C. C. A.)	991	Columbia Nat. Bank, Matthews v. (C. C.)	558
Buxton Min. Co., Golden Reward Min. Co. v. (C. C.)	868	Columbian Fastener Co., Consolidated Fastener Co. v. (C. C.)	795
Buzzell v. Norris (C. C.)	329	Commercial Travelers' Mut. Acc. Ass'n of America v. Fulton (C. C. A.)	423
Buzzell v. Walker (C. C.)	328	Commercial Union Assur. Co. v. The Alliance (C. C. A.)	989
California Fruit Transp. Co. v. Anderson (C. C.)	404	Computing Scale Co. v. Hoyt (C. C.)	962
California Redwood Co. v. Little (C. C.)	854	Computing Scale Co. v. National Computing Scale Co. (C. C.)	962
Calvin v. Escanaba Towing & Wrecking Co. (C. C. A.)	1002	Connecticut Mut. Life Ins. Co., Hillmon v. (C. C.)	749
Campbell Printing-Press & Manuf'g Co. v. Marden (C. C. A.)	653	Consolidated Fastener Co. v. Columbian Fastener Co. (C. C.)	795
Canada Shipping Co. v. Haskell (C. C. A.)	991	Cornwall, Davis v. (C. C. A.)	993
Carey v. Mayer (C. C. A.)	926	Cotting v. Kansas City Stock-Yards Co. (C. C.)	679
Carey v. Williams (C. C. A.)	906	Cowell v. Craig (C. C.)	685
Carter-Crume Co. v. Jonap (C. C.)	1007	Cowles Electric Smelting & Aluminum Co. v. Lowrey (C. C. A.)	331
Catholicon Co., New England Furniture & Carpet Co. v. (C. C. A.)	294	Craig, Cowell v. (C. C.)	685
Cathin, Chase v. (C. C. A.)	991	Crossley v. Duggan (C. C. A.)	992
Central R. Co. of New Jersey v. Wiegand (C. C. A.)	991	Culbertson, Johnson v. (C. C.)	5
Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co. (C. C.)	158	Cunningham, Kinney v. (C. C. A.)	997
Central Railroad & Banking Co. of Georgia, Brown v. (C. C.)	158	Dadirrian v. Gullian (C. C.)	784
Central Trust Co. v. East Tennessee Land Co. (C. C.)	19	Daniel v. Brown (C. C. A.)	993
Central Trust Co. v. Valley R. Co. (C. C.)	195	Davidson v. Baldwin (C. C. A.)	95
Central Vt. R. Co., McPeck v. (C. C. A.)	590	Davis v. Cornwall (C. C. A.)	993
Chapman Derrick & Wrecking Co. v. The Isabel (D. C.)	103	Davis v. Wakelee (C. C. A.)	993
Charles Pope Glucose Co., Chicago Sugar-Refining Co. v. (C. C.)	957	Davis & Rankin Bldg. & Manuf'g Co., Philadelphia Creamery Supply Co. v. (C. C.)	357
Chase v. Catlin (C. C. A.)	991	De Lacey, Northern Pac. R. Co. v. (C. C. A.)	1000
Chehalis County, State Trust Co. v. (C. C. A.)	282	Denny v. City of Spokane (C. C. A.)	719
Chicago Sugar-Refining Co. v. Charles Pope Glucose Co. (C. C.)	957	Denton v. Baker (C. C. A.)	189
Choctaw, O. & G. R. Co., Miller v. (C. C. A.)	998	Denver & R. G. R. Co. v. Lorentzen (C. C. A.)	291
Citizens' Nat. Bank of Des Moines, Iowa, Ex parte (C. C. A.)	991	Dewey, Stratton v. (C. C. A.)	32
City Item Printing Co., Falk v. (C. C.)	321	Dexter, Horton & Co. v. Sayward (C. C.)	237
City of Chicago, Thompson Nav. Co. v. (D. C.)	984	Disney v. Furness, Withy & Co. (D. C.)	810
City of Great Falls v. Theis (C. C.)	943	Dodson v. Fletcher (C. C. A.)	129
City of Hastings, Neb., v. Thomas (C. C. A.)	992	Donallan v. Tannage Patent Co. (C. C. A.)	385
City of Humboldt v. Jackson (C. C. A.)	992	Dooley v. Pense (C. C.)	800
City of Newton v. Levis (C. C. A.)	715	Downing v. Outerbridge (C. C. A.)	931
City of Omaha v. New England Loan & Trust Co. (C. C. A.)	992	Downs v. Farmers' Loan & Trust Co. (C. C. A.)	215
City of Puebla, The, Puget Sound Tugboat Co. v. (D. C.)	982	Drinnen, Western Wheel-Scraper Co. v. (C. C.)	820
City of San Diego, Gamble v. (C. C.)	487	Dudley, United States v. (C. C. A.)	75
City of Spokane, Denny v. (C. C. A.)	719	Duggan, Crossley v. (C. C. A.)	992
Clark v. Wright (C. C. A.)	744	Duryea v. National Starch-Manuf'g Co. (C. C. A.)	651
		Earnmoor S. S. Co., New Zealand Ins. Co. v. (C. C. A.)	368
		El. A. Shores, Jr., The, Manegold v. (D. C.)	987

CASES REPORTED.

xi

	Page		Page
Eastern Oregon Land Co. v. Messinger (C. C. A.)	719	Foley v. The Peninsular (D. C.)	972
Eastern Oregon Land Co. v. Wilcox (C. C. A.)	719	Footo, Excelsior Elevator Guard & Hatch Cover Co. v. (C. C. A.)	442
East Tennessee Land Co., Central Trust Co. v. (C. C.)	19	Foppes v. United States (C. C. A.)	994
East Tennessee Land Co., Schumacher v. (C. C.)	19	Foppes v. United States, two cases (C. C. A.)	995
Eaucabert v. Appleton (C. C. A.)	993	Foster v. Lincoln's Ex'r (C. C. A.)	170
Ebner v. Juneau Min. & Manuf'g Co. (C. C. A.)	993	Fowler Manuf'g Co. v. Pierpont Boiler Co. (C. C. A.)	995
Eclipse Manuf'g Co. v. Standard Radiator Co. (C. C. A.)	993	Francisco R., The, v. The Waterloo (D. C.)	113
Eddy v. Glenn (C. C. A.)	993	Frankel v. United States (C. C. A.)	995
Eddy v. Northern S. S. Co. (D. C.)	361	Friend, The Lottie K., v. The Albert N. Hughes (D. C.)	383
Edison Electric Light Co. v. Stafford (C. C. A.)	994	Fulton, Commercial Travelers' Mut. Acc. Ass'n of America v. (C. C. A.)	423
Edwards v. Bates County (C. C.)	56	Furness, Withy & Co., Disney v. (D. C.)	810
Edwards, Lanyon v. (C. C. A.)	580	Gamble v. City of San Diego (C. C.)	487
Eleven Hundred Head of Cattle, United States v. (C. C. A.)	1004	Garfield & Proctor Coal Co. v. The Mount Hope (D. C.)	119
Elliott, Peck v. (C. C. A.)	10	Garner v. Second Nat. Bank of Providence, R. I. (C. C. A.)	995
Emery, Rhino v. (C. C.)	483	Gates Iron Works v. Kimbell & Cobb Stone Co. (C. C.)	75
Empire Transp. Co. v. The Nannie Lamberton (D. C.)	121	General Electric Co. v. La Grande Edison Electric Co. (C. C.)	25
Escanaba Towing & Wrecking Co., Calvin v. (C. C. A.)	1002	George S. Homer, The, Harris v. (C. C. A.)	995
E. S. Higgins Carpet Co. v. O'Keefe (C. C. A.)	900	Gibbon v. Loewer Sole-Rounder Co. (C. C. A.)	325
Everett Piano Co. v. Bent (C. C.)	79	Gibson, Maitland v. (C. C.)	136
Excelsior Coal Co. v. Oregon Imp. Co. (C. C. A.)	355	Gilchrist v. Godman (D. C.)	970
Excelsior Elevator Guard & Hatch Cover Co. v. Foote (C. C. A.)	442	Girard Point Storage Co., The Norwood v. (D. C.)	113
Excelsior Pebble Phosphate Co. v. Brown (C. C. A.)	994	Golden Reward Min. Co. v. Buxton Min. Co. (C. C.)	868
Faber, International Bank of St. Louis v. (C. C.)	919	Gladiator, The (C. C. A.)	445
Falk v. City Item Printing Co. (C. C.)	321	Glass, First Nat. Bank of Humboldt, Neb., v. (C. C. A.)	706
Fannie P. Skeer, The (D. C.)	121	Glenalvon, The (D. C.)	113
Farmers' Loan & Trust Co. v. Central Railroad & Banking Co. of Georgia (C. C.)	158	Glenn, Aspinwall v. (C. C. A.)	990
Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co., three cases (C. C. A.)	994	Glenn, Branchi v. (C. C. A.)	990
Farmers' Loan & Trust Co. v. Green (C. C. A.)	222	Glenn, Burt v. (C. C. A.)	991
Farmers' Loan & Trust Co. v. Nestelle (C. C. A.)	748	Glenn, Eddy v. (C. C. A.)	993
Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.)	227	Glenn, Mayer v. (C. C. A.)	998
Farmers' Loan & Trust Co., Downs v. (C. C. A.)	215	Glenn, Pomeroy v. (C. C. A.)	1001
Farmers' Loan & Trust Co., Lackawanna Iron & Coal Co. v. (C. C. A.)	202	Glenn, Randall v. (C. C. A.)	1001
Farmers' Loan & Trust Co., Morgan's Louisiana & T. R. & S. S. Co. v. (C. C. A.)	210	Glenn, Williams v. (C. C. A.)	1006
Farmers' Loan & Trust Co., Southern Development Co. v. (C. C. A.)	212	Godillot, American Grocery Co. v. (C. C. A.)	989
Fidelity Insurance, Trust & Safe-Deposit Co. v. Virginia & T. Coal & Iron Co. (C. C. A.)	994	Godman, Gilchrist v. (D. C.)	970
First Nat. Bank of Concord v. Hawkins (C. C. A.)	51	Godwin, United States v., two cases (C. C. A.)	1004
First Nat. Bank of Humboldt, Neb., v. Glass (C. C. A.)	706	Gougar v. Morse (C. C. A.)	995
First Nat. Bank of Little Rock, United States Nat. Bank v. (C. C. A.)	296	Grace v. Collector of Customs of Port and District of San Francisco (C. C. A.)	315
Fish v. Ogdensburgh & L. C. R. Co. (C. C.)	131	Graham v. MacDonald (C. C. A.)	995
Fletcher, Dodson v. (C. C. A.)	129	Grand Avenue Hotel Co. v. Wharton (C. C. A.)	43
		Graven, MacLeod v. (C. C. A.)	84
		Graves v. Stewart (C. C. A.)	996
		Graves v. The W. F. Babcock (D. C.)	92
		Great Southern Fireproof Hotel Co., Jones v. (C. C.)	477
		Green v. Farmers' Loan & Trust Co. (C. C. A.)	222
		Greene, Knights Templars & Masonic Mut. Aid Ass'n v. (C. C.)	461
		Greenwich Ins. Co., Anderson Lumber Co. v. (D. C.)	125
		Gregory v. Pike (C. C. A.)	520
		Grice, In re (C. C.)	627
		Grover, The Maurice B. (D. C.)	378

	Page		Page
Guglar, United States v. (C. C.).....	21	International Bank of St. Louis v. Faber	
Gullian, Dadirian v. (C. C.).....	784	(C. C.).....	919
Hall v. The Alene (C. C. A.).....	976	Isabel, The, Chapman Derrick & Wrecking	
Hampton & O. P. R. Co., Woodfin v. (C. C. A.).....	1006	Co. v. (D. C.).....	103
Hanse, United States v. (C. C.).....	303	Jack v. Walker (C. C.).....	138
Hard v. Proceeds of The Advance (C. C. A.).....	989	Jackson v. Birmingham Brass Co. (C. C. A.).....	801
Harmon, National Park Bank of City of New York v. (C. C. A.).....	891	Jackson, City of Humboldt v. (C. C. A.).....	992
Harris v. The George S. Homer (C. C. A.).....	995	Jacksonville, T. & K. W. R. Co., Savannah, F. & W. R. Co. v. (C. C. A.).....	35
Hartman v. Prince Steam Shipping Co. (C. C. A.).....	990	Johnson v. Bauer (C. C.).....	954
Harvey v. Winney (C. C. A.).....	996	Johnson v. Culbertson (C. C.).....	5
Haskell, Canada Shipping Co. v. (C. C. A.).....	991	Johnson v. United States (C. C. A.).....	996
Hatch v. Johnson Loan & Trust Co. (C. C.).....	828	Johnson Loan & Trust Co., Hatch v. (C. C.).....	828
Hatcher, United Mines Co. v. (C. C. A.).....	517	Jonap, Carter-Crume Co. v. (C. C.).....	1007
Hathaway Manuf'g Co., Providence Steam-Engine Co. v. (C. C.).....	512	Jones v. Great Southern Fireproof Hotel Co. (C. C.).....	477
Hawkins v. Peirce (C. C.).....	452	Jones v. Meehan (C. C. A.).....	997
Hawkins v. State Loan & Trust Co. (C. C.).....	50	Jones, Allen v. (C. C.).....	698
Hawkins, Cleveland, C., C. & St. L. R. Co. v. (C. C.).....	29	Jones & Laughlins v. Sands (C. C. A.).....	913
Hawkins, First Nat. Bank of Concord v. (C. C. A.).....	51	Jordan, Tarr v. (C. C. A.).....	365
Hayden v. Brown (C. C. A.).....	996	Juneau Min. & Manuf'g Co., Ebner v. (C. C. A.).....	993
Healey v. The Maracaibo (C. C. A.).....	998	Kansas City Stock-Yards Co., Cotting v. (C. C.).....	679
Healey v. The Maracaibo (D. C.).....	809	Kansas City Stock-Yards Co., Higginson v. (C. C.).....	679
Helgoland, The, New York, N. H. & H. R. Co. v. (D. C.).....	123	Kelley-Goodfellow Shoe Co. v. Scales (C. C. A.).....	997
Henderson v. Wanamaker (C. C. A.).....	736	Kennedy v. United States (C. C.).....	893
Henion v. New York, N. H. & H. R. Co. (C. C. A.).....	903	Klely, United States v. (C. C.).....	691
Hewecker, United States v. (C. C.).....	59	Kiernan v. The Nannie Lamberton (D. C.).....	121
Hicks, St. Louis & S. F. R. Co. v., two cases (C. C. A.).....	262	Kimbell & Cobb Stone Co., Gates Iron Works v. (C. C.).....	75
Higgins, United States v. (C. C.).....	691	Kinnear, Bausman v. (C. C. A.).....	172
Higgins Carpet Co. v. O'Keefe (C. C. A.).....	900	King v. Lewis (C. C. A.).....	997
Higginson v. Kansas City Stock-Yards Co. (C. C.).....	679	King v. Port Royal & A. R. Co. (C. C.).....	397
Hill v. Hite (C. C.).....	826	Kingman v. Western Manuf'g Co. (C. C. A.).....	997
Hill, United States v. (C. C. A.).....	1004	Kinney v. Cunningham (C. C. A.).....	997
Hillmon v. Connecticut Mut. Life Ins. Co. (C. C.).....	749	Kirk, Morton v. (C. C.).....	290
Hillmon v. Mutual Life Ins. Co. (C. C.).....	749	Kirkpatrick, Pope Manuf'g Co. v. (C. C. A.).....	1001
Hillmon v. New York Life Ins. Co. (C. C.).....	749	Knights Templars & Masonic Mut. Aid Ass'n v. Greene (C. C.).....	461
Hiram Walker & Sons v. Mikolas (C. C.).....	955	Komuk, The (D. C.).....	122
Hite, Hill v. (C. C.).....	826	Koons, Bryson v. (C. C. A.).....	990
Hole, Magna Charta Silver Mining & Tunnel Co. v. (C. C. A.).....	997	Kraatz v. Tieman (C. C.).....	322
Holt v. Holt Electric Storage Co. (C. C.).....	597	Krall v. United States (C. C. A.).....	241
Holt Electric Storage Co., Holt v. (C. C.).....	597	Krug, In re (C. C.).....	308
Homer, The George S. (C. C. A.).....	995	Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co. (C. C. A.).....	202
Honstain, Robinson v. (C. C.).....	678	La Grande Edison Electric Co., General Electric Co. v. (C. C.).....	25
Hopkins, Clarke v. (C. C.).....	386	Laidley, Huntington v. (C. C.).....	865
Hostetter Co. v. Becker (C. C. A.).....	996	Lake Erie & W. R. Co., Mulcahey v. (C. C. A.).....	999
Howell v. The Mary L. Peters (C. C. A.).....	998	Lamberton, The Nannie (D. C.).....	121
Hoyt, Computing Scale Co. v. (C. C.).....	962	Landner, United States v. (C. C. A.).....	1004
Hubbard v. Tod (C. C. A.).....	996	Lanning v. Osborne (C. C.).....	657
Hubbard, Tod v. (C. C. A.).....	1003	Lanyon v. Edwards (C. C. A.).....	580
Hughes, The Albert N. (D. C.).....	883	Larimer, Sheafe v. (C. C.).....	921
Huntington v. Laidley (C. C.).....	865	Lawrence v. Stearns (C. C.).....	878
Huntington, United States v. (C. C. A.).....	1004	Laws, United States v. (C. C. A.).....	1005
Huron Barge Co. v. Turney (D. C.).....	109	Lawyers' Co-operative Pub. Co., West Pub. Co. v. (C. C. A.).....	756
Huse, In re (C. C. A.).....	305	Leeming, Van den Toorn v. (C. C. A.).....	107
Iasigi, In re (D. C.).....	751	Legg v. The Titan (C. C. A.).....	117
Iasigi, In re (D. C.).....	755		
Ingalls, Nash v. (C. C.).....	510		

	Page		Page
Lettelier v. Mann (C. C.)	81	Messinger, Eastern Oregon Land Co. v. (C. C. A.)	719
Levis, City of Newton v. (C. C. A.)	715	Michigan Pipe Co., Town of Cripple Creek v. (C. C. A.)	1003
Lewis, King v. (C. C. A.)	997	Mikolas, Hiram Walker & Sons v. (C. C.)	955
Lewis, Third Street & Suburban R. Co. v. (C. C. A.)	196	Miles v. Vivian (C. C. A.)	848
Lincoln's Ex'r, Foster v. (C. C. A.)	170	Miles, St. Louis & S. F. R. Co. v. (C. C. A.)	257
Little, California Redwood Co. v. (C. C.)	854	Miller, The Bertha M. (C. C. A.)	365
Live Stock Car-Equipment Co. v. May (C. C. A.)	997	Miller v. Choctaw, O. & G. R. Co. (C. C. A.)	998
Loewer Sole-Rounder Co., Gibbon v. (C. C. A.)	325	Millersburg Home Water Co., Nead v. (C. C.)	129
London Assur. Corp. v. The Allianca (C. C. A.)	989	Minch v. The Victoria (D. C.)	122
Lorentzen, Denver & R. G. R. Co. v. (C. C. A.)	291	Missouri Pac. R. Co. v. Sidell (C. C. A.)	998
Lottie K. Friend, The, v. The Albert N. Hughes (D. C.)	383	Mobile & S. H. R. Co., Mercantile Trust Co. v. (C. C.)	702
Louisville, E. & St. L. C. R. Co., New York Security & Trust Co. v. (C. C.)	386	Moore v. Clark (C. C. A.)	998
Louisville & N. R. Co., Ex parte (C. C.)	397	Moore, Union Stock Yards Nat. Bank v. (C. C. A.)	705
Lowell Manuf'g Co., Whittall v. (C. C.)	787	Morgan v. Rogers (C. C. A.)	577
Lowrey, Cowles Electric Smelting & Aluminium Co. v. (C. C. A.)	331	Morgan's Louisiana & T. R. & S. S. Co. v. Farmers' Loan & Trust Co. (C. C. A.)	210
Ludlow, Wilhelmsen v. (D. C.)	979	Morris v. United States (C. C. A.)	990
Lyman, Shaw v. (C. C.)	2	Morse, Gougar v. (C. C. A.)	995
Lynch, Northern Pac. R. Co. v. (C. C. A.)	268	Morton v. Kirk (C. C.)	290
		Mosle v. The Sintran (C. C. A.)	1002
McCann, United States v. (C. C. A.)	1005	Mount Hope, The, Garfield & Proctor Coal Co. v. (D. C.)	119
McClaskey v. Barr (C. C.)	408	Mulcahey v. Lake Erie & W. R. Co. (C. C. A.)	999
McCook, Newkirk v. (C. C. A.)	999	Munroe v. Philadelphia Warehouse Co. (C. C. A.)	999
McCornick v. Western Union Tel. Co. (C. C. A.)	449	Murphy v. United States (C. C. A.)	255
MacDonald, Graham v. (C. C. A.)	995	Mutual Life Ins. Co., Hillmon v. (C. C.)	749
McDuffey, Boston & M. R. Co. v. (C. C. A.)	934	Mutual Life Ins. Co. of New York, Cochran v. (C. C.)	46
McGorray v. O'Connor (C. C.)	861	Myers, Pennsylvania Salt Manuf'g Co. v. (C. C.)	87
Mack, Warth v. (C. C. A.)	915	Mynair, Swenson v. (C. C. A.)	608
Mackay, Anderson v. (C. C. A.)	990		
Mackaye v. Mallory, two cases (C. C. A.)	1	Nannie Lamberton, The, Empire Transp. Co. v. (D. C.)	121
McLean, Valley County v. (C. C. A.)	728	Nannie Lamberton, The, Kiernan v. (D. C.)	121
MacLeod v. Graven (C. C. A.)	84	Nash v. Ingalls (C. C.)	510
McMullen, Ritchie v. (C. C. A.)	522	National Bank of Commerce v. Riethmann (C. C. A.)	582
McPeck v. Central Vt. R. Co. (C. C. A.)	590	National Computing Scale Co., Computing Scale Co. v. (C. C.)	962
Magna Charta Silver Mining & Tunnel Co. v. Hole (C. C. A.)	997	National Mach. Co. v. Wheeler & Wilson Manuf'g Co. (C. C. A.)	432
Maitland v. Gibson (C. C.)	136	National Masonic Acc. Ass'n of Des Moines, Iowa, Ex parte (C. C. A.)	999
Mallory, Mackaye v., two cases (C. C. A.)	1	National Masonic Acc. Ass'n of Des Moines, Iowa, Sparks v. (C. C. A.)	991
Manegold v. The E. A. Shores, Jr. (D. C.)	987	National Masonic Acc. Ass'n of Des Moines, Iowa, Sparks v. (C. C. A.)	999
Manhattan Trust Co., Sioux City, O'N. & W. R. Co. v., two cases (C. C. A.)	1002	National Park Bank of City of New York v. Harmon (C. C. A.)	891
Mann, Letteller v. (C. C.)	81	National Starch-Manuf'g Co., Duryea v. (C. C. A.)	651
Maracaibo, The, Healey v. (C. C. A.)	809	Nead v. Millersburg Home Water Co. (C. C.)	129
Maracaibo, The, Healey v. (D. C.)	809	Needles Nat. Bank, Bowen v. (C. C.)	49
Marden v. Campbell Printing-Press & Manuf'g Co. (C. C. A.)	653	Nestelle, Farmers' Loan & Trust Co. v. (C. C. A.)	748
Marion, The, Tibbol v. (D. C.)	104	New Bedford Steam Coasting Corp. v. Nickerson (C. C. A.)	445
Mary L. Peters, The, Howell v. (C. C. A.)	998	New Dunderberg Min. Co. v. Old (C. C. A.)	598
Matthews v. Columbia Nat. Bank (C. C.)	558	New England Furniture & Carpet Co. v. Catholicon Co. (C. C. A.)	294
Maurice B. Grover, The, (D. C.)	378		
May, Live Stock Car-Equipment Co. v. (C. C. A.)	997		
Mayer v. Glenn (C. C. A.)	998		
Mayer, Carey v. (C. C. A.)	926		
Meehan, Jones v. (C. C. A.)	997		
Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C.)	389		
Mercantile Trust Co. v. Mobile & S. H. R. Co. (C. C.)	702		
Merritt v. American Steel-Barge Co. (C. C. A.)	228		

	Page		Page
New England Loan & Trust Co., City of		Phelan Billiard-Ball Co., Brunswick-Balke-	
Omaha v. (C. C. A.)	992	Collender Co. v. (C. C. A.)	85
Newkirk v. McCook (C. C. A.)	909	Philadelphia Creamery Supply Co. v. Da-	
Newman, In re (C. C.)	615	vis & Rankin Bldg. & Manuf'g Co.	
Newman, In re (C. C.)	622	(C. C.)	357
New York Electric Equipment Co. v. Blair		Philadelphia Traction Co. v. Palmer (C. C.	
(C. C. A.)	896	A.)	1000
New York Life Ins. Co., Hillmon v. (C. C.)	749	Philadelphia Warehouse Co., Munroe v.	
New York, N. H. & H. R. Co. v. The Hel-		(C. C. A.)	999
goland (D. C.)	123	Philadelphia & R. R. Co., Union Switch &	
New York, N. H. & H. R. Co., Henion v.		Signal Co. v. (C. C. A.)	1003
(C. C. A.)	903	Phoenix Ins. Co. v. Warttemberg (C. C. A.)	245
New York Security & Trust Co. v. Louis-		Pierpont Boiler Co., Fowler Manuf'g Co. v.	
ville, E. & St. L. C. R. Co. (C. C.)	386	(C. C. A.)	995
New Zealand Ins. Co. v. Earnmoor S. S.		Pike, Gregory v. (C. C. A.)	520
Co. (C. C. A.)	368	Platt, Board of Com'rs of Lake County v.	
Nickerson, New Bedford Steam Coasting		(C. C. A.)	567
Corp. v. (C. C. A.)	445	Pocahontas, The (D. C.)	122
Nordlinger, United States v. (C. C. A.)	1005	Pomeroy v. Glenn (C. C. A.)	1001
Norma, The, Sullivan v. (C. C. A.)	999	Pope Glucose Co., Chicago Sugar-Refining	
Norris, Buzzell v. (C. C.)	329	Co. v. (C. C.)	957
Northern Pac. R. Co. v. De Lacey (C. C.		Pope Manuf'g Co. v. Kirkpatrick (C. C. A.)	1001
A.)	1000	Port Royal & A. R. Co., King v. (C. C.)	397
Northern Pac. R. Co. v. Lynch (C. C. A.)	268	Port Royal & A. R. Co., Ogden v. (C. C.)	397
Northern Pac. R. Co., Farmers' Loan &		Port Royal & A. R. Co., State of South	
Trust Co. v. (C. C. A.)	227	Carolina v. (C. C.)	397
Northern S. S. Co. v. Eddy (D. C.)	361	Prince Steam Shipping Co., Brown v. (C. C.	
Northern Trust Co., Severs v. (C. C. A.)	1002	A.)	900
Norton v. San José Fruit-Packing Co. (C.		Prince Steam Shipping Co., Hartman v. (C.	
C. A.)	793	C. A.)	990
Norwood, The, v. Girard Point Storage Co.		Proceeds of The Advance, Atlantic Trust	
(D. C.)	113	Co. v. (C. C. A.)	989
Norwood, The, v. The Waterloo (D. C.)	113	Proceeds of The Advance, Hard v. (C. C.	
		A.)	989
Oberder, Bunker Hill & Sullivan Mining &		Proceeds of The Seguranca, Brown v. (C.	
Concentrating Co. v. (C. C. A.)	726	C. A.)	1002
O'Connor, McGorray v. (C. C.)	861	Providence Steam-Engine Co. v. Hathaway	
Ogden v. Port Royal & A. R. Co. (C. C.)	397	Manuf'g Co. (C. C.)	512
Ogdensburgh & L. C. R. Co., Fish v. (C.		Puget Sound Tugboat Co. v. The City of	
C.)	131	Puebla (D. C.)	982
Ogdensburgh & L. C. R. Co., Parker v. (C.		Putnam v. Timothy Dry-Goods & Carpet	
C. A.)	817	Co. (C. C.)	454
Ohio Val. R. Co., Brown v. (C. C.)	176	Pyle v. Clark (C. C. A.)	744
O'Keefe, E. S. Higgins Carpet Co. v. (C.			
C. A.)	900	Rainey, Spang v. (C. C. A.)	250
Old, New Dunderberg Min. Co. v. (C. C.		Randall v. Glenn (C. C. A.)	1001
A.)	598	Republican Min. Co. v. Tyler Min. Co. (C.	
Oliver Min. Co., Staberg v. (C. C. A.)	1003	C. A.)	733
Olson v. Snyder (C. C. A.)	1000	Rhino v. Emery (C. C.)	483
Oregon Imp. Co., Excelsior Coal Co. v. (C.		Rhodes v. United States (C. C. A.)	740
C. A.)	355	Rice, United States v. (C. C.)	691
Oregon Short Line & U. N. R. Co. v. Amer-		Ricks, In re (C. C. A.)	1001
ican Loan & Trust Co., four cases (C. C.		Rietmann, National Bank of Commerce v.	
A.)	1000	(C. C. A.)	582
Osborne, Lanning v. (C. C.)	657	Riphey v. San Diego Land & Town Co.	
Outerbridge, Downing v. (C. C. A.)	931	(C. C.)	657
		Ritchie v. McMullen (C. C. A.)	522
Pacific Coast Milling Co., Addison v. (C.		Robert J. Boyd Paving & Contracting Co.,	
C.)	459	Ward v. (C. C.)	390
Palmer, Philadelphia Traction Co. v. (C.		Robinson v. Honstain (C. C.)	678
C. A.)	1000	Robinson, Union Guaranty & Trust Co. v.	
Parker v. Ogdensburgh & L. C. R. Co. (C.		(C. C. A.)	420
C. A.)	817	Roessler & Hasslacher Chemical Co., Unit-	
Passavant, United States v. (C. C. A.)	1005	ed States v. (C. C. A.)	313
Pease, Dooley v. (C. C.)	860	Rogers, Morgan v. (C. C. A.)	577
Peck v. Elliott (C. C. A.)	10	Rollin H. Wilbur, The (D. C.)	121
Peirce, Hawkins v. (C. C.)	452	Rondot v. Township of Rogers (C. C. A.)	676
Penninsular, The, Foley v. (D. C.)	972	Roser, Buffalo Bill's Wild West Co. v. (C.	
Pennsylvania Salt Manuf'g Co. v. Myers (C.		C. A.)	991
C.)	87	Roth v. American Loan & Trust Co. (C. C.	
Peters, The Mary L. (C. C. A.)	908	A.)	1001

CASES REPORTED.

XV

	Page
Russ v. Telfener (C. C. A.).....	1001
Russell & Co., Buckstaff v. (C. C. A.).....	611
Sabin v. Barnett (C. C.).....	947
Saginaw Valley, The (C. C. A.).....	1002
St. Louis Brewing Ass'n, Stirling Co. v. (C. C.).....	80
St. Louis & S. F. R. Co. v. Hicks, two cases (C. C. A.).....	262
St. Louis & S. F. R. Co. v. Miles (C. C. A.).....	257
St. Louis & S. F. R. Co., Weatherby v. (C. C. A.).....	1006
Sanbern v. The Beaconsfield (C. C. A.).....	990
Sandfield, The, American Sugar-Refining Co. v. (D. C.).....	371
San Diego Land & Town Co., Rippey v. (C. C.).....	657
San Diego Land & Town Co., Ward v. (C. C.).....	665
Sands, Jones & Laughlins v. (C. C. A.).....	913
San José Fruit-Packing Co., Norton v. (C. C. A.).....	793
Saunders, United States v. (C. C. A.).....	407
Savannah, F. & W. R. Co. v. Jacksonville, T. & K. W. R. Co. (C. C. A.).....	35
Sayward, Dexter, Horton & Co. v. (C. C.).....	237
Scales, Kelley-Goodfellow Shoe Co. v. (C. C. A.).....	997
Scheel v. Alhambra Min. Co. (C. C.).....	821
Schmelling, Bunker Hill & S. Mining & Concentrating Co. v. (C. C. A.).....	263
Schumacher v. East Tennessee Land Co. (C. C.).....	19
Seattle, L. S. & E. R. Co. v. Union Trust Co. (C. C. A.).....	179
Second Nat. Bank of Providence, R. I., Garner v. (C. C. A.).....	995
Seguranca, The (C. C. A.).....	1002
Severs v. Bull (C. C. A.).....	1002
Severs v. Northern Trust Co. (C. C. A.).....	1002
Shaw v. Lyman (C. C.).....	2
Sheafe v. Larimer (C. C.).....	921
Shores, Jr., The E. A. (D. C.).....	987
Short, Burke v. (C. C. A.).....	6
Sidell, Missouri Pac. R. Co. v. (C. C. A.).....	998
Sierra Nevada Wood & Lumber Co., United States v. (C. C.).....	691
Silver Peak Mines v. Valcalda (C. C.).....	886
Sintran, The, Mosle v. (C. C. A.).....	1002
Sioux City, O'N. & W. R. Co. v. Manhattan Trust Co., two cases (C. C. A.).....	1002
Skeer, The Fannie P. (D. C.).....	121
Smith v. Western Union Tel. Co. (C. C.).....	132
Smith, Swift v. (C. C. A.).....	709
Smith, Woerishoeff v. (C. C. A.).....	1006
Snyder, Olson v. (C. C. A.).....	1000
Southern Development Co. v. Farmers' Loan & Trust Co. (C. C. A.).....	212
Spang v. Rainey (C. C. A.).....	250
Sparks v. National Masonic Acc. Ass'n of Des Moines, Iowa (C. C. A.).....	991
Sparks v. National Masonic Acc. Ass'n of Des Moines, Iowa (C. C. A.).....	999
Spencer v. Uxelson (C. C. A.).....	1002
Staberg v. Oliver Min. Co. (C. C. A.).....	1003
Stafford, Edison Electric Light Co. v. (C. C. A.).....	994
Stahl v. Williams (C. C. A.).....	1003
Standard Radiator Co., Eclipse Manuf'g Co. v. (C. C. A.).....	993
State Loan & Trust Co., Hawkins v. (C. C.).....	50

	Page
State of South Carolina v. Port Royal & A. R. Co. (C. C.).....	397
State Trust Co. v. Chehalis County (C. C. A.).....	282
Stearns, Lawrence v. (C. C.).....	878
Stearns, United States v. (C. C. A.).....	953
Steiner v. United States (C. C. A.).....	1003
Steinwender v. The Aspasia (D. C.).....	91
Stewart, Graves v. (C. C. A.).....	996
Stirling Co. v. St. Louis Brewing Ass'n (C. C.).....	80
Stratton v. Dewey (C. C. A.).....	32
Sullivan v. Beck (C. C.).....	200
Sullivan v. The Norma (C. C. A.).....	999
Sweeney, Tyler Min. Co. v. (C. C. A.).....	277
Swenson v. Mynair (C. C. A.).....	608
Swift v. Smith (C. C. A.).....	709
Syme, Aultman & Taylor Co. v. (C. C. A.).....	238
Tannage Patent Co., Donallan v. (C. C. A.).....	385
Tarr v. Jordan (C. C. A.).....	365
Telfener, Russ v. (C. C. A.).....	1001
Theis, City of Great Falls v. (C. C.).....	943
Third Street & Suburban R. Co. v. Lewis (C. C. A.).....	196
Thomas, City of Hastings, Neb., v. (C. C. A.).....	992
Thompson Nav. Co. v. City of Chicago (D. C.).....	984
Tibbol v. The Marion (D. C.).....	104
Tieman, Kraatz v. (C. C.).....	322
Timothy Dry-Goods & Carpet Co., Putnam v. (C. C.).....	454
Titan, The, Legg v. (C. C. A.).....	117
Tod v. Hubbard (C. C. A.).....	1003
Tod, Hubbard v. (C. C. A.).....	996
Toledo, St. L. & K. C. R. Co., White v. (C. C. A.).....	133
Town of Cripple Creek v. Michigan Pipe Co. (C. C. A.).....	1003
Town of Phelps v. Briggs (C. C. A.).....	1003
Township of Rogers, Rondot v. (C. C. A.).....	676
Turner, Waples-Platter Co. v. (C. C. A.).....	1005
Turney, Huron Barge Co. v. (D. C.).....	109
Tyler Min. Co. v. Sweeney (C. C. A.).....	277
Tyler Min. Co., Republican Min. Co. v. (C. C. A.).....	733
Union Guaranty & Trust Co. v. Robinson (C. C. A.).....	420
Union Pac. R. Co. v. Yates (C. C. A.).....	584
Union Stock-Yards Nat. Bank v. Moore (C. C. A.).....	705
Union Switch & Signal Co. v. Atlantic City R. Co. (C. C. A.).....	1003
Union Switch & Signal Co. v. Philadelphia & R. R. Co. (C. C. A.).....	1003
Union Trust Co., Seattle, L. S. & E. R. Co. v. (C. C. A.).....	179
United Mines Co. v. Hatcher (C. C. A.).....	517
United States v. Alaska Packers' Ass'n (C. C.).....	152
United States v. Borgfeldt (C. C. A.).....	953
United States v. Boyd (C. C.).....	858
United States v. Boynton (C. C.).....	691
United States v. Burr (C. C. A.).....	1004
United States v. Collins (D. C.).....	65
United States v. Dudley (C. C. A.).....	75
United States v. Eleven Hundred Head of Cattle (C. C. A.).....	1004

	Page		Page
United States v. Godwin, two cases (C. C. A.)	1004	Warttemberg, Phoenix Ins. Co. v. (C. C. A.)	245
United States v. Guglard (C. C.)	21	Waterloo, The, The Francisco R. v. (D. C.)	113
United States v. Hansee (C. C.)	303	Waterloo, The, The Norwood v. (D. C.)	113
United States v. Hewecker (C. C.)	59	Weatherby v. St. Louis & S. F. R. Co. (C. C. A.)	1006
United States v. Higgins (C. C.)	691	Webb v. York (C. C. A.)	616
United States v. Hill (C. C. A.)	1004	Welsh v. The Alvena (C. C. A.)	973
United States v. Huntington (C. C. A.)	1004	Western Electric Co. v. Western Tel. Const. Co. (C. C.)	959
United States v. Kiely (C. C.)	691	Western Manuf'g Co., Kingman v. (C. C. A.)	997
United States v. Landner (C. C. A.)	1004	Western Tel. Const. Co., Western Electric Co. v. (C. C.)	959
United States v. Laws (C. C. A.)	1005	Western Union Tel. Co., McCornick v. (C. C. A.)	449
United States v. McCann (C. C. A.)	1005	Western Union Tel. Co., Smith v. (C. C.)	132
United States v. Nordlinger (C. C. A.)	1005	Western Wheel-Scraper Co. v. Drinnen (C. C.)	820
United States v. Passavant (C. C. A.)	1005	West Pub. Co. v. Lawyers' Co-operative Pub. Co. (C. C. A.)	756
United States v. Rice (C. C.)	691	W. F. Babcock, The, Graves v. (D. C.)	92
United States v. Roessler & Hasslach		Wharton, Grand Avenue Hotel Co. v. (C. C. A.)	43
Chemical Co. (C. C. A.)	313	Wheeler & Wilson Manuf'g Co., National Mach. Co. v. (C. C. A.)	432
United States v. Saunders (C. C. A.)	407	White v. Blum (C. C. A.)	271
United States v. Sierra Nevada Wood & Lumber Co. (C. C.)	691	White v. Toledo, St. L. & K. C. R. Co. (C. C. A.)	133
United States v. Stearns (C. C. A.)	953	Whittall v. Lowell Manuf'g Co. (C. C.)	787
United States v. Vautine (C. C. A.)	1005	Wiegand v. Central R. Co. of New Jersey (C. C. A.)	991
United States v. Zeimer (C. C. A.)	1005	Wilbur, The Rollin H. (D. C.)	121
United States, Foppes v. (C. C. A.)	994	Wilcox, Eastern Oregon Land Co. v. (C. C. A.)	719
United States, Foppes v., two cases (C. C. A.)	995	Wilhelmsen v. Ludlow (D. C.)	979
United States, Frankel v. (C. C. A.)	995	Williams v. American Nat. Bank of Kansas City, Mo. (C. C. A.)	1006
United States, Johnson v. (C. C. A.)	996	Williams v. Glenn (C. C. A.)	1006
United States, Kennedy v. (C. C.)	893	Williams, Carey v. (C. C. A.)	906
United States, Krall v. (C. C. A.)	241	Williams, Stahl v. (C. C. A.)	1003
United States, Morris v. (C. C. A.)	999	Winney, Harvey v. (C. C. A.)	996
United States, Murphy v. (C. C. A.)	255	Woerishoeffer v. Smith (C. C. A.)	1006
United States, Rhodes v. (C. C. A.)	740	Woodbridge Canal & Irrigation Co., Atlantic Trust Co. v. (C. C.)	39
United States, Steiner v. (C. C. A.)	1003	Woodbridge Canal & Irrigation Co., Atlantic Trust Co. v. (C. C.)	501
United States, Zimmerman v. (C. C. A.)	1006	Woodbridge Canal & Irrigation Co., Atlantic Trust Co. v. (C. C.)	842
United States Nat. Bank v. First Nat. Bank of Little Rock (C. C. A.)	296	Woodfin v. Hampton & O. P. R. Co. (C. C. A.)	1006
Useton, Spencer v. (C. C. A.)	1002	Woodson, Cockrill v. (C. C. A.)	992
Valcalda, Silver Peak Mines v. (C. C.)	886	Woodworth, American Freehold Land Mortgage Co. of London v. (C. C.)	951
Valencia, The, v. Zeigler (C. C. A.)	1005	Worthington, Albany Steam Trap Co. v. (C. C. A.)	966
Valley County v. McLean (C. C. A.)	728	Wright, Clark v. (C. C. A.)	744
Valley R. Co., Central Trust Co. v. (C. C.)	195	Yates, Union Pac. R. Co. v. (C. C. A.)	584
Van Den Toorn v. Leeming (C. C. A.)	107	York, Webb v. (C. C. A.)	616
Vautine, United States v. (C. C. A.)	1005	Youngstown Coke Co. v. Andrews Bros. Co. (C. C.)	669
Veatch v. American Loan & Trust Co. (C. C. A.)	471		
Victoria, The, Minch v. (D. C.)	122		
Virginia & T. Coal & Iron Co., Fidelity Insurance, Trust & Safe-Deposit Co. v. (C. C. A.)	994		
Vivian, Miles v. (C. C. A.)	848		
Voight v. Baltimore & O. S. W. R. Co. (C. C.)	561		
Wakelee, Davis v. (C. C. A.)	993		
Walker, Buzzell v. (C. C.)	328		
Walker, Jack v. (C. C.)	138		
Walker & Sons v. Mikolas (C. C.)	955		
Wanamaker, Henderson v. (C. C. A.)	736		
Waples-Platter Co. v. Turner (C. C. A.)	1005		
Ward v. Robert J. Boyd Paving & Contracting Co. (C. C.)	390		
Ward v. San Diego Land & Town Co. (C. C.)	665		
Warth v. Mack (C. C. A.)	915		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

MACKAYE v. MALLORY (two cases).

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

APPEALABLE FINAL DECREES—ORDER OF REVIVAL.

An order entered in the original cause, reviving the suit in the name of complainant's administrator, is not a final appealable decree.

Appeals from the Circuit Court of the United States for the Southern District of New York.

Carter & Ledyard, for appellant.

E. W. Tyler, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. These are appeals by the defendant from an order in each cause admitting the administratrix of the estate of Steele Mackaye, deceased, to prosecute the cause. In one cause Steele Mackaye was the complainant, and in the other he was the complainant in a cross bill. Upon his death his administratrix filed a bill of revivor in each case, and the defendant interposed an answer. In the answers the defendant alleged facts which he insisted established that during a period of about 12 years the original complainant, through negligence and laches, had wholly failed to prosecute the actions, and that the actions had been practically abandoned by the parties at the time of his death. The court below was of the opinion that the revival of the suits by the administratrix was a matter of right under section 955, Rev. St. U. S.; that the defenses alleged in the answers were unavailing; that the filing of bills of revivor was unnecessary; and that, instead of decrees upon the bills of revivor adjudging the actions to stand revived, orders should be entered to that effect in the original causes. The appellant assigns as error that the court below should have sustained the defenses set up in the answers, and should have dismissed the bills of revivor. We are of opinion that these orders cannot be reviewed except by an appeal from the final decree in the causes. Inasmuch as a bill of revivor is not an original suit, but is merely a continuance of an origi-

nal suit (*Clarke v. Matthewson*, 12 Pet. 164), it is not clear that an order or decree thereon would be a final decision, within the meaning of section 6 of the act of congress of March 3, 1891, conferring jurisdiction upon this court to hear appeals. A decision is final, in the sense in which an appeal from it is permitted, when it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the future judgment of the court; so that to bring the cause again before the court for decision will not be necessary. When a bill of revivor is dismissed, as this would practically determine the original cause by leaving it in a situation in which no further proceedings could be had in it, doubtless an appeal would lie in favor of the party seeking a revival; but, if the revival is allowed, the order or decree allowing it does not finally dispose of the cause, and can be reviewed, if it becomes necessary, by an appeal from the final decree therein. *Buckingham v. McLean*, 13 How. 150; *Railroad Co. v. Soutter*, 2 Wall. 520, 521. In *Fretz v. Stoner*, 22 Wall. 198, upon an appeal from a final decree in a cause in which a bill of revivor had been brought, the court considered the defenses which had been interposed by the answer to the bill of revivor. In *Terry v. Sharon*, 131 U. S. 40, 9 Sup. Ct. 705, the court held that an appeal by a defendant would lie from an order reviving a suit and admitting an executor in the place of the deceased complainant. That case is distinguishable from the present, however, in the circumstance that the original suit had passed to a final decree, and the defendant would have had no opportunity to review the order by appealing from that decree.

In the present case there was no decree upon the bills of review, and the orders are merely interlocutory orders in the cause, and are strictly analogous to an order in a suit at law entered on a suggestion upon the record admitting the legal representative of a deceased party to continue the action. *Hatfield v. Bushnell*, 1 Blatchf. 393, Fed. Cas. No. 6,211.

The appeals are dismissed.

SHAW et al. v. LYMAN et al.

(Circuit Court, W. D. North Carolina. December 14, 1896.)

FEDERAL AND STATE COURTS—CONCURRENT JURISDICTION—COMITY.

The pendency in a state court of a suit between the same parties, on the same cause of action, is no bar to a creditors' bill in a federal court to fix the personal liability of directors and stockholders in a corporation. Neither will it authorize the court, on the ground of comity, to stay its hand until a decision by the state court, since no conflict of jurisdiction can arise, and the judgment of either court can be pleaded as *res judicata* in the other.

This was a creditors' bill by Milton G. Shaw and others against A. J. Lyman and others to fix the personal liability of certain directors and stockholders in a corporation. Defendants moved the court to dismiss the case, because of the pendency in a state court of a prior suit between the same parties, on the same cause of action.

Jones & Barnard, J. S. Adams, F. A. Soudley, and Geo. Shuford, for the motion.

H. H. Hayden, T. H. Cobb, J. G. Merrimon, and H. B. Walmsley, opposed.

SIMONTON, Circuit Judge. This is a motion to dismiss the case. The ground of the motion is that, when it was instituted, there was an action pending between the same parties, on the same cause of action, seeking the same relief, in the state court of North Carolina sitting for Buncombe county. The proceedings is by a creditors' bill. The relief sought is by fixing the personal liability of directors and stockholders. There is no res in the case. The proceeds of the judgment in case of recovery are to be administered in equity for the benefit of the creditors.

It is well to say in the beginning that a motion to dismiss cannot be entertained. There can be no question that the mere fact of the existence of a suit between the same parties, for the same cause of action, in the state court, is not a bar to a suit in this court, even on plea in abatement. *Gordon v. Gilfoil*, 99 U. S. 168; *Marks v. Marks*, 75 Fed. 321; *Stanton v. Embrey*, 93 U. S. 548. The question really before this court is: Will this court, under the suggestion that the same question is pending in the state court, between the same parties, hold its hand, and leave the decision to the state court? It is a question of comity,—a comity exercised to prevent conflict of jurisdiction. There are classes of cases in which this comity is exercised. One is where the case necessarily involves the taking possession of the res, the subject-matter of the suit. There the court which has first taken possession of the res is entitled to the jurisdiction, and other courts will not interfere. *Gates v. Bucki*, 4 C. C. A. 124, 53 Fed. 961; *Covell v. Heyman*, 111 U. S. 182, 4 Sup. Ct. 355. This case so well expressed the doctrine that its language should be quoted:

"These courts [courts of the United States and of the states] do not belong to the same system so far as their jurisdiction is concurrent, and, although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction in the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty."

An illustration of this doctrine is found in *Foster v. Bank*, 68 Fed. 723, where Judge Paul refused to entertain a suit, begun by certain creditors of a bank, against the bank and trustees of its property, on the ground that the trustees had themselves instituted a suit in the state court seeking the same result as the bill in the United States court, and had thus carried the res into, and placed it in possession of, the state court.

Another class of cases is where a creditors' bill has been filed in the state court by one set of creditors, and that court has assumed jurisdiction. Subsequently other creditors go into the United States court, filing a similar bill, for a similar purpose. The federal court in such a case will not interfere. Such a case is *Howlett v. Improvement Co.*, 56 Fed. 161.

In *Orton v. Smith*, 18 How. 265, we have a statement of the doctrine on this general subject:

"Besides, the decree in this case demonstrates the impropriety of the interference of the court of the United States, and of its entertaining jurisdiction of a question of title then pending in the state court. It is true, if this were an ejectment in a court of law, the pendency of another ejectment between the same parties might not have afforded sufficient ground for a plea of *auter action pendant*; nor would the court have been bound, even by comity, to await the decision of the state court, or suffer the cause pending before them to be in any way affected by it. But a decree of a court of chancery, on a bill of peace, must necessarily operate by way of estoppel as to the title of the land, and conclude all the parties to it, because it should put an end to all litigation between them. If they have suits pending in other courts on the same question of title, they must cease. This bill acts by injunction on the party. No injunction ever goes to the court having a concurrent jurisdiction of the question. The courts of the United States have no such power over suitors in a state court. But a decree on a bill of peace which does not put an end to litigation is a mere *brutum fulmen*. Unless the court can make a decree which it can execute, it is a sufficient reason for refusing to take cognizance of the case."

Judge Thayer, in *Pierce v. Feagans*, 39 Fed. 587, says:

"The suit in the state court is pending in a different jurisdiction. It is now well settled that a suit in a state court cannot be taken advantage of by way of *lis pendens* to defeat a suit of the same nature, and between the same parties, in the federal court. The two courts, though not foreign to each other, belong to different jurisdictions, in such sense that the doctrine of *lis pendens* is not applicable."

Judge Colt, in *Latham v. Chafee*, 7 Fed. 520, says:

"The main question upon this defendant's plea is whether the pendency of a suit in a state court between the same parties, and involving the same subject-matter, can be pleaded in abatement or in bar to a suit in the circuit court of the United States. It is undoubtedly true, as a general rule, that, as between two courts of concurrent jurisdiction, that which first gets control of the litigation will be allowed to prosecute it to an end. * * * But this rule does not extend to courts of foreign jurisdiction. It has often been held that the courts of a state are foreign, in this sense, to the courts of the United States."

He relies on *Loring v. Marsh*, 2 Cliff. 322, Fed. Cas. No. 8,514, a decision of Mr. Justice Clifford. Judge Sawyer, in *Sharon v. Hill*, 22 Fed. 28, holds the same views.

A citation of all the authorities on this point would be endless. It is clear from them that, unless the special circumstances alluded to above exist, a suit—certainly a personal action—can be brought in this court notwithstanding the fact that there is pending at the same time a similar suit, for the same cause of action, in the state court; that the pendency of such suit cannot be pleaded in abatement or in bar. And it follows, absolutely, that the party bringing the action in this court has the right to bring it; and, as the jurisdiction of this court is fixed by the constitution of the United States, he has that right secured to him by the constitution. Under these circumstances, this court cannot exercise the comity suggested, unless action on its part will bring it into conflict with the state court. There can in this case be no such conflict, as no question can arise as to the disposition of any *res*, and a recovery or failure to recover in either court can be pleaded as *res judicata* in the other. The motion is dismissed.

JOHNSON et al. v. CULBERTSON et al.

(Circuit Court, D. Indiana. March 6, 1897.)

EQUITY JURISDICTION—SUIT AGAINST DISTRIBUTEES.

Where a creditor has a claim against a deceased debtor, whose estate has been settled and distribution thereof made, he must pursue his remedy against the distributees by a bill in equity, notwithstanding the liability is one which must have been pursued against the decedent at law.

On Application for Rehearing.

Hord & Perkins and Keatinge, Walradt & Miller, for plaintiffs.
Addison C. Harris, for defendants.

BAKER, District Judge. It is the general doctrine that, to reach the equitable interest of the debtor in real estate by a suit in chancery, the creditor must first reduce his claim into judgment in an action at law; and, to obtain assistance in equity as to personal property, both a judgment and an execution returned *nulla bona* must be shown. There exists, however, a well-established exception to this rule, where the debtor is deceased, and the satisfaction of the creditor's demand is sought to be charged upon assets of the decedent which have come into the hands of an heir, devisee, or legatee. The history and growth of this equitable jurisdiction is learnedly traced in the opinion of Chancellor Kent in the case of *Thompson v. Brown*, 4 Johns. Ch. 619. This exception is recognized and applied by the supreme court of this state in *Sweny v. Ferguson*, 2 Blackf. 129; *Kipper v. Glancey*, Id. 356; and *O'Brien v. Coulter*, Id. 421. In *Williams v. Gibbes*, 17 How. 239, 254, 255, the supreme court say:

"Now, the principle is well settled, in respect to these proceedings in chancery for the distribution of a common fund among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator, or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *David v. Frowd*, 1 Mylne & K. 200; *Greig v. Somerville*, 1 Russ. & M. 338; *Gillespie v. Alexander*, 3 Russ. 130; *Sawyer v. Birchmore*, 1 Keen. 391; *Shine v. Gough*, 1 Ball. & B. 436; *Finley v. Bank*, 11 Wheat. 304; *Story*, Eq. Pl. § 106; *Wiswall v. Sampson*, 14 How. 52, 67."

On page 256 the court quote approvingly the observations of Sir John Leach in *David v. Frowd*, *supra*, as follows:

"That if a creditor does not happen to discover the proceedings in the court until after the distribution has been made, by the order of the court, amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator who has acted under the orders of the court, yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him."

In *Board of Public Works v. Columbia College*, 17 Wall. 521, 530, the supreme court say:

"The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien on the property, is undoubted. It is a very ancient jurisdiction, but for its exercise the debt must be clear and undisputed, and there must exist some special circumstances requiring the interposition of the court to obtain possession of and apply the property. Unless the suit relate to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that the legal means for its collection have been exhausted."

These cases seem clearly to show, unless the statute of this state is influential to change the rule, that where a creditor has a claim against a deceased debtor, whose estate has been settled and distribution has been made, he may, and, indeed, must, pursue his remedy against the distributees by a bill in equity. The statute of this state, as I view it, contemplates an equitable suit. *Busey v. Smith*, 67 Fed. 13. The ancient and inherent jurisdiction of courts of equity in matters of this nature remains unaffected by our statute. Numerous cases have been cited which clearly show that liabilities of the character which existed against the decedent in this case must be prosecuted at law, but the fact that the liability was one which must have been pursued at law against the decedent does not yield any support to the contention that an action at law can be maintained when brought against the distributees of the decedent to charge them with the ancestral debt on the ground that they have received the ancestral property. The distributees take and hold the ancestral property charged with an implied trust that it may be devoted, under the circumstances pointed out by the statute of this state, to the satisfaction of ancestral debts. *Payson v. Haddock*, 8 Biss. 293, Fed. Cas. No. 10,862. In *Gould v. Hayes*, 19 Ala. 438, it was held that the original jurisdiction in equity was not affected by the statutory jurisdiction conferred on the probate court and other similar tribunals, except where there are words of prohibition or restriction in the statute conferring jurisdiction on such courts. The application for a rehearing will be denied.

BURKE et al. v. SHORT.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1897.)

1. RAILROAD FORECLOSURES—DISTRIBUTION OF PROCEEDS—BONDS AND COUPONS.

A decree for the distribution of the proceeds of a sale under the foreclosure of a mortgage which provided that the coupons of the bonds secured by it should be preferred over the principal, directed that the surplus, after paying preferential claims, should be equally divided among the bonds, paying a certain sum, less than the face of the bond, to the holder of each bond. *Held* that, though it named only bonds, such decree could not be construed as intended to disregard the preference of the coupons, but was intended to deal with the ownership of bonds with their coupons, the holders of both being at the time the same, and, accordingly, that a holder of coupons subsequently detached, which had matured before the foreclosure, was entitled to be paid in full.

2. SAME.

Held, further, that coupons not matured at the time of the foreclosure, though thereby merged in the principal of the bonds, were entitled, when detached and separated in ownership from the bonds, to be paid proportionately with the remainder of the principal.

3. SAME.

Held, further, that orders permitting the withdrawal of parts of a fund deposited in court to secure the payment of certain bonds, the ownership of which was in dispute, upon the deposit of some of such bonds, contemplated the deposit of bonds with proper coupons, and where sums had been withdrawn upon the deposit of bonds without coupons, the same, so far as in excess of the amount properly due to bonds without coupons, must be refunded by the parties making such deposit.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

The questions for settlement arise upon an intervening petition filed by the appellee in the case of American Loan & Trust Co. v. Toledo, C. & S. Ry. Co., 47 Fed. 343. The petitioner is the owner and holder of certain interest coupons detached from mortgage bonds issued by the railway company. The object of the intervention is to obtain the payment thereof out of the proceeds of a foreclosure sale had at the instance of the American Loan & Trust Company as trustee under a mortgage made by the said railway company to secure an issue of 825 bonds for \$1,000 each, bearing interest at the rate of 6 per cent., payable semiannually, for which interest coupons were attached to the bonds. By the terms of the mortgage the interest was preferred in payment over the principal. The coupons which the appellee owns are coupons detached from bonds so secured. On the 23d of June, 1887, a decree foreclosing said mortgage for the equal benefit of all holders of bonds secured thereunder was duly entered in said cause, and by said decree it was determined that the principal of said bonds was due and payable by operation of a default, under a clause in the mortgage precipitating the maturity of the principal upon default in payment of interest, though otherwise the principal would not have matured for many years. The coupons maturing January 1, 1886, July 1, 1886, and January 1, 1887, were also declared to be due and unpaid. At the sale had under this decree the mortgaged railroad was bought by the appellants at the price of \$600,000. Subsequently a decree was entered determining the ownership of the bonds presented for participation in the distribution of the proceeds of sale, wherein it was decided that all of the 825 bonds secured under the mortgage foreclosed were held and owned by the purchasers of the railroad, now the appellants, except 112, which the court found were held and owned by others. The court also found that after providing for the payment of certain receiver's debts, and all costs and expenses of foreclosure, there would be for distribution \$543,442.50. This sum the court ordered should be distributed equally to each of said 825 bonds; making, as the decree recites, the sum of \$658.70 "applicable on each one thousand dollar bond." This decree was entered December 20, 1890. From it and the pleadings it appears that the appellants had claimed the 112 bonds which the circuit court had decided belonged to others, and, not being content with the decree deciding this question of ownership, they prayed an appeal to the supreme court, which was granted. For the purpose of providing for the payment of the bonds whose ownership was thus disputed, the court required the purchasers to pay into court a sum of money equal to that required to pay the preferential claims, costs, and expenses, and, in addition, a sum sufficient to pay to each of the 112 bonds owned by others than the purchasers the sum of \$658.70. That decree also provided that, if the appeal was perfected, the purchasers should have the option of depositing 150 of the bonds owned by them, "together with the coupons attached thereto," to be held as a security for the ultimate payment of the bonds whose ownership was involved in the appeal. The purchasers adopted the latter course, and deposited the bonds as required by the decree. Pending the appeal to the supreme court, Messrs. Burke and Hickox from time to time bought in the bonds over which the litigation was proceeding. As they did so they obtained modifications of the security order theretofore made. Among these modifications was one based upon their claim to have acquired title to some 62 of the litigated bonds. Upon this theory the former order was so modified as to permit them to withdraw from the registry of the court the bonds theretofore deposited, upon paying into court the 62 bonds so acquired by them and \$50,000 in money; this sum to be held as security for the payment of \$658.70

and interest from December 20, 1890, to each of the remaining bonds the ownership of which was still in dispute. Subsequently others of the disputed bonds were paid into court, as having been acquired by them, and upon that basis they were suffered to withdraw from the money so deposited, until at the time of Mrs. Short's presentation of her petition there remained in the registry of the court a sum insufficient to pay her coupons, if she was entitled to payment thereof. Upon a reference of the matters involved under her petition, it was shown that her coupons were in large part coupons maturing before the foreclosure decree, and that the remainder did not mature until thereafter, and that all of them had been detached from some of the disputed 112 bonds. It was also shown that these bonds, minus their coupons, had been bought in that condition by appellants, and, minus the coupons, had been paid into court under the modifying orders above mentioned. The fact that the coupons properly belonging to said bonds were missing when paid into court was unknown to the clerk, who received them as complete bonds. Upon this state of facts the circuit court held that Mrs. Short's coupons were entitled to be paid in full out of the proceeds of the foreclosure sale, with interest from December 20, 1890, so far as she held coupons which represented interest accrued at the date of the foreclosure decree of January 23, 1887. The court also decided that coupons maturing after that date were to be treated as part of the principal of the bond from which they had been detached, and as entitled to a ratable proportion of the pro rata properly payable upon the principal of the bond of which they were to be treated as a part. The court also held that, to the extent that the sum within the registry of the court had been inadvertently reduced by overpayments to the appellants as owners of the bonds from which these coupons had been detached, appellants should pay into the registry of the court a sum sufficient, with that now there, to pay the decree in favor of Mrs. Short, and the costs. From this decree Burke and Hickox have appealed.

Stevenson Burke, for appellants.

James Parker, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Where there is a fund in court to be distributed among a class of creditors, a decree of distribution which seems to make no provision for some of the class will not ordinarily preclude any of the class, having rights similar to those of other claimants, from asserting by bill or petition their right to a share in the fund. The question of delay in filing such claim is one largely governed by the particular circumstances of the case, and by the question as to whether any of the fund remains, out of which equity may be done the tardy applicant. In *re Howard*, 9 Wall. 175; *Williams v. Gibbes*, 17 How. 239. It is unnecessary to consider how far the decree of distribution made in this case is subject to be reopened by one of the class secured by the foreclosed mortgage, inasmuch as we are of opinion that that decree, properly construed, does provide for the equal distribution of the proceeds of sale among all the beneficiaries under the mortgage. The averment of the petition that the decree of December 20, 1890, makes no provision for the payment of the interest coupons held by petitioners may be treated as an inadvertent conclusion of law, not estopping the court or the petitioner. The facts entitling her to relief are stated, and the meaning of that decree, as well as others made later, is matter of law, for legal ascertainment. If the decree of distribution is to

be construed as adjudging that the proceeds of sale are to be exclusively distributed in payment of the principal of the bonds secured by the mortgage, and that holders of interest coupons are not entitled to consideration, or to any benefit of the common security, then appellee was entitled to no relief, however erroneous the decree, inasmuch as she was, at least by representation, a party to the cause in which that decree was made. Such a construction is wholly unauthorized. Conceding that her rights must depend upon the real meaning and legal effect of the decree of foreclosure, the decree of distribution, and the later orders made in the cause, we think the decree from which appellants have appealed was right. The decree of distribution, properly construed, was intended to deal with the ownership of bonds and their coupons under the general designation of "bonds." The decree of foreclosure had found that three interest coupons had matured and were unpaid. The mortgage provided for a preference of interest over principal, and it is inconceivable that the court meant that the principal should be paid in preference to the coupons, or to exclude the coupons from consideration as independent subjects of ownership. The case of a separation of a bond from its coupons was doubtless not in the mind of the court, because at that time the bonds and coupons were in the hands of the same persons. The share to be paid to each bond was insufficient to pay both principal and interest, and it was unimportant to pay one sum on account of interest and another on account of principal. Hence the order that \$658.70 should be paid "on each of said one hundred and twelve bonds, * * * with interest from December 20, 1890." This order clearly meant the bond with its proper coupons,—the coupons found thereon by the decree of foreclosure. This idea is further found in the direction of the same decree which allowed appellants to deposit 150 bonds, "with the coupons attached thereto," as a security for the payment of the distributive share due to the owners of the bonds not owned by them, when the question of ownership should be settled. The subsequent order allowing appellants to withdraw those bonds, and the later order allowing a withdrawal of the share due to bonds subsequently acquired by them, upon paying into court the bonds so purchased, contemplated a payment into court of a bond with its proper coupons, and all sums withdrawn by appellants under such orders in excess of the share properly due to a bond without its coupons were inadvertent overpayments, and should be returned to the registry of the court, as improperly obtained.

The objection to so much of the decree as is based upon coupons maturing after the decree of foreclosure is predicated upon the argument that by the decree of foreclosure the coupons not matured were merged in the bonds. This may be admitted. But it does not dispose of the question. The circuit court regarded the accrued interest at date of foreclosure as preferred over the principal, and the principal of the bond with its annexed unmatured coupons as together constituting the principal of the bond. If the owner of such a bond chose to sever the bond proper from its unearned cou-

pons, he thereby divided the bond. The holder of the several coupons would become equitably the owner of a proportion of the bond. The court therefore treated Mrs. Short, so far as she held coupons maturing before the decree of distribution and after the foreclosure decree, as equitably entitled to that part of the dividend due on the principal of the bond represented by the proportion which the par value of the coupons bore to the par value of the bond from which it was taken. We see nothing inequitable in this. The decree must be affirmed, with costs.

PECK et al. v. ELLIOTT.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1897.)

1. FEDERAL COURTS—JURISDICTION—POSSESSION OF RES—CITIZENSHIP.

The fact that the circuit court has possession of all the assets of an insolvent corporation, for the purpose of winding up its affairs, in a suit pending in such court, gives it jurisdiction to entertain a petition, ancillary to such suit, against a debtor of the corporation, to ascertain and enforce payment of his debt, without regard to the citizenship of the parties or the amount in controversy.

2. CORPORATIONS—INCREASE OF CAPITAL.

When the charter of a corporation or the general law under which it is incorporated does not impose any limitation upon the amount of capital which the incorporators may venture in the business, nor require the amount of the capital to be stated in the certificate of organization, but such corporation is given power to fix by by-laws the amount of capital, the rule that there can be no implied power to increase the capital of a corporation, fixed by the charter or articles of incorporation at a definite sum, has no application; and an increase of capital, by an amendment of the by-law fixing it, is valid, and a subscriber to such increase is bound.

3. SAME—REPEAL OF STATUTE.

The provisions of section 5 of the Tennessee act of March 23, 1875 (Laws Tenn. 1875, c. 142), by which an increase of stock of a corporation is permitted by the action of the stockholders, were not repealed by the act of March 27, 1883 (Laws Tenn. 1883, c. 163).

4. SAME—TAX ON INCREASE OF STOCK—PRESUMPTIONS.

When a statute requires the payment of a tax by a corporation upon increasing its capital stock, and makes its payment a condition precedent to the exercise of corporate powers, a court, in a suit involving the validity of such an increase of stock, will presume, in the absence of proof to the contrary, that the tax has been paid.

5. SAME—ACCEPTANCE OF INCREASED STOCK—ESTOPPEL.

One who has accepted increased stock of a corporation, and has taken the office of president of such corporation by virtue alone of such stock, is estopped to question its validity, on the ground of the nonpayment of a tax required to be paid by the corporation on increasing its stock.

6. SAME—SUBSCRIPTIONS—ISSUE BELOW PAR—COLORABLE TRANSACTION.

Where increased stock of a corporation is required by the terms of the authority for the increase to be sold at par, and the corporation buys from a subscriber to the increase a patent of no value to it, for the purpose of allowing the subscriber to get his stock below par by crediting the purchase price on his subscription, and afterwards resells the patent to him for a nominal sum, such transaction, being a mere evasion of the requirements of the issue of the stock, does not entitle the subscriber to any credit on his subscription.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

The Southern Malleable Iron Company is a manufacturing company, incorporated in August, 1890, under the general law of Tennessee. In November, 1893, H. H. Peck and Charles D. McGuffey were appointed receivers under a bill filed in the United States circuit court for the Southern division of the Eastern district of Tennessee, by the Northern Bank of Kentucky, a judgment creditor, with a levy upon certain assets. The object of the bill was to preserve the property as an operative unit plant, collect in its debts, complete certain valuable contracts, and sell the property as a whole, including its good will, for the satisfaction of all its debts according to priority of lien. The appellants under this bill were appointed receivers, and placed in possession of all its assets of every kind. During the course of the proceedings usual to such a creditors' bill, the receivers filed a petition, alleging the total inadequacy of the assets to pay debts, and setting out that the appellee, J. M. Elliott, a director and president of the corporation, was a subscriber to the capital stock of said company to the extent of 120½ shares of \$100 each, and was indebted on that account in a balance due thereon of \$6,997.32, and that the insolvency of the corporation rendered it necessary that this stock liability should be enforced. Leave of court was asked to file this petition in the principal case, and that J. M. Elliott be made a defendant thereto by proper process, and for a decree against him to the extent of his unpaid stock liability. An order was accordingly made by the Honorable D. M. Key, district judge, holding the circuit court, allowing the petition to be filed, and ordering that process should issue as prayed. It may not be out of place to say that, after the filing of the original bill, other bills were filed by creditors, including one for a foreclosure of a mortgage on the property of the company made to secure an issue of bonds. Subsequently all these bills were consolidated, and ordered to proceed under the name and style of "Ross-Meehan Brake Shoe Foundry Company v. Southern Malleable Iron Company et al." Elliott was duly made a defendant to the proceeding begun by the receivers, and filed his answer, denying the jurisdiction of the court; denying the jurisdiction to proceed against him by petition or bill in equity; and denying his liability as a stockholder. Proof was taken, and, upon a final hearing, the petition of the receivers was dismissed. 72 Fed. 957. From this decree, an appeal has been prosecuted, and errors assigned by the receivers.

Thomas McDermott, for appellants.

Geo. T. White, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

LURTON, Circuit Judge (after stating the facts as above). The jurisdiction of the court to entertain this petition of the receivers against the appellee depends upon its jurisdiction in the original case, to which this proceeding was wholly ancillary. This petition is auxiliary to the original suit. It is a petition by the receivers asking the aid of the court to enable them to collect in an asset of the corporation. It was filed by direction of the court under an order made in the principal cause. The jurisdiction of the court in the principal cause is not questioned, and cannot be in this collateral suit. *Compton v. Railroad Co.*, 31 U. S. App. 486-529, 15 C. C. A. 397, and 68 Fed. 263; *Mellen v. Iron Works*, 131 U. S. 352-367, 9 Sup. Ct. 781; *Lumley v. Railroad Co.*, 22 C. C. A. 60, 76 Fed. 66. The fact that the circuit court had possession of all the assets of the Southern Malleable Iron Company, for the purpose of winding up its affairs as an insolvent corporation, is the fact which made it admissible to bring a debtor of that corporation into the court, to the end that his debt might be ascertained and payment coerced. For the purpose of collecting in choses in action, the court might direct its receivers to

institute independent suits in that or courts of the state, or **cause such debtors to be made defendants in the principal cause, and determine for itself any question which might be involved by the defenses to the claim.** Such a proceeding would not involve any question of citizenship, or amount in controversy, nor mode of trial. The complete jurisdiction of the court over the res, the property and assets of this corporation, involved its right to bring before it persons having possession of any of those assets, or having claims thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury, as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. It might, in its discretion, submit such controversy upon issues made to a jury, or dispose of them without doing so. That the liability of appellee was one of a legal character did not operate to defeat the jurisdiction, and bring its proceedings against him to a stand. These questions seem conclusively settled by *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, a case which arose upon a like proceeding in the same court, and in which certain questions were certified by this court under the court of appeals statute.

We come, then, to the merits of the case. The defense to this stock liability is that the stock subscribed for by appellee was increase stock, and that there was no power in the corporation to increase its capital. In Tennessee, prior to 1870, all charters were granted by special legislation. Such charters, as in other states, usually defined definitely the amount of the capital stock of the company, or fixed a maximum beyond which it should not go. By article 11, § 8, of the Tennessee constitution, adopted in 1870, it is provided as follows:

"No corporation shall be created, or its powers increased or diminished, by special laws, but the general assembly shall provide by general laws for the organization of all corporations hereafter created."

The "general law" under which the Southern Malleable Iron Company was organized was approved March 23, 1875, and is chapter 142 of the Acts of Tennessee for 1875. That act prescribes a form of application to be followed whenever the corporation is one for the purposes of profit, and that the general powers of such corporations shall be those prescribed by section 5 of the act. The act contains no requirement that the application for incorporation shall anywhere state the amount of the capital stock proposed to be invested in the business. Upon the contrary, the only provision in the act of 1875 touching the matter of capital stock is found in section 5, where it is said:

"The corporation may, by by-laws, make regulations concerning the subscription for, or transfer of stock; fix upon the amount of capital to be invested in the enterprise; the division of the same into shares; the time required for payment thereof by subscribers for stock; the amount to be called for at any one time."

Judge Clark, who heard this case in the court below, was of opinion that this power should be construed as authorizing the corporation "to fix only the original or initiatory stock of the company," and that this corporation, having, by a by-law, settled upon "the

amount of capital to be employed in the enterprise," was without power to subsequently increase this capital by an amendment of the by-law. He was further of opinion that the fact that Elliott, by virtue of this new stock, became a member of the corporation, a director, and its president, did not estop him from denying the validity of the new stock, although creditors of the corporation were dependent upon its collection for the satisfaction of claims presumably contracted upon the faith of the increased capital. This latter conclusion was grounded upon the proposition that, where the corporation is totally without power to increase its stock, the void act of increase cannot be adopted or ratified or the subscriber estopped in favor of creditors. *Scovill v. Thayer*, 105 U. S. 143. That changes in the amount of the capital stock do involve changes in organization, and in the relative relation of the original stockholders towards the corporation and each other, is very evident. That such changes cannot occur without the consent of the shareholders affected is also elementary. How such consent is to be given depends upon the organic law of the corporation. In the absence of some other binding provision in the constitution, that consent would have to be unanimous. But if the stockholder becomes such under a charter or statutory provision which subjects him, by the action of the directors or of a majority of the members of the corporation, to the liability of such change of relation growing out of an increase of stock, he cannot complain. He has so contracted. *Cook, Stocks & S.* § 280; *Thomp. Corp.* § 78; *Payson v. Withers*, 5 Biss. 276, Fed. Cas. No. 10,864; *Payson v. Stoeve*, 2 Dill. 427, Fed. Cas. No. 10,863; *Railroad Co. v. Gammon*, 5 Sneed, 567; *Read v. Gas Co.*, 9 Heisk. 545-553. In the case last cited, where a large increase in the capital stock had been authorized, after the defendant in error had become a subscriber, Judge McKinney, referring to the effect upon the relative rights of original subscribers, said:

"One of the terms of his subscription was that after organization the board of directors would have the power under the charter to increase the capital stock from time to time, not exceeding one million of dollars. But [said the judge] such increase of the capital stock could work no change in the rights or liabilities of the original subscribers, for the reason that the corporation continues to be the same entity, and for the further reason that it was part of the contract of the original subscribers that the directors should have the power to increase the capital stock."

Where the capital is fixed in the charter, whether the charter be by special act of legislation, or under a general organization statute, the limit so settled by the charter itself cannot be exceeded unless authority to make an increase be plainly conferred in the charter or by statute. *Railway Co. v. Allerton*, 18 Wall. 236; *Thomp. Corp.* §§ 2076-2079; *Mor. Priv. Corp.* § 454; *Beach, Priv. Corp.* § 468. The reason is plain. Where the amount of the capital stock is definitely fixed by the charter itself, a departure therefrom would be to alter the charter itself. The general rule that the powers of a corporation are those definitely granted and those necessarily implied from the character of the business it is authorized to carry on has application to any change of the authorized capital, and no authority to alter the capital thus defined will be implied. This is

the limit of the rule against the power to increase by implication, as laid down in the authorities cited above.

Mr. Morawetz, in his very carefully prepared text, states the principle thus:

"A corporation has no implied authority to alter the amount of its capital stock where the charter has definitely fixed the capital at a certain sum." Mor. Priv. Corp. § 434.

So Mr. Beach says:

"It is well settled that a corporation has no implied authority, either by resolution of the shareholders or by-law, to alter the amount of its capital stock where the charter has definitely fixed it at a certain sum." Beach, Priv. Corp. § 468.

The cases cited in support of the text of both of these authors are all cases where the amount of the capital was definitely fixed in the constitution of the company. The case before us is that of an incorporation under a general law which does not impose any limitation whatever upon the capital which incorporators may venture in their business. Neither does it require that the corporators shall in the constating instrument state what their capital is or is to be. No provision is made for any registration or other mode of publishing the amount of the capital of any company organized under this statute. The marked distinction between this and all other such acts to which attention has been called lies in the fact that, under this law, the amount of the capital of any company formed thereunder constitutes no part of the organic law, but is distinctly made a matter for corporate regulation, and relegated to the field covered by that branch of corporate law constituting the by-laws of the company. A by-law may regulate the exercise of a corporate power, but it cannot enlarge or alter the powers conferred by the charter or by statute. A by-law in its nature is subject to amendment, alteration, and repeal. It cannot destroy or impair a right, and must therefore be a reasonable exercise of the internal management of the corporation. Rights may vest in members or others under a by-law which cannot be divested by subsequent alteration. A by-law is a subordinate law. It must not conflict with law, constitutional, statutory, or common, and must not conflict with the constitution of the corporation as found in its charter. Subject to these qualifications, a by-law is distinguishable from the charter of the corporation in the fact that it is subject to alteration. These principles are primary, and need no support.

If a corporation is given power to determine upon its capital stock as a matter of internal regulation, it is difficult to see why one determination is the exhaustion of the power. Any matter which is the proper subject of regulation by by-law may be so regulated from time to time as the corporate interests demand. The right to alter such a regulation when once made may involve vested rights, and for that reason be inadmissible without consent of all affected. But the right to alter or amend a regulation which is the proper subject of corporate legislation through by-law must depend upon questions wholly foreign to those involved by the assumption of powers not expressly granted. Hence it is that the

rule invoked against an implied power of increase where the amount of the capital is definitely fixed by the charter or the statutory articles of incorporation has no application where the power to determine upon the capital to be engaged is made one of the matters for internal regulation by by-law.

But it is said that in Tennessee there was a well-settled, definite, public policy, which forbids the granting of an unlimited power of increasing the capital of such artificial creations. This public policy is supposed to be indicated by what is said in reference to old legislative charters, wherein it is said was always found a definite amount of capital. Whether this is so or not may be matter of dispute. But, assuming it to be so, we find by the nineteenth section of this act of 1875 a very marked departure from any former policy in respect to the increase of the capital of such old legislative charters. That section provides "that any corporation heretofore created by an act of the general assembly which may desire to change its name, increase its capital stock, or obtain any powers granted by this act, shall have the right to do so, by the board of directors of said corporation copying such amendment and making an application," etc. Then follows a form of application and a direction that, when the same has been acknowledged and probated and filed with the secretary of state in the manner provided for articles of original incorporation, the desired amendment shall become ipso facto a part of such old charter. The whole matter is set in motion by the directors, and no one may deny or question the granting of the powers thus applied for. By the subsequent act of 1883, being chapter 163 of the Acts of 1883, this same easy mode of increasing capital stock is extended to corporations theretofore created under a general law which gave to chancery courts the power to organize corporations. Now, whether section 19 of the act of 1875 and the act of 1883 be construed as working an increase of capital stock by the mere application of the directors, or as merely conferring a power of increase to be subsequently exercised by the members of the corporation to be affected, we shall not stop to consider. In one event the directors alone would be able to increase the stock of any such company to any extent they saw fit. Upon the other construction the applying corporation, acting alone through its directors, would obtain for their corporation an unlimited right of increasing capital stock, whenever the members chose to exercise it. It is thus very evident that, when this act was passed, there was no definite legislative policy prohibiting the granting of a right to increase the capital of such companies, to be exercised at the will of the corporation concerned. The liberality of the legislature in this respect towards these old legislative irrevocable charters would not lead us to expect any less liberality towards the new brood of corporations anticipated under the legislation then in hand, especially as the same act reserved the right to repeal, alter, or amend the law under which they were to organize. Neither does the power to increase imply or involve the power of decrease. Very different questions of public policy are involved by a power of diminishing capital invested in such companies. The rights of creditors would be affected by a decrease. Their rights are not injuriously involved by an increase.

To decrease the capital of such a company would be, in most cases, to withdraw capital pledged to the fortunes of the adventure. These reasons have led the courts with great unanimity to hold that the power of increasing the capital does not involve or imply the power to decrease. *Sutherland v. Olcott*, 95 N. Y. 94; *Moses v. Bank*, 1 Lea, 398-408; *Salt Co. v. Curzon*, L. R. 3 Exch. 35-42; *Seignouret v. Insurance Co.*, 24 Fed. 332; *Spell. Priv. Corp.* § 770; *Smith v. Goldsworthy*, 4 Adol. & E. (N. S.) 430; *Cook, Stocks & S.* § 281; *Mor. Priv. Corp.* § 434. That an increase in the capital stock goes to the very foundation of the organization, and changes the relation between original subscribers and the corporation, must be admitted. It furnishes a consideration which might move the legislative authority to withhold or regulate the power. But in the last analysis this is a matter which affects members alone. If they become such, subject to such changes, they cannot complain. No question of public policy is involved by this consideration. Under this act, the power of increase is vested in the whole corporation to be exercised by the shareholders. Under such a power, the directors alone cannot authorize an increase. *Railway Co. v. Allerton*, 18 Wall. 233; *Eidman v. Bowman*, 58 Ill. 444; *Brice, Ultra Vires* (3d Eng. Ed.) 280.

These considerations lead us to the conclusion that where, by the constitution of a corporation, it is given power to fix upon the amount of capital stock to be engaged in the business by by-laws, an increase of capital by an amendment of the by-law is valid, and a subscriber bound. The case is like that of a corporation whose capital, by charter provision, is limited by a maximum named therein. In such a case an increase is valid, provided it does not exceed the charter limit. *Brice, Ultra Vires* (3d Eng. Ed.) 280; *Gray v. Bank*, 3 Mass. 364; *Railroad Co. v. Cushing*, 45 Me. 524-532; *Cook, Stocks & S.* § 281. This question has not been decided by the supreme court of Tennessee. The question was mooted in *Cartwright v. Dickinson*, 88 Tenn. 476-487, 12 S. W. 1030, but expressly reserved.

The case of *Insurance Co. v. Kamper*, 73 Ala. 325, has been much relied upon by appellee. It is not in point. The Alabama law required that the constating instrument should state the amount of capital proposed to be employed. This became a definite sum stated in the charter. The fact that the application also stated that the sum named was subject to increase was a nullity. It was an unauthorized power injected into the application. The Tennessee statute contains, as we have already stated, no requirement that the application shall fix the amount of the capital.

This brings us to the Tennessee act of March 27, 1883, being chapter 163 of the Acts of 1883. That act is as follows:

"That any persons organized as a corporation under a charter granted by a chancery court of this state, or under the Acts of 1875, chapter 142, approved March 25, 1875, who may desire to, to change the name of such corporation, increase its capital stock, or obtain any power granted by the act entitled 'An act to provide for the organization of corporations,' approved March 23, 1875, shall have the right to do so under and in the manner provided by section 19 of said act, which provides for the amendment of charters granted by the legislature, and with the like effect as therein provided: provided, that this act shall in no way apply to or affect corporations where suits have already

been brought to declare their charters void, and shall have no effect on any kind of litigation or suits now pending against such corporation, for any purpose."

This it is urged is a repeal by implication of the provision in the act of 1875 which we construe as permitting an increase of stock through corporate action of stockholders. This act deals with two distinct classes of corporations,—those organized under the act of Jan. 30, 1871, authorizing chancery courts to organize corporations with the powers conferred by the act, and those organized under the act of 1875. The language of the act is general, but it is manifest that some of the subjects with which it deals relate to but one of the two classes of corporations, while others are common to both. Thus, it is provided that persons organized under either of the two general laws referred to, "who may desire to," may have three distinct privileges. First, they may change the name of the corporation. Second, they may increase the capital stock of the corporation, or obtain the power to increase the capital stock, as these words may be construed. Third, they may obtain the powers granted by the act of 1875. The words of the act in furtherance of the intention must be taken distributively, "*redendo singula singulis*." They should be applied to the subject-matter to which they relate, as indicated by the context. *Suth. St. Const.* § 282. "Persons organized as a corporation under" the act of 1875 cannot possibly wish to obtain the powers with which they are already vested. This provision must therefore be referred to corporations not organized under the act of 1875. This principle of construction, being clearly applicable to this act, may be properly applied to so much of the act as refers to the subject of an increase of capital stock. If this act be construed as one by which the power to increase capital stock is to be obtained by such an amendment, to be exercised by the members of the corporation, then that power already existed, and these words should be referred to the other class of corporations where the power did not exist. The power to change the corporate name did not exist under either class of articles of association. This part of the act may therefore be regarded as applicable to both classes of corporations.

The act of 1883 contains no repealing clause, and the argument for repeal of the power of increase by by-law, which we find in the fifth section of the act of 1875, has no basis, if the rule of construction we have applied be sound. But if the maxim, "*Redendo singula singulis*," has no proper application, and all the provisions of the act be held as intended to apply to corporations organized under the act of 1875, then there is no room for an implied repeal of that power, if the act of 1883 be construed as conferring on the directors the power to increase the capital by simply making the application prescribed. Such a power of increase by action of the directors would not be necessarily inconsistent with the power of increasing by action of the shareholders through by-law. The whole subject would not be covered by the new act. Repeals by implication are not favored, and will not be presumed if the two acts can stand together. Repugnancy in principle merely is not enough to work a

repeal, unless it is clear that the new legislation is intended to cover the whole field. *Suth. St. Const.* § 137; *Cate v. State*, 3 Sneed, 120; *Durham v. State*, 89 Tenn. 723 et seq., 18 S. W. 74. On the other hand, if the act be construed as a method by which corporations not having the power of increasing capital may obtain the power, then the inclusion of corporations organized under the act of 1875, among those intended as beneficiaries, would not repeal a power already existing, there being no difference in limitation or method between the existing power and that to be obtained by applying for the amendment. So far as that act may be regarded as a legislative opinion that the power of increase did not exist under the act of 1875, such opinion, though entitled to some consideration, would not be of any considerable weight, and is offset by a contrary opinion evidenced by the repeal of the act by the act of April 7, 1893 (*Acts Tenn.* 1893, p. 299), and the substitution of no other mode of increasing capital. This express repeal would leave no mode by which such companies might lawfully increase their capital stock, unless the power existed under the act of 1875,—a condition of things which we cannot assume the legislature to deliberately intend in view of the legislative history of this subject.

Another objection to a decree against appellee remains to be considered. The eighth section of the revenue act of 1891 provided, among other things, that every corporation increasing its capital should pay a certain privilege tax upon the increase; "and no such corporation, joint-stock company, or association shall have or exercise any corporate powers until the said tax shall have been paid. And the secretary of state shall not file or record any charter, certificate of incorporation, or articles of association, or certify or give any certificate to any corporation, joint-stock company, or association until the foregoing tax has been paid; and no such company, incorporated by any special act of the legislature, shall go into operation, or exercise any corporate powers or privileges, until said tax has been paid." There are several answers to this:

First. It does not appear that this tax has not been paid. The court will not presume that this tax law has been violated, but will, on the contrary, presume that the law has been complied with. *Young v. Iron Co.*, 85 Tenn. 189, 2 S. W. 202.

Second. This defense is not open to appellee. If the corporation had the power to increase its stock, the failure to pay this tax is a mere irregularity, against which the appellee, by his acceptance of the stock and his taking the office of president by virtue alone of his stock, has estopped himself. The case in this aspect falls under the cases of *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, and *Veeder v. Mudgett*, 95 N. Y. 295. That this increase was made by a resolution of the stockholders clearly appears. A by-law is nothing more nor less than a resolution of the members of the incorporation. This resolution was unanimously passed. Elliott claimed a credit for \$3,012.50, for a patent right assigned to the company in part payment on his stock. This arrangement was made as a means of letting Elliott have the stock at less than par, its capital having been impaired by losses, so that its actual value

was less than 75 per cent. of its par value. The difficulty to be met was not that increase stock might not in good faith be sold at less than par, but in the fact that the by-law authorizing the increase required the new stock to be sold at par. Elliott made the transfer of this patent right July 6, 1892, and on January 31, 1893, the directors passed a resolution in the following words:

"Resolved, that, for and in consideration of the sum of \$1.00, the right transferred to this company by J. M. Elliott, Jr., for the manufacture of his vertical hook coupler, be, and is hereby, transferred back to him. All rights by this transfer are released and conveyed back to him, the same as though said transfer made on the 6th day of July, 1892, had not been made."

The arrangement by which this patent right was to be taken at the price fixed was for the purpose of evading the condition prescribed by the shareholders, namely, that the increase stock should be sold at par. This seems to have been known to Elliott. The resolution by which he reacquired the patent, at the nominal sum of one dollar, must be construed either as a rescission of the agreement for the purchase of his patent, or as but a part of the original illegal scheme by which the limitation upon the power of the directors to sell the new stock at less than par was to be evaded. In either event, the appellee is not entitled to the credit, it not appearing that the patent was of any value to the corporation while it held the title. The subsequent agreement of the receivers to allow this credit was a mere proposed compromise settlement, and never carried out, appellee refusing to pay the balance due upon obtaining such credit or to give his notes therefor.

The decree must be reversed and remanded, with direction to enter a decree against appellee for \$6,997.32, with interest from the filing of the petition of the receivers. Appellee will pay the costs of this court and costs under the petition in the court below.

CENTRAL TRUST CO. v. EAST TENNESSEE LAND CO. et al. (FORD, EATON & CO., Interveners).

SCHUMACHER et al. v. SAME.

(Circuit Court, E. D. Tennessee. March 6, 1897.)

1. EQUITY—MASTER'S REPORT.

The report of a master upon a question referred to him will not be disturbed, except in case of clear error.

2. RECEIVERS OF CORPORATIONS—DISAFFIRMANCE OF CONTRACTS.

The receiver of an insolvent corporation is not bound to carry out its executory contracts, unless he elects to do so for the best interests of the estate in his charge, and such a contract cannot be enforced against a receiver who has not signified his adoption of it, but has resisted its enforcement.

3. SALE OF LAND—ACTION FOR DAMAGES.

The vendor of land contracted to be sold to a corporation which has since become insolvent, and whose estate is being administered, in case the receiver elects not to go on with the contract, has a claim in damages for the breach, but it is a claim at large, and not accompanied by a vendor's lien.

Upon the Intervening Petition of Ford, Eaton & Co.

White & Martin, for Ford, Eaton & Co.
Geo. W. Easley and Prichard & Sizer, for East Tennessee Land Co.

SEVERENS, District Judge. In this case the petitioners seek to recover the purchase price of some land which the petitioners claim to have sold to the East Tennessee Land Company by executory contract prior to the commencement of this suit, and for the enforcement of an alleged vendor's lien upon the land so sold. The master to whom this and other matters were referred has reported against the petitioner, placing his decision upon the lack of a good title in the petitioners. As appears from the facts disclosed, there are several questions of doubt in regard to whether the petitioners are entitled to recover, and, if so, whether upon the footing of the contract for the contract price, or whether they would be limited to damages consisting of the difference between the contract price and the actual value of the land. The petition cannot be treated as one for the specific performance of the contract, for that has already been denied by a former decree of this court, so that their footing here must stand upon the right in a common-law suit to recover damages to which they may be entitled, that remedy being reserved to them. There is some controversy in the decision of the courts upon the question whether a vendor, upon tendering a deed which is refused by the vendee, can recover the contract price; and in some quarters it is held that, inasmuch as a common-law court has no authority to compel a specific performance, and the result of the suit will be to leave the title in the vendor, the proper measure of damages is the difference between the contract price and the value of the land. This question arises in the present instance, for there would be no vendor's lien for mere unliquidated damages resulting from the refusal of the vendee to go on with the contract. Practically, the present suit to compel payment of the purchase money upon tender of conveyance, with a prayer for the enforcement of a vendor's lien, amounts to a suit for specific performance. Another question of doubt and of difficulty is whether the execution of a deed by one of two executors in whom a former owner of the land vested a power of sale was valid, or was capable of confirmation by the separate act of the other executor, performed several years later. Other objections are raised by the receiver, which I will not stop to consider.

It appears from the foregoing statement that the question of the sufficiency of this title was fairly a matter for determination by the master. The rule applicable to a master's report is that it will not be disturbed except in case of clear error; and it seems to the court that the petitioner does not show such a state of the case as would warrant the court, under this rule, to reverse the master's decision. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *The Cayuga*, 8 C. C. A. 188, 193, 59 Fed. 483. But there is another ground which is not stated expressly as a ground of his action by the master, but which, nevertheless, is apparent upon the facts of the case. This contract, when the receiver

was appointed, was executory. The receiver was not bound to execute that contract, but might adopt it or not, as he should think for the best interests of the estate committed to his charge. Being in charge of an insolvent estate, he could elect whether he would execute the contract, or abide the damages resulting from its breach; and in exercising his discretion he may properly take into account the equities of the holders of other unperformed obligations of the East Tennessee Land Company. *Wabash W. Ry. Co. v. United States Trust Co.*, 150 U. S. 287, 14 Sup. Ct. 86; *Dushane v. Beall*, 161 U. S. 513, 515, 516, 16 Sup. Ct. 337. He has at no time signified his adoption of the contract, but, on the contrary, has resisted its enforcement. No doubt, there would still be left to the vendor a claim in damages for the breach of the contract if at the time when it went into insolvency and was transferred to the receiver a cause of action had arisen; but this would be a claim at large, and would not be accompanied by a vendor's lien. If the petitioner in this case was proceeding for relief of that kind, it ought probably to be allowed; but, as that is not the object of the petition, and would, in the existing state of the main case, be substantially fruitless, it is not supposed to be worth while to deal with the petition on that aspect further. For the reasons above stated, the exception to the master's report will be overruled.

UNITED STATES v. GUGLARD et al.

(Circuit Court, S. D. California. February 1, 1897.)

No. 689.

1. EQUITY JURISDICTION—ENJOINING TRESPASSES—ACCOUNTING.

A bill alleging trespasses by defendant on the plaintiff's land, and the cutting and removal of growing timber therefrom, to the injury of the inheritance, with threats by defendant to continue such trespasses, and praying an injunction to restrain the same, states a case for equitable relief; and a court of equity, having acquired jurisdiction under such bill, will decree an account and satisfaction for the injuries already done.

2. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill in equity, alleging trespasses on the plaintiff's land, and cutting and removal of timber therefrom by one defendant and the purchase and disposal by another defendant of the timber so cut and removed, and thereupon praying an injunction against the cutting and removal of the timber, and an accounting by both defendants, is not multifarious.

On Demurrer to the Bill.

George J. Denis, U. S. Atty.

Walter F. Haas, S. O. Houghton, and Chas. D. Houghton, for defendants.

WELLBORN, District Judge. The bill alleges that complainant is, and since the 30th day of May, 1848, has been, the owner of certain lands therein described, and that said lands are not mineral; that there has been growing on said lands a large quantity of timber, trees, and wood; that on the 1st day of October, 1893, and

at other dates and times between said date and the filing of the bill, the defendant Fidella Guglard, without license or authority therefor, wantonly and unlawfully cut and removed, and is still wantonly and unlawfully cutting and removing, a large part of the timber, trees, and wood growing on said lands; that the exact amount of trees, timber, and wood so cut and removed is unknown to complainant. The bill further alleges that the defendant Anson L. Hamilton, and other parties to the complainant unknown, have purchased and received from said defendant Fidella Guglard said timber, trees, and wood so cut and removed from said lands; that said Hamilton has sold and disposed of to other parties, to the complainant unknown, the timber, trees, and wood so purchased and received by him as aforesaid, and realized therefrom large sums of money, the exact amount of which is to complainant unknown; that prior to the filing of the bill complainant made written demand upon said defendant Hamilton for an accounting of the amount of timber, trees, and wood purchased and received by him, as aforesaid, and also the value thereof, at the times and places when and where the same were so received by him, and also the sums of money for which the same were sold by him, and the sums of money received by him from said sales, and the profits realized thereon, and demanded that said defendant account to complainant for the balance due from said defendant to the United States; but to so account, or at all, said defendant Hamilton has neglected and refused, and does still neglect and refuse. The bill further alleges that the defendant Fidella Guglard "has threatened, is threatening, and intends to, and, unless restrained by this honorable court, will, wrongfully and unlawfully cut and chop down all of the timber, trees, and wood growing and being on said section twenty-three, and will remove the same, and cause the same to be removed, from said section twenty-three, to the great and irreparable injury of this complainant; and said defendant Fidella Guglard has also threatened, and is threatening, and intends to, and, unless restrained by this honorable court, will, wrongfully and unlawfully cut and chop down all of the timber, trees, and wood growing and being on" said lands, "and will remove the said trees, timber, and wood, and cause the same to be removed, to the great and irreparable injury of this complainant." The prayer of the bill is for an injunction against the defendants, restraining the further cutting or removal of wood on said lands, and for an accounting from each of said defendants for the timber, trees, and wood received by them respectively. The defendant Hamilton demurs to the bill for want of equity, for multifariousness, and for lack of necessary parties.

The last-named ground of the demurrer is not urged in defendant's brief, and requires now no further notice than the statement that it is untenable. The other grounds will be examined in the order in which they are above stated.

1. Is the case made by the bill within the jurisdiction of a court of equity? From the brief of complainant I extract the following:

"The theory of complainant's bill of complaint is that the bill shows that complainant is entitled to the relief of an injunction against the defendant Guglard;

that this relief of an injunction against Guglard is the primary relief sought by the bill, and gives a court of equity jurisdiction of the suit; that, where a court of equity has thus acquired jurisdiction of a suit it will grant whatever other relief is proper, even though such relief is legal in its kind, and could have been obtained by an action at law; that this incidental relief is given to prevent a multiplicity of suits, a court of equity abhorring multiplicity; that while a court of equity, under the statutes now in force, will not take jurisdiction of a suit for discovery, where discovery is the only relief sought, and while the same may possibly be true of an accounting, where the subject-matter of the account is not uncertain, and does not arise out of a contract, express or implied, and where the items of the account are all on one side, still, where the complainant shows himself entitled primarily to an injunction, or to some other equitable relief, the complainant is entitled, in a court of equity, both to an accounting and to a discovery, as an incident to the primary relief to which he shows himself to be entitled; that for the foregoing reasons the complainant is entitled to an accounting and to a discovery as against the defendant Guglard, as well as the primary relief of an injunction against the defendant Guglard; that the court, as a court of equity, having acquired jurisdiction of the suit by reason of the fact that the bill shows the complainant to be entitled to the primary relief of an injunction against the defendant Guglard, the defendant Hamilton is a proper party defendant, because his being a party is necessary to prevent a multiplicity of suits; that, being a proper party defendant, the court may grant any proper relief against Hamilton, even though such relief is legal in its kind; and that for this reason complainant is entitled to an accounting and to a discovery from said defendant Hamilton, as well as from the defendant Guglard."

The demurring defendant urges that the bill does not state a case for equitable relief, for the reason that the mere cutting of growing trees is not such trespass as a court of equity will enjoin. In this I cannot concur. Any injury to the inheritance or substance of the estate is irreparable. Growing trees are a part of the land whereon they grow, and their destruction is an injury to the substance of the estate. One of the authorities, at least, cited by defendant (*Mining Co. v. Fremont*, 7 Cal. 317), expressly sustains this view. From that case (page 323) I quote as follows:

"In the case of *Gates v. Teague* (Oct. term, 1856; not reported), this court held that the mere allegation that the injury was irreparable would not, in itself, be sufficient, but the complaint must show how. The same is stated as the rule in the case of *Amelung v. Seekamp*, 9 Gill. & J. 474. This is, no doubt, the correct rule, and facts must be stated to justify the conclusion of irreparable injury. But in the cases of mines, timber, and quarries the statement of injury is sufficient. In the nature of the case, all the party could well state as matter of fact is the destruction of the timber in the one case, and the taking away the minerals in the other."

The authorities cited by complainant on this point are to my mind, conclusive against defendant's contention. *Silva v. Garcia*, 65 Cal. 591, 4 Pac. 628; *Mining Co. v. Clarkin*, 14 Cal. 544; 2 Story, Eq. Jur. § 929; *Thomas v. Oakley*, 18 Ves. 184; *Smith v. Rock*, 59 Vt. 232, 9 Atl. 551; *Wood v. Braxton*, 54 Fed. 1005-1008; *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565; *U. S. v. Gear*, 3 How. 120. See, also, *U. S. v. Brighton Rancho Co.*, 26 Fed. 218; *Id.*, 25 Fed. 465; *Fost. Fed. Prac.* § 215; *Hicks v. Michael*, 15 Cal. 107; *Mining Co. v. Fremont*, 7 Cal. 317; and *More v. Massini*, 32 Cal. 590. Where a bill shows cause for equitable relief by injunction to stay destructive and continuous trespass in the nature of waste, the court, to prevent another suit, will decree an account and satisfaction for the injuries already done. *College v. Bloom*, 3 Atk. 262;

Lee v. Alston, 1 Brown, Ch. 194; *Pom. Eq. Jur.* §§ 231-237; *Brooks v. Stolley*, 3 McLean, 523, Fed. Cas. No. 1,962; *Semon v. Freitag* (Ky.) 29 S. W. 320; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 63 Fed. 540. And when jurisdiction is thus acquired, the fact that the items of the account are all on one side does not affect the rule. In some of the cases cited above there was no mutuality in the accounts. As already stated, complainant's right to an injunction is sufficient to sustain the jurisdiction of a court of equity, and, in the exercise of such jurisdiction, the court will grant all the relief which the circumstances of the case require.

2. The remaining question is whether or not the bill is multifarious by reason of a misjoinder of parties defendant. "It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion." *Gaines v. Chew*, 2 How. 619. In *Von Auw v. Fancy Goods Co.*, 69 Fed. 450, it is said:

"The rule of multifariousness has recently been summed up in *Gibson's Suits in Chancery* (section 292; quoted in 1 Beach, Mod. Eq. Prac. § 129) in a manner which commends itself to my judgment. He says that to make a bill demurrable for multifariousness it must contain all of the following characteristics: First, two or more causes of action must be joined against two or more defendants; second, these causes of action must have no connection or common origin, but be separate and independent; third, the evidence pertinent to one or more of the causes must be wholly impertinent as to the other or others; fourth, one or more of the causes of action must be capable of being fully determined without bringing in other cause or causes to adjust any of the legal or equitable rights of the parties; fifth, the decree as to one or more of the separate or independent causes must be conclusive against one or more of the defendants, and the decree proper as to the other cause or causes must be conclusive against the other defendants or defendant; sixth, the relief proper against one or more of the defendants on one or more of the separate and independent causes of action must be distinct from the relief proper against the other defendant or defendants of the other cause of action; seventh, the satisfaction of the proper decree by any of the defendants to the extent of his alleged liability on any one or more of the distinct causes of action must not be a satisfaction of a proper decree against the other defendant or defendants on the other cause or causes of action; and, eighth, the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest."

Applying this doctrine to the case at bar, there appear three reasons why the bill is not multifarious: First. The causes of action joined against the defendants have some connection and common origin. A cause of action exists against both defendants to recover the value of certain timber. The timber is the same in both cases. Both causes of action have their common origin in the unlawful cutting and removal of this timber. Second. The evidence pertinent to the cause of action against *Guglard* is necessary to a recovery from *Hamilton* of the value of the timber purchased by him from *Guglard*. Third. Complainant cannot be doubly compensated for the same injury, and the satisfaction of a decree for money against either of said parties would be, pro tanto, a satisfaction of a decree against the other. I hold that *Hamilton* is a proper party, and that the objection of multifariousness is not well taken. On this point, see *Gaines v. Chew*, 2 How. 619, and note, and *U. S. v.*

Flournoy Live-Stock & Real-Estate Co., 69 Fed. 886. Demurrer overruled, and defendant assigned to answer the bill at next rule day.

GENERAL ELECTRIC CO. v. LA GRANDE EDISON ELECTRIC CO. et al.

(Circuit Court, D. Oregon. February 24, 1897.)

MORTGAGES—FORECLOSURE BY BONDHOLDERS—TRUSTEES.

Holders of bonds secured by a mortgage made to a trustee cannot ignore the trustee, and foreclose the mortgage by a suit in their own names, without showing that they have requested the trustee to take advantage of a default of the mortgagor, and that he has refused or unreasonably neglected to do so.

F. V. Holman, for plaintiff.

C. A. Dolph, for defendant Security Savings & Trust Co.

BELLINGER, District Judge. This is a suit to foreclose a mortgage given by the La Grande Edison Electric Company to the Security Savings & Trust Company, trustee, to secure the payment of certain bonds of the mortgagor company held by the complainant company. The trust company demurs to the bill of complaint, and the question is presented as to whether the bondholders can ignore the trustee, and foreclose the mortgage by which their bonds are secured, without showing that the trustee has failed in its duty to do so. A number of cases are cited in support of the bondholders' right to prosecute such foreclosure, those mainly relied upon being the following: *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61; *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10; *Mercantile Trust Co. of New York v. Missouri, K. & T. Ry. Co.*, 36 Fed. 221. *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, involved the question whether the trustee could proceed to a foreclosure and sale to pay the principal as well as the interest, without averring and proving that the bill had been filed for that purpose by request of the holders of 75 per cent. in amount of the outstanding bonds. It was contended that the trustee was so far subjected to the wishes of the bondholders that it was without right or power to proceed to a foreclosure for the collection of the principal sum before the date of payment in course, except upon the request of the holders of 75 per cent. in amount of the outstanding bonds. The court, in its opinion, says:

"We do not agree with this view. Whenever default upon the interest should continue sixty days after maturity and demand, then and thereupon it was declared that the principal of all the bonds should be and become immediately due and payable, and that the trustee, upon the request of the holder or holders of seventy-five per cent. of the outstanding bonds, and written notice thereof be served on the New York agency of the mortgagor, where the bonds and coupons were made payable, might take possession and operate the road; and upon like request it was made the duty of the trustee to foreclose the mortgage, and, after advertisement, sell the property at public auction to the highest bidder for cash. Hence, although, as to the particular form of foreclosure and sale at public auction by advertisement, and without the aid of the court, the proper construction would be that that course could not be taken without the request prescribed, this not only did not limit the power of the trustee to proceed by application to a court of equity to foreclose, but each of the mortgages contained near its close the following clause: 'It is hereby further agreed

that nothing herein contained shall be held or construed to prevent or interfere with the foreclosure of this instrument, the appointment of a receiver, or any other act or proceeding appropriate in such cases, by any court of competent jurisdiction.' There was nothing in the mortgages which took away the inherent right of resort to the court, and this clause did not impart what existed without it, but its insertion, evidently out of abundant caution, made it perfectly clear that the provisions relied on by the appellants did not apply to foreclosure by bill in equity, but to the cumulative remedy specified. It is easy to see why taking possession and selling without the intervention of the court should be guarded against, and the trustee not be required or allowed to proceed in that summary manner except on the request of a certain percentage of the holders of the bonds. Such proceedings might result in injury, which could not be predicated of those regularly taken in a court of equity. Arbitrary procedure by the trustee was not desirable, in view of the interests of both mortgagor and the bondholders as a class, while each would find the protection to which it might be entitled at the hands of the court. *Mercantile Trust Co. of New York v. Missouri, K. & T. Ry. Co.*, 36 Fed. 221."

In short, the effect of the decision is that the trustees were restricted in their right to take possession and sell without the intervention of the court until such time as three-fourths of the bondholders might request that procedure, but that the right to foreclose by suit in equity did not depend upon any such condition.

The case of *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10, is a case where the bonds provided that should default be made in the payment of any half year's interest, and continue for six months, thereupon the principal of all the bonds should become due and payable, "and the trustees may so declare the same, and notify the company thereof; and, upon the written request of the holders of a majority of the bonds then outstanding," the trustees "should proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property or otherwise as therein provided." Two questions were presented: (1) Whether the court could require the payment of the principal of the debt, and order the sale of the mortgaged property therefor on default in payment of interest; and (2) whether there could be a decree of foreclosure without proof of the written request of the holders of a majority of the bonds. Both of these questions were decided in the affirmative. The court says:

"But inasmuch as, by the terms of the first article, the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor's right of possession terminates upon a default of the payment of interest as well as the principal on any of the bonds, we are of the opinion that, independently of the provisions of the other articles, the trustees, or, on their failure to do so, any bondholder, on nonpayment of any installment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others or of the trustees. It is properly and strictly enforceable by and in the name of the latter, but, if necessary, may be prosecuted without, and even against, them."

In neither of these cases was the question raised on this demurrer involved. The question here is whether this foreclosure shall be at the suit of the trustees or of the bondholders. In the cases cited the questions were whether the principal of the debt had become due by default in the payment of interest, and whether there could be any foreclosure except upon proof that the bondholders had re-

quested it, and it was held that there could be such foreclosure; that the remedy which depended upon the consent of the bondholders was merely cumulative, and that the remedy by foreclosure was independent of it; that there was reason to guard the taking possession and selling without the intervention of the court; that such proceedings, if they could be arbitrarily taken by the trustee, might result in injury that could not be predicated of those regularly taken in court. What is said as to the right of each bondholder to have a foreclosure without the co-operation or consent of any others or the trustee is with reference to the separate bondholder's right to compel payment,—to his dependence upon the other bondholders or the trustee. No such co-operation is required. The right of one does not depend upon the co-operation of the others. Now, this right is in no way affected by the question as to whether foreclosure shall be had at the suit of the trustee, except in those cases where the trustee refuses to act. The language used in the opinion in *Railroad Co. v. Fosdick* does not imply, as claimed for it, that the bondholders, or any of them, may foreclose the mortgage without regard to the trustee, but the contrary. "We are of opinion," say the court, "that, independently of the provisions of the other articles, the trustees, or, on their failure to do so, any bondholder, on nonpayment of any installment of interest on any bond, might file a bill for the enforcement of the security. * * * It is properly and strictly enforceable by and in the name of the latter [the trustees], but, if necessary, may be prosecuted without, and even against, them."

The case of *Mercantile Trust Co. of New York v. Missouri, K. & T. Ry. Co.*, 36 Fed. 221, does not affect the question upon which the demurrer in this case depends. The sole question there was whether a suit for foreclosure brought a few days after default in the payment of interest was prematurely brought. The mortgage provided for entry by the trustee and sale by advertisement, but it provided that this could not be done until six months after default and demand of payment. The claim was that this limitation as to time applied to foreclosure as well as to the special proceeding provided for in the mortgage, but it was held otherwise, and that the special proceeding was merely cumulative, and that the right to proceed in equity was not thereby affected. The opinion discusses the right of a couponholder, having a right of action at law, to resort to equity as well, upon the theory that, inasmuch as the mortgage is given as security for the payment of the interest as well as of the principal, if there was an intention to exclude him from the right to proceed in equity, such intention would naturally have been expressed in clear and unmistakable language. The court says:

"Inasmuch as these proceedings stand upon the discretion of a court of equity, it is not strange that the parties were willing to leave to the bondholders and couponholders an open door to such a court."

All this has reference merely to the right of bondholders and couponholders to have a foreclosure in equity upon a default in the payment of interest, and, as to this, whatever right such bondholder or couponholder has, he has the right to have the trustee enforce for his benefit.

If, upon the authority of these cases, it should be held that the provision in the mortgage of the La Grande Electric Company by which it is provided that, if any default of such company shall continue for 30 days after written notice given by the trustee, the entire principal of the bonds shall, at the election of the trustee, be deemed immediately due and payable, applies only to the cumulative remedy provided for in the mortgage, and that the ordinary remedy of foreclosure and sale of the mortgaged property may be had upon default in payment of interest without such notice, the question still remains whether a bondholder can ignore the trustee, and foreclose in behalf of himself and other bondholders. That is the question raised on this demurrer. I am of the opinion that a couponholder or bondholder cannot thus foreclose against the trustee without showing some necessity for so doing. The bill of complaint alleges "that the defendant trust company, trustee as aforesaid, has failed to take possession of or to operate said property, under the provisions of said mortgage or trust deed, or to foreclose the same," etc. But it does not appear that a majority of the bondholders, or that any bondholder, has requested the trustee to take possession of the mortgaged property or foreclose the mortgage; nor are any facts alleged which show a failure on the part of the trustee to so act. The allegation that the trustee has failed to foreclose may be a mere conclusion, predicated upon its omission to do so, although, by the terms of the mortgage, it does not become the duty of the trustee to begin foreclosure or other proceedings under the mortgage until after written request by the bondholders; and, without this, good faith does not require such action by the trustee, except upon the request of the bondholders interested. By article 5 of the mortgage, the bondholders have the right to elect whether the trustee, in case of default, shall proceed to foreclose in the ordinary way, or shall resort to the cumulative remedy of taking possession and collecting the rents and profits without foreclosure. If the interests of the bondholders required, and the conditions of the mortgage permitted, the trustee to take action upon the mortgagor's default in the payment of interest or taxes, still it might properly wait until the majority of the bondholders indicated which of these remedies they desired the trustee to adopt; and, if the provision of the mortgage requiring default to continue for 30 days, and written notice by a majority of the bondholders, does not preclude a single bondholder in his right to have his lien enforced against the mortgaged property, it is, to say the least, not unreasonable that the bondholder desiring such action should apply to the trustee therefor. This action is by all the holders of outstanding bonds. These owners are entitled under the mortgage to control the action of the trustee in the remedy to be adopted. Upon their election, the duty is put upon the trustee to proceed in the method chosen. The trustee, if it might, ought not to adopt its own course, or proceed in the absence of such action by the bondholders; and, in omitting to do what it ought not to do, it has not failed in its duty to the bondholders. Until, therefore, it appears, at least, that the plaintiff bondholders have requested the trustee to take advantage of the mortgagor's default, and the trustee has refused or unreasonably

neglected to do so, the bondholders are under no necessity of proceeding in their own names and against the trustee. The demurrer is sustained.

CLEVELAND, C., C. & ST. L. RY. CO. v. HAWKINS et al.

(Circuit Court, D. Indiana. February 20, 1897.)

No. 8,733.

BANKS AND BANKING—SPECIAL DEPOSITS—BANK AS TRUSTEE—INSOLVENCY.

The C. Ry. Co., in order to secure one H. as surety for it on a bond for \$18,000, given pursuant to an order of court, made a special deposit of \$18,000 in the name of H., trustee, in a bank of which H. was president, receiving from the bank a certificate stating the particulars of such deposit, and its purpose. The money so deposited was never separated from the other moneys of the bank, but the amount was credited on the books to H., trustee. Some time after the deposit was made, H. drew \$9,000 in checks signed as trustee, deposited the same in his personal account, and checked it out. The trust account showed a balance of \$9,000 when the bank failed and passed into the hands of a receiver, the cash then in the bank amounting to about \$11,000. *Held*, that the C. Ry. Co. was entitled to have its claim allowed as a preferential claim upon the assets in the receiver's hands to the extent of \$9,000 only, and to be paid the remaining \$9,000 *pari passu* with other creditors.

John T. Dye and Elliott & Elliott, for complainant, cited the following:

Casey v. La Societe De Credit Mobilier, 2 Woods, 77, Fed. Cas. No. 2,496; McKee v. Lamon, 159 U. S. 317, 16 Sup. Ct. 11; Cook v. Tullis, 18 Wall. 342; Jones v. Kilbreth (Ohio Sup.) 31 N. E. 349; Knatchbull v. Hallett, 13 Ch. Div. 696; Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co., 104 U. S. 54; Frelinghuysen v. Nugent, 36 Fed. 239; Peters v. Bain, 133 U. S. 697, 10 Sup. Ct. 354; Oil Co. v. Hawkins, 20 C. C. A. 468, 74 Fed. 401; San Diego Co. v. California Nat. Bank, 52 Fed. 59; Van Alen v. Bank, 52 N. Y. 1; Dows v. Kidder, 84 N. Y. 121; People v. City Bank of Rochester, 96 N. Y. 32; Cavin v. Gleason (N. Y. App.) 11 N. E. 504; McLeod v. Evans, 66 Wis. 401, 23 N. W. 173, 214; Silk Co. v. Flanders (Wis.) 58 N. W. 384; Myers v. Board, 51 Kan. 87, 32 Pac. 658; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908; Harrison v. Smith, 83 Mo. 210; Stoller v. Coates, 88 Mo. 514.

John W. Kern, for respondent Edward Hawkins, cited the following:

10 Am. & Eng. Enc. Law, 12; Reissner v. Oxley, 80 Ind. 580; Chicago v. Sheldon, 9 Wall. 50; 27 Am. & Eng. Enc. Law, 82, 83; Knatchbull v. Hallett, 13 Ch. Div. 696, 753; Frelinghuysen v. Nugent, 36 Fed. 229, 239; Peters v. Bain, 133 U. S. 670, 697, 10 Sup. Ct. 354; Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co., 104 U. S. 54; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Atkinson v. Printing Co., 114 N. Y. 168, 121 N. E. 178; In re North River Bank (Sup.) 14 N. Y. Supp. 261; Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Sherwood v. Bank, 94 Mich. 78, 53 N. W. 923; Englar v. Offutt, 70 Md. 78, 16 Atl. 497; Appeal of Carmany (Pa. Sup.) 31 Atl. 334; Freiberg v. Stoddard, 161 Pa. St. 259, 28 Atl. 1111; Trustees v. Kirwin, 25 Ill. 73; Bank v. Goetz (Ill. Sup.) 27 N. E. 909; Wetherell v. O'Brien (Ill. Sup.) 29 N. E. 904; Association v. Jacobs, 141 Ill. 261, 31 N. E. 414; Wilson v. Coburn (Neb.) 53 N. W. 466; Slater v. Oriental Mills (R. I.) 27 Atl. 443; Parker v. Jones, 67 Ala. 234; Shields v. Thomas (Miss.) 14 South. 84; Steamboat Co. v. Locke, 73 Me. 370; Fowler v. True, 76 Me. 43; Fletcher v. Sharpe, 108 Ind. 276, 9 N. E. 142; Bank v. Blackmore, 21 C. C. A. 514, 75 Fed. 771; Wasson v. Hawkins, 59 Fed. 236.

BAKER, District Judge. This is a bill to procure the allowance of an alleged preferential claim amounting to \$18,000 upon the as-

sets of the Indianapolis National Bank in the hands of Edward Hawkins as receiver, for money deposited in said bank by the complainant company as a special deposit in trust, and which money, it is claimed, was mingled with the moneys of the bank which came into the hands of the receiver. The material facts shown by the evidence in this cause are as follows: An order was made by this court directing the trustees to satisfy of record a certain mortgage securing 18 lost or missing bonds issued in 1871 by the Cincinnati, Wabash & Michigan Railroad Company, upon the execution of a bond by the complainant company, with Theodore P. Haughey as surety, for the payment to the holders of said bonds, upon the presentation thereof to the clerk of this court, of such sums as they would be legally entitled to receive from the trustees of the mortgaged property. The complainant company executed a bond with Theodore P. Haughey as surety, conditioned for the payment to the holders of said 18 lost or missing bonds, pursuant to such order. The complainant having at that time a balance of \$50,000 in the Indianapolis National Bank, delivered to the bank a check, payable to its order, which is as follows:

"The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.
"\$18,000.

No. A 2349.

"Cleveland, O., Mch. 7th, 1892.

"Pay to the order of Indianapolis Nat'l Bank, Indp., Ind., eighteen thousand & 00 dollars.

G. S. Russell, Treasurer.

"To Indianapolis National Bank, Indianapolis, Ind."

At the time of the delivery of this check to the bank it executed the following certificate of deposit:

"Indianapolis, March 8, 1892.

"The C., C., C. & St. L. Ry. Co. has this day made a special deposit of eighteen thousand dollars in the Indianapolis National Bank in the name of T. P. Haughey, trustee, to secure him as surety on a bond given under an order of the U. S. circuit court for the payment of C., W. & M. R. R. bonds of the issue of 1871, numbered 449, 866 to 870, inclusive, 902, 1460, 1462 to 1471, inclusive, according to the terms of said order; in all 18 bonds.

"The Indianapolis National Bank,

"By Theo. P. Haughey, Pres't."

The order of the court referred to in the foregoing instrument, so far as material here, is as follows:

"Thereupon the complainant herein submits to the court its bond and obligation for the payment to the holders of said eighteen (18) bonds above numbered and specified, when they shall be produced to the clerk of the United States circuit court, of the sums which said holders shall be legally entitled to receive under said mortgage from the proceeds of said mortgaged property as their pro rata share of the proceeds thereof, which bond is executed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, with T. P. Haughey of Indianapolis as surety, and produces to the clerk the certificate of the Indianapolis National Bank showing that it has made a deposit in said bank to the credit of said Haughey as trustee for the sum of \$18,000, to secure him as such surety, which bond and security are now approved by the court, and the said trustees, J. Alfred Barnard and Arthur G. Wells, are ordered and directed to satisfy of record the mortgage hereinabove described upon the surrender and cancellation of the 1892 bonds held by the Cincinnati, Wabash and Michigan Railway Company."

The money represented by the check was never separated from the other moneys of the bank, but remained an undistinguishable part of the common mass. On the 20th day of May, 1893, Theodore P. Haughey, as trustee, by a check so signed, drew \$5,000 from this account of \$18,000, which had been entered on the books of the bank to the credit of T. P. Haughey, trustee; and on the 29th day of May, 1893, T. P. Haughey, trustee, drew another check against said deposit for \$4,000. The sums represented by these two checks were charged against said deposit, and were passed to the individual credit of T. P. Haughey. The moneys so credited to T. P. Haughey's individual account soon afterwards, and before the failure of the bank, were checked out by him for his own personal use. The deposit account remained in this condition, with a balance of \$9,000 standing in the name of T. P. Haughey, trustee, on the books of the bank, at the time of its failure, on July 24, 1893. When the bank failed, there was in the vaults of the bank in cash \$11,646.87. It also had in its possession in the hands of agents, in cash, the further sum of \$53,833.70. On these facts the court is of opinion that the complainant is entitled to have its claim allowed as a preferential claim to the extent of \$9,000 only. The deposit of \$18,000 made by complainant in the bank perhaps ought to have been separated from the other moneys of the bank, and set apart as a special deposit. It may be conceded that the bank committed a breach of trust in failing so to separate it from its other moneys, and to hold it as a special deposit. In point of fact the deposit was placed to the credit of T. P. Haughey, trustee, on the books of the bank, and the money represented by such deposit constituted an undistinguishable part of the mass of money in the bank. It was so deposited in pursuance of the agreement of the complainant and the bank. If the bank is to be regarded as a trustee holding the money as a special deposit, the breach of such trust would not, under the facts of this case, give the complainant a right to charge the assets in the receiver's hands with a preferential claim. The ancient doctrine only permitted a trust fund which had been diverted or misapplied to be followed and recovered, when it could be traced and identified. The modern and better doctrine permits the recovery of trust funds which have been misapplied, when it is shown that such trust funds have entered into and form a part of the assets which have come into the possession of the receiver, although the identical trust funds are so intermingled with the common mass as to be incapable of identification. But the right to priority of payment out of the common mass is not grounded on the breach of trust merely. It rests upon the ground that the trust funds have entered into and form an undistinguishable part of the assets which have come into the receiver's charge. An enlargement has been ingrafted on this rule by some courts, which hold that, if the trust funds have been applied to the payment of the debts of the insolvent, it will be sufficient to authorize the amount of the trust funds so misapplied to be charged as a preferential claim upon the assets in the receiver's hands, on the theory that the assets which have come into his hands have been increased to the ex-

tent that the trust funds have been applied to the payment of the insolvent's debts. It may well be doubted whether the doctrine of this class of cases is sound, for it is by no means certain that the assets of the insolvent which finally came into the hands of the receiver have actually been increased by the application of the trust funds to the payment of the insolvent's debts. However, it is not material to the decision of the present case to determine this question.

Another rule has been established, which has been regarded as influential in the determination of some cases, but which is not important here. The rule is one resting on the doctrine of presumptions. That rule is this: If a trustee has two funds in his possession or on deposit, one a trust fund and the other his personal funds, moneys drawn by him for his private use, although purporting to be drawn by him in his trust capacity, will be charged to his personal funds or deposit. In the present case there is no evidence tending to prove that Mr. Haughey had any money on deposit to his personal credit in the bank at the time he drew his two checks as trustee. These checks were drawn by him in his trust capacity, and were paid by transferring from the trust fund standing in his name \$9,000 to his individual credit; and these sums of money represented by these two checks were drawn from the bank by him on his personal checks, and went to pay his private debts, and not those of the bank. Hence no part of the trust funds was withdrawn in order to pay the debts of the bank, or otherwise went to swell the amount of the assets which came into the hands of the receiver. The testimony not only fails to trace the trust funds so misapplied into the receiver's hands, but, on the contrary, it shows that no part of such misapplied trust funds ever came into his hands; and it further shows that the bank received no benefit from the breach of trust complained of. The \$9,000 of trust funds remaining in the bank at the time of its failure came into the possession of the receiver as a part of the mass of assets received by him. The complainant is entitled to have \$9,000 of its claim paid in full as a preferential claim. The remaining \$9,000 is allowed as an unpreferred claim, to be paid *pari passu*. Let a decree be prepared accordingly.

STRATTON et al. v. DEWEY et al.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 523.

1. EQUITY PRACTICE—HEARING EVIDENCE ON DEMURRER.

It is contrary to correct practice for the court, upon a demurrer to a bill, to consider evidence submitted by consent of the parties; and an order entered upon such a hearing, overruling the demurrer and granting relief, is altogether irregular.

2. APPEAL—FINAL DECREES.

An order which grants certain relief upon the party's complying with conditions specified in the order, and provides that, if the conditions are not complied with, the relief shall be denied, is not a final decree, and is not appealable.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The appellees, Charles P. Dewey and Albert B. Dewey, on September 29, 1894, filed their bill, which they designate as a "bill in the nature of a bill of review," against Jesse D. T. Stratton, Minnie Stratton and her husband (J. Thomas Stratton), and Horace E. Kelley, to review and set aside a final decree pro confesso rendered by the circuit court November 18, 1893, in equity cause No. 235, in which all appellants here except Kelley were complainants and the appellees were defendants. The decree in suit No. 235 adjudged the real estate in controversy to the appellant Minnie Stratton. And, without a reference to a master to state the account between the parties, the sum of \$4,000 was further decreed in her favor against the appellees, as the rental value of the land for the years 1890, 1891, 1892, and 1893. A more extended reference to the provisions of the decree is not considered necessary. Errors of law apparent upon the face of the decree in suit No. 235 are principally relied upon by appellees to reverse the decree and reopen the case. And, as an excuse for their failure to seasonably file a bill of review, the bill alleges ignorance on the part of appellees of the rendition of the decree in No. 235, which resulted from the serious and protracted illness of their counsel, who had exclusive charge and control of the litigation in their behalf. Appellants filed a demurrer to the bill December 31, 1894. It appears from the briefs on file that counsel for the respective parties agreed that at the hearing of the cause the court below should consider certain affidavits and other written evidence in connection with the bill and demurrer. The record discloses that the agreement of counsel was respected by the court, and the cause coming on to be heard March 19, 1896, in the manner suggested by the agreement, the following decree was rendered: "This cause came on to be heard at this term, and was argued by counsel; and thereupon, and upon consideration thereof, it was ordered, adjudged, and decreed as follows: That the demurrers of the defendants to complainants' bill are overruled, to which rulings defendants except; and the court having heard the bill and exhibits and affidavits in support thereof, and counter affidavits and exhibits submitted by defendants, it is thereupon ordered, adjudged, and decreed that complainants, Chas. P. Dewey and A. B. Dewey, shall within thirty days from this date pay all costs incurred in equity cause, in this court, No. 235, up to this date, and also all costs that have been incurred in this cause No. 294, and that they shall pay into the registry of this court the sum of four thousand dollars (\$4,000), with interest thereon from the 18th day of November, 1893, to the date hereof, at the rate of six per cent. per annum, to be held until the final decree shall be rendered in cause No. 235, to abide such order as may be rendered in said decree; and, upon complainants paying said costs and making said deposit within the time specified, it is ordered, adjudged, and decreed that the pro confesso taken and entered upon the order book of this court on the — day of August, 1893 (the same being one of the rule days of this court), and also the final decree of this court pronounced, passed, and entered on the 18th day of November, 1893, in that certain cause then pending in this court upon the equity side of the docket, wherein the said Jesse D. T. Stratton, Minnie Stratton, and her husband, J. Thomas Stratton, defendants herein, were complainants, and said Charles P. Dewey and A. B. Dewey were defendants, and styled upon the equity docket of this court as 'Jesse D. Stratton et al. vs. C. P. Dewey et al.,' and numbered 235 on said equity docket of this court, be and the same are set aside, and said cause reopened, and that said complainants herein, Charles P. Dewey and A. B. Dewey, be now permitted to answer said bill in said cause No. 235,—such answer to be a full answer to the allegations of the bill, and the interrogatories therein to them propounded, and to be filed on or before the first Monday in May, A. D. 1896,—and, upon said payments and deposit being so made within the time herein specified, said cause No. 235 will thereafter proceed according to the rules of practice in equity. It is further ordered, adjudged, and decreed that if said costs are not paid or said deposit not made within thirty days from the date hereof, or if said answers are not filed within the time herein specified, then said decree pro confesso and final decree in said cause No. 235 shall be and remain in full force, and not vacated by this decree, and complainants' bill in this cause will thereupon stand dismissed as on final hearing, and all costs in this cause incurred are in that event adjudged against them, for which execution may issue." From this decree the defendants in the court below appeal and assign error.

Branch T. Masterson, for appellants.

S. W. Jones, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the facts, delivered the opinion of the court.

The manner in which this cause was heard finds no warrant in the rules of correct chancery practice, and the order made upon the hearing of the demurrer is altogether irregular. This court, however, cannot enter upon a consideration of these questions, nor determine those raised by the assignment of errors, as we are satisfied the motion to dismiss the appeal must be sustained because the order made by the court is not a final decree. It is in the nature of a conditional order, its finality depending upon certain contingencies that might or might not occur. The decree passed in suit No. 235, November 18, 1893, was ordered to be vacated and the cause reopened, and leave granted appellees to file an answer therein, if they should within 30 days deposit \$4,000 in the registry of the court, and pay all the costs of this suit and in suit No. 235. But if the costs should not be paid, nor the deposit of \$4,000 made, within the 30 days, or if the answer should not be filed within the time allowed, the decree in cause No. 235 was to remain in full force; and (using the concluding language of the decree) "complainants' bill in this cause will thereupon stand dismissed as on final hearing, and all costs in this cause incurred in that event adjudged against them, for which execution may issue." Something more was required to make the decree final than was done in this case. If appellees failed to do what the order required to be done within the prescribed time, appellants should have applied to the court for a final decree dismissing the bill. If the order of court was fully complied with by appellees, a final decree should have been passed, upon their application, reversing the decree in suit No. 235, and reopening that cause for further proceedings. Speaking of an order similar in some of its aspects to the one now before the court, Mr. Justice Miller, as the organ of the court, in *Jones' Adm'r v. Craig*, 127 U. S. 215, 216, 8 Sup. Ct. 1175, says:

"This order, made upon the hearing of the demurrer to a bill in chancery, is wholly irregular. This court, however, has no jurisdiction of the case as it stands, because the order just cited is not a final decree. Something yet remains to be done in order to make it such, and that action depends upon whether or not the complainants will comply with the order to bring in the sum due on the mortgage. If that order is complied with, then a decree should be made, upon the hypothesis on which the order was made, in favor of the complainants in the bill, and quieting their title. If, however, the money is not brought into court, then, according to the theory of the order, the bill of complaint should be dismissed. But, even assuming the right of the court to make the order, as well as its validity, the circumstances under which the bill of complaint is to be dismissed or the relief granted to the complainants named therein, and the sum to be paid, are matters which are yet to be determined, which may turn out either one way or the other, and which, when ascertained, will be the foundation for a final decree. There is no final decree as the matter now stands."

The appeal is therefore dismissed, and the cause remanded for further proceedings.

SAVANNAH, F. & W. RY. CO. v. JACKSONVILLE, T. & K. W. RY. CO.
et al.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1897.)

No. 533.

RAILROAD RECEIVERSHIPS—PREFERRED CLAIMS—RENTALS OF TERMINAL FACILITIES.

A receiver of a railroad having been appointed in a foreclosure suit, with instructions to pay, out of moneys and income in his hands, for supplies and operating expenses, and for expenses of operation during the six months previous to the receivership, another railroad company presented an intervening petition in the suit, setting up a contract with the insolvent railroad company to furnish it with terminal facilities at a stipulated rental, alleging that such facilities had been used up to the appointment of the receiver, and by him after his appointment, and claiming a preference, for the rental due, over the mortgage debt. *Held*, that as the intervener, whether entitled to its whole claim or not, was at least entitled to a fair rental for the time during which its terminal facilities were used by the receiver, it was error to sustain a demurrer to the whole petition.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

On July 23, 1892, the Pennsylvania Company for Insurances on Lives and Granting Annuities filed its bill against the Jacksonville, Tampa & Key West Railway Company for the foreclosure of a mortgage executed to it, as trustee, May 15, 1890, by said railway company. This mortgage is subsequent in point of time to three others executed by the constituents of the Jacksonville, Tampa & Key West Railway Company to the Mercantile Trust Company, to secure bonds aggregating \$2,216,000. Agreeably to the prayer of the bill, a receiver was appointed, who went into possession of, and is now operating, the railway. By the order of appointment, the receiver was authorized, out of the moneys and income coming into his hands, to pay all state and municipal taxes chargeable against the property; to pay for such repairs, supplies, labor, and services as should, in his judgment, be necessary or proper to conserve and operate the railway and other property; and to pay the indebtedness of said railway company incurred for expenses of operation during the six months next preceding the date of the order. He was further authorized to pay the maturing interest coupons attached to the bonds issued by the three constituent companies to the Mercantile Trust Company. Subsequently, the appellant, the Savannah, Florida & Western Railway Company, filed its petition of intervention in the original suit, in which it claimed an indebtedness of \$45,352.32 against the Jacksonville, Tampa & Key West Railway Company, and, to secure the payment of the same, prayed that an equitable lien be declared in its favor superior to that of the bondholders. The debt of appellant is alleged to have arisen out of a contract entered into between it and the Jacksonville, Tampa & Key West Railway Company, August 1, 1888, by the terms of which appellant agreed to furnish to the Jacksonville, Tampa & Key West Railway Company certain terminal facilities at the city of Jacksonville, as follows: "The necessary track room at its terminal station grounds, in the city of Jacksonville, Florida, for the arrival, departure, standing, and making up of its trains, both passenger and freight, and the necessary facilities for the proper accommodation of its traffic at the said city of Jacksonville, for the period of ninety-nine (99) years, with the privilege of renewal on like terms and conditions." In the contract, the term "first party" refers to the appellant, and "second party" to the appellee, the Jacksonville, Tampa & Key West Railway Company. The third, fourth, and fifth clauses of the contract provide for the payment of the terminal facilities, as follows: "Third. The second party covenants and agrees to pay to the first party, for the use of such of the premises aforesaid as may be exclusively set apart and accepted for its purposes, an annual rental as follows: Six per cent. on the actual cost thereof, and the actual annual expenditure for maintenance and operating expenses, including taxes and insurance. Fourth. The second party covenants and agrees to pay to the first party, as annual rental for the use of such of the premises aforesaid as may be used by it in common with the first party, such part of the interest at six per cent. on the actual cost thereof, and of

the actual cost of maintenance and operating expenses, including taxes and insurance, as may be proportionate to its use thereof, which proportion shall be ascertained and determined on the basis of the total number of passengers and tons of freight added together that are carried by each to and from Jacksonville during each year. Fifth. From the date of this agreement, and until the end of the present calendar year, the second party shall pay monthly, on account of the rental of all the premises aforesaid, three hundred and twenty-five (\$325) dollars, and at the end of the calendar year, or at some reasonable time thereafter, the relative traffic for the year of each party shall be ascertained and stated by each party to the other for the purpose of arriving at the actual rental due by the second party for the said year; and the amount so established as the total actual rental due for the said year shall be the amount to be paid on account in equal monthly installments during the next calendar year, subject to further payments or deductions when the relative traffic of each party for that year shall have been ascertained and determined; and for each calendar year thereafter the same method of payments on account, subject to revision at the end of each year, shall be followed during the existence of this agreement; but, pending the said annual statement of passengers and tonnage, the second party shall pay monthly on account the same in amount as it has been paying during the previous year." In reference to the performance of the contract by the appellant, the petition alleges: "That, in pursuance of said contract, petitioner did furnish terminal facilities, including depots, warehouses, and wharves, necessary for the purpose of the transaction of its business by the Jacksonville, Tampa and Key West Railway Company, together with room at its station grounds for the arrival, departure, standing, and making up of its trains, and all necessary facilities for the accommodation of its traffic, including the use of switch engines, flagmen, watchmen, crew, and employes necessary for the making up of its trains and doing its switching, police for the protection of its property; and did also furnish a ticket office and ticket agent, and the money to pay for same; and, in addition thereto, did furnish and pay for the maintenance of a ticket office jointly with the petitioner at the St. James Hotel; and did pay the salary of a soliciting agent for both, and the salaries for maintaining a joint ticket office in the city of Jacksonville for the account of petitioner and the Jacksonville, Tampa and Key West Railway Company; and did pay moneys out for the Jacksonville, Tampa and Key West Railway Company for its proportion of cost of telephone at the ticket office in Jacksonville; and did pay for its proportion of electric lights, ice, and for the postage stamps necessary in the operation of said road; and also did pay out sums of money for labor and repairs to said cars of the said Jacksonville, Tampa and Key West Railway Company, and for lubricants; and did, from time to time, furnish labor and material for the said Jacksonville, Tampa and Key West Railway Company; and did pay for the rent of the different ticket offices for account of the Jacksonville, Tampa and Key West Railway Company; and did pay for repairs of piers and wharves for account of said Jacksonville, Tampa and Key West Railway Company, and for all water rents due for water used, and for all other material and labor and offices and repairs necessary and required for the operation of the said Jacksonville, Tampa and Key West Railway Company, and for proper facilities and terminals for said railway company. That for a more particular account of the several items of expenditure and repairs, and amounts before enumerated due to the petitioner, petitioner files herewith an itemized account, marked 'Exhibit B,' and makes said account a part and parcel of its petition; and, for particularity as to the amounts due petitioner, reference is made to said itemized account. Petitioner further states that, as far as the dates when said several amounts became due is concerned, petitioner refers to said itemized statement, marked 'Exhibit B,' hereto attached." Exhibit B consists of a lengthy and complicated itemized statement of account, extremely difficult to properly understand.

To the petition of intervention, demurrers were interposed by both the complainant and defendant in the original suit, and by the receiver. All the parties assign substantially the same grounds of demurrer, which may be stated in the language employed by the original complainant: "First. That it appears by the petitioner's own showing that the alleged debt is an unsecured claim against the defendant railway company, and that petitioner's right to payment is subordinate and inferior to that of the bondholders represented by complainant. And, second, that it appears from petitioner's own showing that the greater part of its alleged indebtedness is a claim which arose against the defendant railway company more than six months prior to the appointment of the receiver in this case, and that the petitioner has no

greater equity to receive payment thereof than any other unsecured creditor in like situation would have; and wherefore, and for divers other errors and imperfections, this complainant demands of this court whether it shall be compelled to make any other or further answer to the said petition or any of the matters and things therein contained." At the hearing, the demurrers were sustained, and the petition dismissed, "without prejudice to the right of the Savannah, Florida and Western Railway Company to file a petition for the payment of any money which became due to it from the Jacksonville, Tampa and Key West Railway Company on account of operating expenses, within six months next preceding the appointment of a receiver herein." From the decree thus rendered, the Savannah, Florida & Western Railway Company appeals.

John T. Hartridge, for appellant.

J. C. Cooper and R. W. Liggett, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

The appellant claims an indebtedness of \$45,352.32 against the appellee the Jacksonville, Tampa & Key West Railway Company, on account of terminal facilities supplied the latter from August 1, 1888, to July 30, 1892, and insists that its demand is a preferential claim, superior in dignity to that of the bondholders, and hence entitled in priority of payment. The Jacksonville, Tampa & Key West Railway Company went into the hands of a receiver, July 23, 1892; and the receiver was authorized by the order of the court to pay, out of the earnings and income of the property, for such repairs, supplies, labor, and services as, in his judgment, should be necessary or proper to conserve and operate the railway, and to pay the indebtedness of the railway company incurred for expenses of operation during the six months next preceding the order of appointment. The account attached as an exhibit to the appellant's petition of intervention, if we understand its confused statement, embraces the period beginning August 1, 1888, to the appointment of the receiver, July 23, 1892, and also the interval between the date of such appointment and July 30, 1892. In the operation of the railway during the latter period, the receiver availed himself of the terminal facilities supplied by the appellant. It appears from the petition that the Jacksonville, Tampa & Key West Railway Company had no terminal facilities at Jacksonville. Those furnished were therefore indispensable to the successful operation and management of the railway. They added to the income, and enhanced the value, of the property in the receiver's hands. Indeed, without the facilities supplied by the appellant, the receiver could have operated the railway only at a serious disadvantage. It is therefore only right and proper that he should pay for the use and enjoyment of the property, certainly for the period of its occupancy by him (*Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824; *Oil Co. v. Wilson*, 142 U. S. 313, 12 Sup. Ct. 235; *Carswell v. Trust Co.*, 20 C. C. A. 282, 74 Fed. 88; *Railroad Co. v. Lamont*, 16 C. C. A. 364, 69 Fed. 23), not necessarily at the rate fixed by the contract, but the reasonable rental value of its use, to be determined by the proof (*Carswell v. Trust Co.*, supra).

The appellant, then, being entitled to a partial recovery on the case made by the petition of intervention, the court erred in sustaining the demurrers and dismissing the suit. It is a fundamental rule of equity pleading that "if any part of the bill is good, and entitles the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained." *Livingston v. Story*, 9 Pet. 658; *Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 520, 4 Sup. Ct. 583; *Heath v. Railway Co.*, 8 Blatchf. 407, Fed. Cas. No. 6,306.

As the case must be reheard in the circuit court, it is deemed proper to say that we would not be understood as restricting the appellant's measure of recovery, under the contract, to the period covered by the receivership; nor do we hold that it may recover, for that period, for all the items included in the account. An expression of opinion as to these questions is for the present reserved. As the case is presented, we must decline also to pass upon other difficult and important questions arising upon the assignment of errors. These involve, among others, the application of the landlord's lien laws of Florida, and suggest, rather than directly raise, the more serious question as to the effect of a continuance of the contract, pending the receivership, upon the rights of the holders of the various issues of bonds. No steps appear to have been taken by any of the parties at interest, since the railway was placed in the hands of a receiver, to annul or modify the pre-existing contract of appellant and the Jacksonville, Tampa & Key West Railway Company. Hence the relationship which the receiver bears to that contract (*New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 268), and the effect of its continuance, present questions which should only be determined upon a record more specific and distinct than the one before us. These questions are merely suggested on this appeal that the appellant may, if deemed advisable, so amend its petition and exhibit as to present in a simple and lucid manner the precise grounds relied upon for a recovery, to the end that the court may act advisedly and with due intelligence in deciding questions of such gravity and importance to the parties interested. Upon this appeal the sole point decided is that the petition of intervention, considered in connection with the annexed statement of account, discloses that the appellant is entitled, at least, to a partial recovery, and that, therefore, the demurrers should not have been sustained and the petition dismissed.

For the error indicated, the decree of the circuit court is reversed, and the cause remanded, with directions to set aside the order sustaining the demurrers and dismissing the petition; the cause thereafter to proceed according to the established rules of equity practice.

ATLANTIC TRUST CO. v. WOODBRIDGE CANAL & IRRIGATION CO.

(Circuit Court, N. D. California. January 4, 1897.)

1. IRRIGATION COMPANIES — MORTGAGE FORECLOSURES — RECEIVERS—PREFERENTIAL CLAIMS.

The equitable rules giving priority to labor and supply claims arising within a limited time before the appointment of a railroad receiver in foreclosure proceedings are applicable by analogy to irrigation companies, which are also quasi public corporations, subserving great public uses.

2. SAME.

Where a receiver is appointed in foreclosure proceedings against an irrigation company, claims for labor performed in the construction of ditches, etc., are not entitled to preference over the mortgage debt. Claims for labor expended in repairs and improvements are entitled to preference only when there has been a diversion of income to payment of interest, or otherwise to the benefit of the security. But debts for labor and supplies necessary to keep the works a going concern will be given a preference, even out of the corpus of the property, though there has been no diversion of income.

J. J. Scrivner and John B. Hall, for complainant.

Daniel Titus, for defendant.

Wm. M. Cannon and Paul C. Morf, for petitioners for preference.

McKENNA, Circuit Judge. This is a suit to foreclose a mortgage, in which a receiver was appointed. Demurrer of complainant to petition of William Alloway, claiming preference as a laborer. The allegation of the petition is:

"That said defendant, the Woodbridge Canal & Irrigation Company, on the 1st day of October, 1894, was, and is now, indebted to your petitioner in the sum of \$278, for work and labor done and bestowed between the 1st day of April, 1894, and the 1st day of October, 1894, by said petitioner for said above-named defendant, in the construction, alteration, addition to, repair, and supervision of its said ditches and canals, as a laborer, and at its request."

It is further alleged, in substance, that such sum was one of the necessary current expenses incurred by said defendant in preserving, operating, repairing, constructing, and extending the ditches, canals, and branches of defendant's works, and was essential to their conservation.

The question is, is the sum due a preferential debt? What is or is not a preferential debt, as against mortgaged railroad property, if a receiver be appointed, has received consideration in a number of cases, and certain propositions have become established. The primary principle is that the mortgage lien is paramount to subsequent charges, and, if displaced at all, it must be by a clearly superior equity. The equity, whatever its extent, is applied as part of the court's discretion of taking the control and administration of the property by a receiver. It may be a condition of appointment, or exercised afterwards. It may be applied to income or corpus, under particular circumstances. These propositions are not disputed. I mention them now to limit the inquiry to what is disputed, without the necessity of noticing the language of some of the cases which seem to make them important distinctions. It would seem from the cases that the equity depends partly upon the principle that current income, though in terms covered by the mortgage lien, is the prop-

erty of the mortgagor until possession be taken by the mortgagee, and hence it may be applied to current debts, and partly upon the principle of estoppel, arising from the delay of the mortgagee after default of the mortgagor. It is not necessary to review the cases. This has been done so often by able judges that to do so again would be as affected as useless. An able summary of their general doctrine was made by Mr. Justice Harlan in *Thomas v. Railway Co.*, 36 Fed. 808. The exact point in the case at bar, however, is not explicit in that summary, nor an indisputable inference from it, nor from the decisions of the supreme court. At any rate, since that time Judges Caldwell and Jenkins, in well-considered opinions, have expressed opposite views, and a reconciliation of them seems impossible. None, at least, was apparent to Judge Jenkins, for he definitely disapproved of those Judge Caldwell entertained. Judge Jenkins says that the principle which underlies the allowance of preferential claims in the case of railroad foreclosures is "bottomed upon the idea of diversion of funds in equity belonging to the general creditors, in preference to bondholders." Judge Caldwell extends the principle, and includes in the claim of preference "those which have aided to conserve the property, and have been contracted within some reasonable time"; and an essential antagonism seems to be expressed between his view and that of Judge Jenkins by the following passage: "And it is an error to suppose that such debts can only be given priority where there has been a diversion of the income of the road. * * *" See *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182; *Same v. Northern Pac. R. Co.*, 68 Fed. 36. In *Trust Co. v. Riley*, 16 C. C. A. 610, 70 Fed. 32, decided by the circuit court of appeals for the Eighth circuit, a distinction is made which brings us nearer to the case at bar. Sanborn, circuit judge, delivered the opinion of the court. After stating the general principle by a quotation from *Fosdick v. Schall*, 99 U. S. 235, he described the kind of claim passed upon in all the subsequent cases, down to and including *Thomas v. Car Co.*, 149 U. S. 110, 13 Sup. Ct. 824, and said:

"From this brief review of the decisions of the supreme court bearing upon this question, we think these propositions may properly be deduced: First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership, and out of the proceeds of the sale of its property. Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor, which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee. Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds,—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company; and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements has been diverted to pay interest on the mortgage debt, or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims in preference to the mortgage debt (*Fosdick v. Schall*, 99 U. S. 235; *Burnham v. Bowen*, 4 Sup. Ct. 675; *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 8 Sup. Ct. 1011; *Railroad Co. v. Hamilton*, 10 Sup. Ct. 546; *Morgan's L. & T. R. &*

S. S. Co. v. Texas Cent. Ry. Co., 11 Sup. Ct. 61), or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad and to keep it a going concern."

From this case it is clear that diversion of income is not a universal condition of preference. This is confirmed by the language of Mr. Chief Justice Fuller, speaking for the circuit court of appeals for the Fourth circuit in *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 10 C. C. A. 323, 62 Fed. 205.

"It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver for a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver, or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses accrued within 90 days, and of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, in view of the interests both of the property and of the public, that the property may be preserved and disposed of as a going concern, and the company's public duties discharged; and that such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time, and as a condition, of the receiver's appointment,—the necessity and propriety of making it depending upon the facts and circumstances of the particular case, and the character of the claims."

The question recurs, when may diversion be absent, and the claim still be a preferential one? This question is answered by Judge Colt in *Wood v. Railroad Co.*, 70 Fed. 741. The learned judge cites all the cases and reviews some of them, and deduces six propositions. Two of them are as follows:

"Fifth. That the current income of a railroad is primarily to be devoted to the payment of current debts, and that where such income has been used for the payment of interest upon mortgage indebtedness, or for permanent improvements, or in any manner has been diverted for the benefit of the mortgagees at the expense of the current debt fund, there must be a restoration, to the extent of such diversion; sixth, that, independently of the question of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road."

Applying these and other propositions to the facts of the case, the learned judge said:

"There is no allegation in this petition of a diversion of current income for the benefit of the mortgagees, and therefore this claim, as now presented, does not come within the principle of diversion laid down in *Fosdick v. Schall*, *supra*, *Burnham v. Bowen*, *supra*, and *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, *supra*. It does appear, however, that the materials purchased were coupling links and pins and tank steel furnished from time to time between September 22 and December 8, 1893; and the petition alleges 'that said supplies were necessary to the operation, from day to day, of said railroad.' I am of opinion that the petition states a case which brings this claim within that limited class of debts incurred for labor and supplies necessary to keep the road a going concern from day to day, and that it should be held to possess a superior equity over mortgage liens, upon the principle recognized in *Miltenberger v. Railway Co.*, 1 Sup. Ct. 140; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, *supra*; *Bound v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 473; *Thomas v. Car Co.*, *supra*; *Hale v. Frost*, 99 U. S. 389.

The case was affirmed on appeal by a very guarded opinion delivered by Judge Putnam. It may be said, in passing, that the circuit court of appeals made the claim a lien on the body of the

railroad, in accordance with the authority of *Miltenerberger v. Railway Co.*, saying:

"So far as we have discovered, *Miltenerberger v. Railway Co.* is the only instance in which the supreme court has in fact allowed accrued supply bills a priority against the corpus of mortgaged property; and, as we understand that suit, the circumstances of the case at bar, in its final stages, are substantially the same, for our present purposes, and we have followed strictly its conclusions, without going beyond them."

This case is at the limit of authority as to its facts, while as to law it precisely defines it. There has been a decided modification of prior views by the later cases, or, may be, it is more accurate to say a decided admonition against the impairment of the mortgage lien. In *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, Mr. Justice Brewer gave it emphatic expression, and, among other things, said:

"No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

An example of the same kind is the case of *Bound v. Railway Co.* (decided by the circuit court of appeals for the Fourth circuit) 7 C. C. A. 322, 58 Fed. 473.

In applying the principles which I have enunciated to the case at bar, there is some uncertainty. The allegations of the petition are somewhat confusing. They assign the services to construction, repairs, and expenses of operation. As far as they were for construction, they must be governed by the case of *Railway Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, and cannot be given preference. So far as they are for repairs and improvements, they cannot be given preference, as there is no allegation of diversion of income, nor, indeed, of the receipt of any income. So far as they are for operation,—keeping the works a going concern,—they are within the principles declared, and may be entitled to preference, even out of the corpus. What the services were actually for, I assume the evidence will show, and then can be determined the class to which they belong.

I have assumed that the law as to railroads is the same as that applicable to water companies. The extension, however, is contended against, but I have no hesitation in making it. It is true, I am directed to no case which makes it, but there are analogies between railroads and irrigation districts which justify it. Irrigation districts, in a sense, are new things to our jurisprudence, but old principles apply to them when the conditions of their application exist. Irrigation works, like those of a railroad, are usually constructed on credit, and canal companies conducting them have been declared by the supreme court of the state of California to be quasi public corporations. In *Ditch Co. v. Zellerbach*, 37 Cal. 577, the court, speaking by Mr. Chief Justice Sawyer, said:

"So, also, there are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a quasi public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain."

And in *Price v. Irrigating Co.*, 56 Cal. 431, the court, speaking by Mr. Justice McKinstry, said:

"Every corporation deriving its being from the act above cited has impressed upon it a public trust,—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created. Every such corporation may exercise, on behalf of the public, the power of eminent domain; and no man nor company of men, incorporated or otherwise, can take the property of a citizen for his or their own exclusive benefit. So plain a proposition cannot require elaboration. The power—in its nature a public power—and the public duty are correlative. The duty exists, without any express statutory words imposing it, whenever the public use appears."

See, also, Const. Cal. art. 14, § 1, and *San Diego Land & Town Co. v. City of National City*, 74 Fed. 79.

The use of water for irrigation, the supreme court of the United States, in *Irrigation Dist. v. Bradley* (decided Nov. 16, 1896) 17 Sup. Ct. 56, held to be a public use, upon the same reasoning that it was so decided by the supreme court of California. The power of eminent domain cannot be conferred or exerted for any other purpose. Being a public use, therefore, it is essential to the interests of the public that it be kept a going concern. It is as essential that the business of furnishing it be kept a going concern as that the business of a railroad should be kept a going concern. This is a condition of the equitable doctrine of preference. And a water company, therefore, is like a railroad company, not like a coal company; and hence *Snively v. Coal Co.*, 69 Fed. 204, and cases there cited, do not apply. Judge Adams clearly stated the rule of preference as to railroad companies, and the reason of it to be, among other things, that a railroad corporation was a quasi public one, as we have seen a water company is by the laws of California. The demurrer to the petition of Alloway, together with demurrers to the similar petitions of James Blakeley, Theo. Caldwell, A. H. Cowell, N. Densmore, George Faass, E. Franklin et al., Fred Grohe, James A. Griffin, J. Lane, Sailsbury & Vickory, and W. H. Williams will therefore be overruled, with leave to complainant to answer the petitions within 10 days.

GRAND AVENUE HOTEL CO. v. WHARTON et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

SALE—IMPLIED WARRANTY.

Defendant made a contract with plaintiffs to purchase from them two boilers of a certain kind, particularly described in the specifications attached to the contract, such boilers to be set up by plaintiffs in defendant's hotel at Kansas City. After the boilers were set up, it was found that the muddy water of the Missouri river, which was the only source of water supply, caused a sediment to form, which rendered the boilers useless. *Held* that, though the plaintiffs knew that the water of the Missouri would necessarily be used in the boilers, and knew its character, yet, as defend-

ant had contracted for a definite, known kind of boilers, there was no implied warranty on plaintiffs' part that they would operate successfully with the muddy water of the Missouri.

In Error to the Circuit Court of the United States for the Western District of Missouri.

The plaintiff in error, a Missouri corporation, owning and conducting the Midland Hotel at Kansas City, Mo., on August 26, 1891, entered into a written contract with the defendants in error, a Pennsylvania partnership, using the firm name and style of Harrison Safety Boiler Works, whereby the defendants in error agreed to furnish and deliver to plaintiff in error, upon the cars at Philadelphia, in the state of Pennsylvania, two Harrison safety boilers of 150 horse power each, and the services of an erector to set the same, for the sum of \$3,600, to be paid therefor at times specified in the contract, all within 90 days from the time of shipment. The contract contained full, particular, and minute specifications of the material and construction of the boilers in all their parts. The boilers were delivered and set up according to the contract, and by reason of some material accepted by the defendant in error to apply upon the price the claim for said boilers was reduced to \$3,555. When said boilers were put in use in said hotel, it was found that from the muddy water of the Missouri river, used in them, sediment was deposited, filling, or partially filling, the caps which formed the lower portions of the boilers, and causing incrustations, diminishing the heating capacity of the boilers, and also causing such caps to burst, requiring the fires to be drawn and the replacing of the broken caps with new ones, entailing frequent interruptions in the heating of the hotel. For the purpose of cleansing such water from the mud before use in said boilers, the plaintiff in error, in December, 1891, purchased of defendants in error one Cochrane feed-water heater for \$325, on which the defendants in error paid freight to the amount of \$13.02, which is the basis of the second cause of action. The third cause of action is for new caps and other material furnished on orders of plaintiff in error for use in repairs of the boilers rendered necessary from the causes aforesaid. The defendants in error were the manufacturers of these boilers. And plaintiff in error, by its answer, alleged that when said written contract of August 26, 1891, was entered into, the defendants in error well knew that the boilers were for use in said Midland Hotel in Kansas City, and also the uses there required of them; that the only supply of water was the Missouri river; and that from these circumstances they impliedly undertook and warranted that such boilers were adapted to the use of said hotel, and to the use of water from the Missouri river; and alleged that by reason of constant incrustations and breakings as above indicated they wholly failed to subserve such uses, entailed on plaintiff in error large expenses and damages, sought to be recovered as a counterclaim, and were worthless, and as such had been removed from the hotel, after defendants in error had made ineffectual attempts to put them in suitable working order. Upon the trial, the plaintiff in error offered to show that before the making of said written contract the agent of defendant in error came to Kansas City to make the contract with plaintiff in error for boilers embodying the Harrison principle, adapted to the use of said hotel and to the use of Missouri river water, knowing that this was the supply of water on which the plaintiff in error must depend in using such boilers, and that this was made known to him by the plaintiff in error before the making of such contract. Also that the boilers furnished were wholly unfit and unsuitable for the use of Missouri river water. Upon the objection that the testimony so offered was immaterial and irrelevant, and had no tendency to prove an implied warranty, the court excluded such offers of testimony, to which rulings the plaintiff in error duly excepted. Under the direction of the court the verdict of the jury was in favor of the plaintiffs below for substantially the amount claimed in the first three causes of action, the other having been abandoned.

Gardiner Lathrop (Thos. R. Morrow, John M. Fox, and Samuel W. Moore with him on brief), for plaintiff in error.

Sanford B. Ladd (John C. Gage and Charles F. Small with him on brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN District Judge, after stating the case as above, delivered the opinion of the court.

1. Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular use of which he is advised, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the use to which it is to be applied. *Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537; *Leopold v. Van Kirk*, 27 Wis. 152; *Jones v. Just*, L. R. 3 Q. B. 197; *Brown v. Edgington*, 2 Man. & G. 279; *Lime Co. v. Fay* (Neb.) 55 N. W. 213; *Pease v. Sabin*, 38 Vt. 432; *Iron Co. v. Groves*, 68 Pa. St. 149.

2. But when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular use, yet if the known, described, and definite thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. *Seitz v. Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46; *Jones v. Just*, L. R. 3 Q. B. 197; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232. In the case last cited it was said by the court:

"It was made plain that the defendant got the exact article or thing he bargained for; and, although it may have been stated that it was required for a particular purpose, still, as he did not exact an express warranty, he took the risk of its fitness for the intended use, and no warranty in that respect can be implied."

3. The language of the court in the Wisconsin case just quoted applies exactly to the present case. Here the purchaser contracted for a definite, well-known kind of boiler, its president having then a boiler of the same kind in use. The specifications as to the size, form, material, and every detail were minute, and embodied in the contract. The manufacturers were obligated to deliver exactly such boilers as were described and contracted for, and could not, under the contract, deliver anything different. There is no claim that the boilers did not in every respect conform to this contract and specifications, nor any claim that they were defective, either in respect to workmanship or material. The purchaser did not exact a warranty that the boilers would operate with the muddy waters of the Missouri river, and therefore assumed that risk itself. The writing must, on familiar principles, be held to embody the entire contract obligations of the parties, and all negotiations and colloquies of the parties preceding the execution of the writing were immaterial. The surrounding circumstances might be considered in applying the terms of the contract, or in the interpretation of doubtful terms, but not for the purpose of adding terms not contained in the writing. There was nothing doubtful or uncertain in the terms of this written contract. There were no errors in the rulings of the court, and the judgment is affirmed.

COCHRAN et al. v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, D. Oregon. February 24, 1897.)

No. 2,230.

LIFE INSURANCE—SUICIDE—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.

Insured was found dead in the family spring, with a hole in the back of his head, from a bullet fired from a pistol in his own hand. He had been accustomed to take his pistol with him to the spring to shoot squirrels, which, by digging, interfered with the water supply. Plaintiff, as part of her proofs of death, presented the coroner's verdict of suicide, and stated as the cause of death, "supposed to have suicided." Assuming that this placed on plaintiff the burden of showing that the death was not by suicide, *held*, that on the facts, including want of adequate motive, absence of powder stains, and the probability that deceased may have leaned over the spring to look for holes,—holding on by a door behind him, with the cocked pistol in his hand,—the jury were warranted in finding that death was accidental, and returning a verdict for plaintiff.

This was an action at law by Martha A. Cochran (now Martha A. Calloway) against the Mutual Life Insurance Company of New York, upon a policy of insurance on the life of her husband. The jury returned a verdict for plaintiff, and defendant moved for a new trial.

Geo. E. Chamberlain, J. W. Whalley, and J. K. Weatherford, for plaintiffs.

Bronaugh, McArthur, Fenton & Bronaugh, for defendant.

BELLINGER, District Judge. This is an action upon a policy of insurance upon the life of Cochran. The jury returned a verdict for \$5,000, the amount of the policy. Cochran was found dead in a spring near his house, from a pistol shot in the back part of his head, fired from a pistol in his own hand. A coroner's jury found that the deceased committed suicide, and the widow, in submitting proofs of death, attached a copy of the findings of the coroner's jury, as she was required to do by the form of proof provided for her by the company, and stated as the cause of death, "Supposed to have suicided with a pistol." It is claimed in support of the motion for a new trial that this answer put the onus upon the plaintiff of explaining this statement, and of showing that the deceased did not commit suicide, and that as to this there is a failure of proof. It is held that representations made in the proof of death as to the manner of the death of the insured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. I assume that the statement in the proof of death that the deceased was "supposed" to have committed suicide, although not the representation of the manner of death, but of a current theory in respect to it, has so far the effect of such a representation, inasmuch as it was intended for the action of the company, as to justify the company in relying upon the assumption that the deceased committed sui-

cide, and put the burden upon the plaintiff of showing that the manner of death was otherwise; and the question therefore is, do the facts in evidence warrant the conclusion reached by the jury that such representation was not true, and that, contrary to it, the deceased was killed by the accidental discharge of his own pistol?

The evidence tended to show that the supply of water for the domestic and farm uses of deceased was from a large spring near the dwelling house; that it was the dry season of the year; that squirrels had been digging holes beneath the spring, in such a way as to cause loss of a part of the water therefrom, and consequent inconvenience to the deceased and his family, from lack of water; that deceased had been in the habit of taking his pistol and visiting the spring to shoot these squirrels; that on the morning of his death he went to the spring, having the pistol with him (this was before breakfast); that, when breakfast was ready, Mrs. Cochran called to her husband, who responded to the call, and came and ate his breakfast with the family; that after breakfast he returned to the spring, having the pistol with him, as was his habit; that shortly thereafter a pistol shot was heard in that direction, and, upon investigation, deceased was found floating in the spring, face downward, dead, with a large bullet hole behind the right ear. The bullet had passed through the temporal bone and into the brain, ranging slightly upward and transversely through the brain, lodging there, according to the testimony of the physician who conducted the post-mortem examination. Other witnesses, who were present and saw the wound probed, testify that the bullet ranged downward and forward, so that it would have come out at the lower end and in front of the left ear, had it passed through the head. The wound was a ragged, irregular one,—large enough to admit the index finger of the physician who conducted the post-mortem examination. The spring is inclosed in cement walls 5 feet high. It is 9 feet square, and at the time in question it had a depth of water of about 3 feet. Over this is a spring house, built of wood, 6 feet high at the cone of the roof from the top of the cement wall. The door is at the edge of the spring, and is about $2\frac{1}{2}$ feet high, and of about the same width. The bottom of the door opening is the top of a sill some 3 or 4 inches above the ground. There was some testimony tending to show powder stains or marks at the surface of the wound, but the preponderance of the evidence was against any indication of powder burn upon the skin or hair of deceased, the wound being at a point just in the edge of the hair. There was nothing unusual in the conduct of deceased prior to his death. He was a sufferer from stomach ailments. His son George admitted that he had testified at the coroner's inquest that deceased told him he would kill himself if he did not get over his stomach trouble; but the witness testifies that he was much excited at the time, and did not know all that he testified to, and that now he has no recollection of such a statement by deceased. The financial circumstances of the deceased were good, although there was an attempt to show that he was involved over his business matters, and was in mental worry on such account. One of these matters involved a friend

to whom he had given a check for \$600, and who was in danger of losing the money through failure of a bank, other than the one on which the check was drawn, where he had placed the check for collection. The deceased was in no way involved in the transaction. The other business matter grew out of a note indorsed by deceased, with a number of other persons, for the Albany Woolen Mill. The note was for a large sum, but the woolen mill was solvent, and there was no ground for apprehension on that account. Moreover, all the other indorsers were men of recognized financial ability. The burden put upon the plaintiff by the representation of suicide as to the manner of death in her proof of death makes the case one where she must show that her husband did not purposely kill himself. Do the facts warrant such a conclusion? It does not necessarily follow from the facts which the evidence tends to establish, but this is not required. The nature of the case necessarily leaves the question uncertain. It is enough if, by a process of reasoning, such a conclusion becomes probable. Were there such facts, therefore, in evidence as warranted the jury, in the exercise of their right to judge of the credibility of the witnesses and of the weight to be given to their testimony, in the conclusion, upon the probabilities of the case, that the deceased did not commit suicide? In discussing the facts, much was said as to the testimony bearing upon the question of powder marks and burns upon the skin and hair of the deceased. There was testimony tending to prove that there was no indication of powder burn about the wound, and the jury might properly arrive at that conclusion. From such a conclusion it seems probable that the pistol from which the shot was fired was held at some distance from the head. This may be called one of the phenomena in the case, and it points to an accidental rather than an intentional shooting. The difficulty of firing such a shot, and the uncertainty of aim which it involves, makes it improbable that such a shot was intentional. The position of the body at the time the shot was fired is inexplicable upon any other theory than that of an accidental shooting. The deceased was necessarily leaning so far over the spring that the body fell entirely within it. There is nothing to explain such a posture in a premeditated shooting. It is doubtful if such a position could be maintained under such circumstances; and, if it could, did the deceased intend in this way to provide two methods of self-destruction,—to drown himself if his pistol failed? It was within his power, by placing the muzzle of the pistol against his head, to avoid any possible chance of a miscarriage in that method of suicide. Why a second method? And would the spring which was the source of his family supply of water be chosen for such a purpose? The habits and instincts of men are against such a hypothesis. The theory of the plaintiff is much more reasonable, and it is consistent with the known facts. Deceased had been in the habit of visiting this spring, sometimes with his pistol, sometimes with a rifle, and shooting squirrels there. He had already made such a visit before breakfast on the morning of his death. These animals had dug holes about there, and these had a tendency to draw off the water from the spring, already low and

insufficient. It is not improbable that he would cock his pistol on approaching the spring, and carelessly proceeded to inspect the interior of the spring after getting there, without thinking of the condition of his pistol. In examining for squirrel holes that might exist under the cement wall, he would naturally lean over the spring, and in so doing he would quite as naturally grasp the side of the low doorway near him. It is not improbable that he would do this with the pistol still in his hand. As he leaned forward over the spring, examining its interior,—unmindful, in his interest in what he was doing, of any danger,—the pressure of his weight on the hand by which he was supporting himself probably discharged the pistol while the arm holding it was extended at its full length, or nearly so. This explains those features of the case not otherwise explainable, and yet necessary to be explained in determining the question at issue. All minds may not agree as to the deductions thus drawn from the facts in evidence, but if the jury made these deductions, as they must have done, the court cannot, upon any argument of a different conclusion, overrule them and set their verdict aside. The motion is denied.

BOWEN v. NEEDLES NAT. BANK.

(Circuit Court, S. D. California. February 1, 1897.)

No. 652.

PLEADING—AMENDMENTS—NEW CAUSE OF ACTION.

A complaint, on bills of exchange, filed by the payee against the drawer, may be amended by joining an additional cause of action based on defendant's promise to pay certain checks of a third party, upon which plaintiff had advanced the amount therein called for, since this is kindred in character to the original causes of action, and might originally have been joined with them.

This was an action at law by Abner T. Bowen against the Needles National Bank on certain bills of exchange. The case was heard on defendant's motion to strike out from the amended complaint certain parts thereof, which set up a new cause of action.

Works & Lee, for plaintiff.

Gardiner, Harris & Rodman and H. C. Dillon, for defendant.

WELLBORN, District Judge. Three causes of action are set up in the original complaint, each on a bill of exchange, of which the plaintiff was the payee and the defendant the drawer. Under a general leave of the court to amend his pleadings, plaintiff filed an amended complaint, which embraces all the matters set forth in the original complaint, together with another, and fourth, cause of action, based upon defendant's promise to pay certain checks of a third party, upon which plaintiff had advanced the amounts therein called for. The pending motion is to strike out this latter part of the amended complaint, on the ground that it introduces a new cause of action. The question is not free from difficulty, and the motion has been submitted

without citation of authorities or argument. I have made such research, however, as was practicable, and the cases below cited are more nearly in point than any others which I have been able to find. Upon the authority of these cases, I hold that since the new cause of action is kindred in character to the others, and might have been originally joined with them, all being based upon contracts, its introduction by amended complaint is allowable. *Tiernan v. Woodruff*, 5 McLean, 135, 23 Fed. Cas. 1203; *Tilton v. Cofield*, 93 U. S. 166; *U. S. v. Seventy-Six Thousand One Hundred and Twenty-Five Cigars*, 18 Fed. 150; *Estee, Pl. & Prac.* § 4445; *Anderson v. Mayers*, 50 Cal. 525; *Atkinson v. Canal Co.*, 53 Cal. 102; *Railroad Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877. Motion denied.

HAWKINS v. STATE LOAN & TRUST CO.

(Circuit Court, S. D. California. February 1, 1897.)

LIMITATION OF ACTIONS—CONVERSION OF CHATTELS.

An action by the receiver of an insolvent national bank, in which it is alleged that the defendant, to which negotiable paper was sent by the bank for collection, appropriated the proceeds thereof, and refused to pay the same over on demand, is an action for the conversion of chattels, and is governed by the limitation fixed by subdivision 3 of section 338 of the California Code of Civil Procedure relating to actions for "taking, detaining, or injuring any goods or chattels."

E. T. Dunning and John W. Kern, for plaintiff.
Gardiner, Harris & Rodman, for defendant.

WELLBORN, District Judge. Plaintiff alleges that he is the duly appointed and qualified receiver of the Indianapolis National Bank of Indianapolis, Ind., having been appointed on the 3d day of August, 1893, and having qualified on the 8th day of the same month, and that the defendant is a corporation duly organized under the laws and a citizen of the state of California; that on the 1st day of June, 1893, said National Bank forwarded to defendant for collection on account of said National Bank, a draft, on a person therein named, for \$996.39, payable 90 days after date; that defendant, at the maturity of said draft, collected the money due on said draft, "and, notwithstanding the fact that it had full knowledge of the insolvency and failure of said Indianapolis National Bank, and of the appointment of this plaintiff as receiver thereof, it appropriated the said sum to its own use, and refused, and still refuses, to pay the same over to plaintiff, though often requested by him so to do." Defendant has demurred to the complaint on the ground that the same is barred by the statute of limitations of the state of California, and contends that the limitation applicable is that contained in subdivision 1 of section 339 of the Code of Civil Procedure of California, while plaintiff contends, that subdivision 3 of section 338 of the Code of Civil Procedure of California applies. The period prescribed in the former section is two years, and would bar the action. The period prescribed in the latter section is three

years, and would not bar the action. Subdivision 3 of this latter section is as follows:

"Sec. 338. Within three years: * * * (3) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property."

Construing this last-named subdivision in an action for the value of certain personal property converted by defendant, in which action said subdivision was, as here, set up in bar, the supreme court of California says:

"The words of the statute are not used to indicate any particular form of action, but I think it applies to all those cases in which the person injured has a remedy in an action of claim and delivery, or for conversion. Certainly one whose property has been wrongfully taken or detained may sue for conversion if at the time he was entitled to the possession of it. I think the case falls within the provisions of section 338, and the cause of action was not barred." *Horton v. Jack*, 37 Pac. 652, 653.

The word "chattel," the plural of which is used in said subdivision 3 of section 338, is thus defined:

"Every species of property, movable or immovable, which is less than a freehold. * * * Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion, and transferred from one place to another. 2 Kent, Comm. 340; Co. Litt. 48a; 4 Coke, 6; *Ex parte Gay*, 5 Mass. 419; *Brewster v. Hill*, 1 N. H. 350." 1 Bouv. Law Dict. p. 305.

Defendant's refusal to pay over, on demand, the money mentioned in the complaint, was conversion, for which an appropriate action will lie. *Richmond v. Soportos* (City Ct. N. Y.) 18 N. Y. Supp. 433; *Harris v. Cable* (Mich.) 62 N. W. 582. I hold, that subdivision 3 of section 338 controls in this case. Demurrer overruled, and defendant allowed 10 days to answer.

FIRST NAT. BANK OF CONCORD v. HAWKINS.

(Circuit Court of Appeals, First Circuit. March 5, 1897.)

No. 202.

1. NATIONAL BANKS—INSOLVENCY AND ASSESSMENT—ULTRA VIRES—ESTOPPEL.

A national bank which has purchased from a third party shares of stock in another national bank as an investment, and which appears on the books of the latter bank as a stockholder, is estopped, after the latter's failure, to deny liability to an assessment on the stock on the ground that its purchase thereof was ultra vires.

2. SAME—ASSESSMENT—NATURE OF LIABILITY.

The liability of a shareholder in a national bank to an assessment on his shares is not a contractual liability flowing from his acquisition of the shares, but a liability which arises by force of the statute authorizing the assessment.

In Error to the Circuit Court of the United States for the District of New Hampshire.

This was an action by Edward Hawkins, as receiver of the Indianapolis National Bank, against the First National Bank of Concord, to recover an assessment made by the comptroller of the currency upon certain shares of stock in the former bank, which were held by the latter as owner. In the circuit court a jury was waived

by stipulation in writing, and the case was tried to the court, which made a finding of facts, and rendered judgment for the plaintiff. The defendant has sued out this writ of error.

The finding of facts was in the following language:

"The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893. The plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month. The capital stock of the bank was 3,000 shares, of the par value of \$100 each. On the 25th day of October, 1893, an assessment was ordered by the comptroller of \$100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof. The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis National Bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis National Bank as a shareholder of 100 shares of its stock from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment or any part thereof. The parties of record, through their counsel of record, having appeared before me in this, a jury-waived case, and having adduced their evidence, I find the facts above stated."

Reuben E. Walker and Frank S. Streeter, for plaintiff in error.
J. S. H. Frink, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This case is based by the plaintiff in error on the proposition that it had no power under the law of its creation to acquire the stock of another national bank as an investment. It is not necessary for us to consider this proposition. It is settled that it had full power to loan on the stock as collateral, or to take it in settlement of a doubtful debt, and in either case, as incidental thereto, to cause the stock to be transferred into its own name absolutely, if it deemed it for its interest so to do. *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122; *Bank v. Case*, 99 U. S. 628. Therefore, on the face of the transaction, no illegality appeared, and nothing to advise either the bank whose stock it acquired, or the existing or future creditors of that bank, or the comptroller of the currency, who was their quasi public representative, that the transaction was not within the scope of the unquestionable powers of the plaintiff in error. Under these circumstances, the entire trend of the law is that the plaintiff in error is estopped to deny its liability in this case. *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328, 330; *Bank v. Case*, 99 U. S. 628; *Scovill v. Thayer*, 105 U. S. 143, 149; *Anderson v. Warehouse Co.*, 111 U. S. 479, 483, 4 Sup. Ct. 525. There might arise some exceptional instances where, for special reasons, this estoppel would not apply; as where stock had been issued in excess of the authorized limit (*Scovill v. Thayer*, *ubi supra*), or where, in

the cases represented by section 5152 of the Revised Statutes, there are no interests capable of binding themselves either by contract or estoppel, or where the substance of the transaction appears on its face, as in *Beal v. Bank*, decided by us and reported in 15 C. C. A. 128, and 67 Fed. 816, although the latter class is not strictly exceptional. But none of those special elements are found here. We have no need to reconcile *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, which arose on a statute of Missouri, as the decisions referred to by us apply directly to national banks, and come down to a later date.

The plaintiff in error maintains that the liability sought to be enforced here is merely contractual, flowing out of the acquisition of the stock in question and continuous upon it; so that, therefore, if the original investment was unauthorized, the liability, being still in fieri, cannot be enforced. But this does not correctly state the nature of the liability. There can be no substantial doubt that, whether the purchase of the stock was authorized or not, the plaintiff in error was, after its transfer, by the force of the transaction, its owner, and that no one else could stand as such. Under these circumstances, the liability sought to be enforced here arises by force of the statute, and is not contractual. *Keyser v. Hitz*, 133 U. S. 138, 151, 10 Sup. Ct. 290. Indeed, the expressions of the supreme court found in *Bank v. Case*, *ubi supra*, are so much in harmony with the rules deducible from the practical conclusions of that court in the cases to which we have referred, that we accept them as disposing of this suit. The court said, at page 633:

"There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the national banking act that prohibits it. But, if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action."

The judgment of the circuit court is affirmed, with interest, and with the costs of this court to the defendant in error.

BOWEN v. CLYMER et al.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 543.

LIMITATION OF ACTIONS—POSSESSION OF LANDS BY HEIR—LITIGATION WITH ADMINISTRATOR.

Possession of land, held by one who claims it only as heir of a deceased owner, and who, during the whole of such possession, is litigating with the administrator of such deceased owner the validity of the administration, will not ripen into a title under statutes of limitation, good as against a purchaser from the administrator under an order of sale for payment of debts, made after the administrator's right is established; nor can the possession of one to whom the heir has conveyed pending the litigation, and who has knowledge of it, and of the nature of the heir's title, give any better right.

In Error to the Circuit Court of the United States for the Northern District of Texas.

De Edward Greer, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. R. D. Bowen, the plaintiff, brought this action against J. M. Clymer, W. J. Dorsett, G. W. Wharton, and N. P. Wharton, to try the title and recover the possession of land described in the pleadings. The petition is in the statutory form. The defendants pleaded the general issue, and pleaded specially the three, five, and ten years' statutes of limitation. On the trial the judge instructed the jury to find a verdict in favor of the defendants, which action of the court is assigned as error.

The proof established or tended to show the following facts: That one Earle Cravens departed this life, intestate, April 10, 1880, in Dallas county, Tex.; that at the time of her death she was the owner of the land in controversy; that one Mary P. Fortson was the sister and sole surviving heir of the deceased; that plaintiff and defendants claim through Earle Cravens as a common source of title; that one George F. Alford was appointed administrator of the estate of Earle Cravens on September 20, 1880, by the county court of Dallas county, Tex., and that he duly qualified and entered upon the duties of such administrator; that, at the time of this grant of administration, there were existing claims against the estate to the amount of more than \$1,000; that on February 28, 1882, Mary Fortson, as sole heir, joined by her husband, filed her suit in the county court of Dallas county, Tex., in the administration of the estate of Earle Cravens, in which she attacked the grant of administration, on the ground that the court had no jurisdiction to grant the same, and asking that the same be dismissed, and the appointment of the administrator set aside, and that the grant of administration and all proceedings under it be declared null and void. On May 22, 1882, the county court granted judgment as prayed for by the heir, and decreed that the administration was null and void. On appeal to the district court, that court, on December 12, 1883, reversed the judgment of the county court, dismissed the suit of Mrs. Fortson, and established the validity of the administration. From this judgment, Mrs. Fortson appealed to the supreme court, which, on December 5, 1884, reversed the judgment of the district court, and remanded the cause thereto for further proceedings therein. On April 6, 1886, the district court adjudged and decreed that the administration was null and void, and that said Alford be removed as administrator, and his appointment be revoked, set aside, and held for naught. From this judgment the administrator appealed to the supreme court, and that court, on June 18, 1889, rendered its judgment, reversing the judgment of the district court, and adjudged and decreed that the suit against the administrator be dismissed, and that their judgment be certified to the district court for observance. On February 15, 1890, the district court, having received the mandate of the supreme court, rendered judgment thereon that the heir take nothing by her suit, and that the defendant Alford, the administrator, go hence without day, and the

administration on the estate of Earle Cravens, deceased, be sustained, and that this judgment be certified to the county court of Dallas county, sitting in probate, with instructions to proceed in the matter of said administration. The proof tended to show that on January 24, 1892, the established and existing indebtedness against the estate of Earle Cravens amounted to \$3,660.83; that on February 27, 1893, the county court of Dallas county ordered a sale of the land in controversy for the payment of the indebtedness against the estate, under which order the land was sold by the administrator, and bought by R. D. Bowen, plaintiff, the sale reported to the court, and duly approved and confirmed, and the administrator was ordered to make a deed therefor to plaintiff, which deed was made as ordered, bearing date November 13, 1893, and was duly recorded in the county where the land is situated. On January 18, 1884, Mary P. Fortson, as sole heir of Earle Cravens, sold and conveyed the land in controversy to C. H. Cooper. The next day he conveyed the land to J. M. Clymer, one of the defendants, under whom the other defendants claim through proper deeds. Clymer testified that he had all of his negotiations for the purchase of the land with George F. Alford; that they had considerable negotiation about the purchase of it; and that the price and terms were agreed on between him and Alford, and when the deeds of Mrs. Fortson to Cooper, and from Cooper to Clymer, were handed to him by Alford, Clymer objected, stating to Alford that he had bought the land from him, and wanted a deed from him. Whereupon Alford said that Cooper was his partner, and that a deed from Cooper was the same as a deed from Alford; and, under these circumstances, relying on these statements, he accepted the deed, supposing that he was getting a good title to the land. He paid the purchase money to Alford. He had possession of the land before he bought it, but did not claim it until then, after which he continued in possession, claiming it as his own. There was proof as to the continued possession of the premises, and the payment of taxes on the land, but the view we have taken of the case makes any further reference thereto unnecessary.

There is no appearance for defendants in error in this court. We have not the benefit of either oral argument or brief on their behalf. There is no suggestion in the record of the ground on which the trial judge based his charge directing a verdict for the defendants. The counsel for plaintiff in error suggest that the only ground on which the charge of the court can be held to be correct is that the defendants had acquired title by the statute of limitations. It is certainly too late for the heir or those claiming under her to contest the validity of the administration. Waiving any question as to the proper forum for such matter, there is no suggestion in the record of any collusion between the purchaser at the administrator's sale and Alford, or any ground to charge the purchaser with the equities, if any, growing out of the dealings of Alford and Cooper with Clymer, in 1884. The indebtedness of the deceased was a charge upon her estate as clearly as the lien of an attachment upon her property in her lifetime would have raised. The estate vested in the heir, subject to administration. The heir herself did not claim against the

estate, but through it. It is not suggested that the purchaser from her did not know her relations to the estate, but, on the contrary, it is shown that she sold and conveyed in her character as sole heir. We therefore concur with the suggestion of counsel for the plaintiff in error that the only ground upon which the charge of the court can be held to be correct is that the defendants acquired title by the statute of limitation. Plaintiff in error contends that these purchasers from the heir, pending the litigation between the heir and the administrator, over the grant of the administration itself, are chargeable as his pendens purchasers. On this point there is a dearth of direct authorities. It is not a question of whether limitation will run against the estate in the course of administration,—for, subject to certain qualifications, not necessary to be mentioned, it is too well settled that the right of an estate may be lost by limitation,—but the question is: Can the heir, while holding only as such, keep possession of the property, and during the whole time litigate with the administrator over the validity of the administration, until, by the lapse of three or five years' time, her possession shall ripen into a title by prescription; and, if she cannot do this by holding possession herself, can she effect it by a sale to another, who has knowledge of her relation to the estate, and his subsequent possession, pending her litigation with the administrator, of three or five years? It seems clear to us that these questions must be answered in the negative, and that a purchaser from her is so charged with notice of the pending litigation, and notice of its character, as to debar him from claiming that his possession is peaceable, if adverse. As said above, direct authorities have not been presented by plaintiff's counsel or found by us. The cases of *Harle v. Langdon's Heirs*, 60 Tex. 555, and *Paxton v. Meyer*, 67 Tex. 96, 2 S. W. 817, present closer analogies than any we have examined; but our conclusion is based rather upon elementary principles, deduced, it is true, from adjudged cases, but too well settled to require citation.

It follows that the judgment of the circuit court must be reversed, and the cause is remanded to that court, with instructions to award the plaintiff a new trial.

EDWARDS v. BATES COUNTY.

(Circuit Court, W. D. Missouri, W. D. February 27, 1897.)

PLEADING AT LAW—MISSOURI CODE—AMENDED ANSWER.

In an action at law in a federal court in Missouri, the defendant, in an answer entitled a "plea to the jurisdiction," set up, besides the want of jurisdiction, certain defenses on the merits. The court, without considering these defenses, dismissed the suit for lack of jurisdiction. This judgment was reversed by the supreme court, and the case remanded "for further proceedings in conformity to law." *Held* that, under the Missouri Code, it was thereafter in the discretion of the court below to permit the filing of an amended answer responsive to the issues tendered by the petition, and embracing, in substance, matters contained in the original answer, minus the plea to the jurisdiction.

This was an action at law by James C. Edwards against Bates county, Mo., to recover upon certain funding bonds. The cause

was heard on a motion to strike out the amended answer, and for judgment for the sum demanded in the petition.

J. K. Skinker, for plaintiff.

Gates & Wallace, for defendant.

PHILIPS, District Judge. On the hearing of this case on the original pleadings, this court held it had not jurisdiction over the subject-matter of the suit, for the reason that the real amount in controversy did not exceed the sum of \$2,000, exclusive of interest and costs, and thereupon dismissed the action. 55 Fed. 436. From this judgment the plaintiff appealed to the supreme court, where the judgment was reversed; that court holding that on the face of the pleadings this court had jurisdiction over the subject-matter. 163 U. S. 269, 16 Sup. Ct. 967. After remand, the defendant, on leave of the court, filed an amended answer; and the plaintiff has filed a motion to strike out the amended answer, and for judgment for the sum demanded in the petition. This motion is predicated of the contention of plaintiff's counsel that under the Code of Practice of the state there is contemplated but one answer on the part of the defendant, in which may be embraced all matters in abatement, as well as of defense to the merits, and that where the defendant has interposed in the answer the defense of want of jurisdiction over the subject-matter, and that defense is decided adversely to the defendant, the right thereafter to plead to the merits of the cause of action is gone, and the plaintiff, without more, is entitled to judgment as for want of answer. It is to be conceded that under the Missouri Code of Practice it is competent for the defendant in his answer to conjoin a plea in abatement with matters of defense to the merits. And it may, for the purpose of this case, be further conceded that, where the defendant relies upon both characters of defense, he should unite them in one answer. *Little v. Harrington*, 71 Mo. 390; *Cohn v. Lehman*, 93 Mo. 582, 6 S. W. 267; *Christian v. Williams*, 111 Mo. 443, 20 S. W. 96; *McIntire v. Calhoun*, 27 Mo. App. 513. And I may go further, and say that where the answer interposes only the defense of a plea to the jurisdiction, and on trial this plea is not sustained, it might not be reversible error should the trial court refuse thereafter leave to defendant to interpose a plea to the merits. But, as applied to the facts of a case situated as the one at bar, I do not understand that, after the issue of abatement has been found for the plaintiff, it is not competent, under the Missouri Code, to allow the defendant to file an amended answer to the merits, where the original answer, in addition to the plea to the jurisdiction, contained also matter of defense to the merits. The original answer distinctly pleaded, *inter alia*:

"That the plaintiff's petition does not state facts sufficient to constitute a cause of action against the defendant upon the coupons mentioned therein, which are alleged to have matured on the 18th days of January of the years 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, for the reason that it appears upon the face of the said petition that any right of action upon the said coupons is barred by the statute of limitation of the state of Missouri."

The answer further said that:

"The defendant alleges that the funding bonds sued on herein, and described in the plaintiff's petition, are not yet due and payable, and will not be due until the 1st day of October, 1905, as the terms of said bond will show."

The answer then proceeded to set out the terms and conditions on which the bonds sued on were issued by the defendant county; showing that defendant, in conformity therewith, exercised its option to call in and pay off said bonds, of which it gave the required notice, and provided the funds therefor at the place designated in the contract, and that, by reason of the failure of the holder of the bonds to so present them and accept payment thereof, the plaintiff's right of action had not accrued to sue for the principal of said bonds, as the bonds did not otherwise mature until the year 1905. And as a consequence of the facts alleged, if found to be true, the interest sought by the petition to be recovered on the bonds would cease from the date when the defendant made the tender conformably to the provisions of the contract, if not receded from. These issues tendered by the answer were not adjudicated by the court, for the reason that it held the plea to the jurisdiction well taken. This, too, was the only matter passed upon by the supreme court. It is true that defendant's attorney entitled his answer a "plea to the jurisdiction." But, under the spirit of the Code, the courts look to substance, rather than form, and seek to administer justice on the facts pleaded and established, rather than the conclusions drawn therefrom by the pleader. The Code of Civil Procedure (section 2074) declares that:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

Had this court ruled against the defendant on the plea to the jurisdiction, it should have proceeded to pass upon the other issues tendered by the answer. The judgment heretofore rendered by this court shows that it went solely to the plea to the jurisdiction. And the mandate of the supreme court is that:

"It is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is, hereby reversed. * * * And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to set aside the order dismissing the action for want of jurisdiction, and for further proceedings in conformity to law."

The legal attitude of the case thereafter is the same as if the original answer had contained alone the substance of the allegations touching the merits which had never been tried. Before the same was set down for trial the defendant, on leave of the court, filed an amended answer, pleading the matters aforesaid to the merits, and further tendering the general issue as to other material allegations of the petition not expressly admitted to be true in the original answer, with some affirmative allegations germane to and in contravention of the averments of the petition. By express provisions of the Code of Civil Procedure (section 2104), it is provided that:

"The party may be allowed on motion to file an amended or supplemental petition, answer or reply, alleging facts material to the cause or praying for any other or different relief, order or judgment."

The supreme court of the state has held, under this statute, that a defendant at any time may abandon any defense or part thereof set up in his answer. *Institution v. Forbes*, 52 Mo. 201; *Elliott v. Secor*, 60 Mo. 163. The only limitations the courts of this state have ever imposed upon the exercise of the discretion of a trial court in allowing amended or supplemental answers under the Code is that it shall not contradict material admissions of a former answer, nor work a hurtful surprise to the plaintiff, nor operate to unduly delay the cause, or show intolerable laches, such as the court should discourage, nor otherwise thereby unduly prejudice the cause of the plaintiff. The amended answer in this case goes to matters within the terms of the issues tendered by the petition, and embraces, in substance, matters contained in the original answer, minus the plea to the jurisdiction. It is not necessary that the court should here say that all the matters set up in the amended answer are permissible, or constitute a valid defense. The motion goes to the whole answer, and in my judgment, for the reasons assigned, is not tenable, and the same is overruled.

UNITED STATES v. HEWECKER.

(Circuit Court, S. D. New York. December 9, 1896.)

WILLFUL MURDER—DEATH IN A FOREIGN COUNTRY—FUGITIVE FROM JUSTICE—INDICTMENT—THREE YEARS' LIMIT—SECTIONS 1043, 1045 AND 5339, REV. ST.—ON DEMURRER, PLEA TO INDICTMENT SUSTAINED.

A seaman on the American schooner *M.* was indicted for having shot in the harbor of Havana one Miller, who died therefrom in the hospital, three days afterwards, at Havana, on January 21, 1892. The indictment was not found until March 10, 1896; and H. in the meantime had been imprisoned at Havana upon conviction for an assault, and on the expiration of his sentence delivered to the United States authorities. On demurrer to the indictment: *Held* (1) that the defendant was not a fugitive from justice under section 1045 of the Revised Statutes, so as to be excepted from the exemption of indictment after three years, provided by section 1043; (2) that the death having taken place on land within a foreign jurisdiction, the case was not one of "willful murder" at common law, under the federal authorities; (3) that the only United States statute applicable, viz., section 5339, though making the offense punishable with death, neither declares it to be "murder" nor does it limit that offense to cases of death within a year and a day, which at common law was an essential element of the offense of murder; (4) *held*, therefore, that the case was not one of "willful murder" within section 1043, and the indictment was therefore barred by the three-years limitation.

Wallace Macfarlane, U. S. Atty., and Max J. Koehler, Asst. U. S. Atty.

Abram J. Rose and Alfred C. Pette, for defendant.

BROWN, District Judge. The defendant on March 10, 1896, was indicted by the grand jury of the circuit court in this district, for having maliciously shot and wounded one Edward J. Miller, on the

17th day of January, 1892, on board the American schooner Rebecca J. Moulton, in the harbor and bay of Havana, Cuba, "within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state," from which wound said Miller afterwards died in a hospital at Havana, on January 21, 1892. The indictment contains two counts, both averring the above facts, and that the Southern district of New York is the district in which said Hewecker "was found, and into which he was first brought for the offense aforesaid."

To this indictment a plea in abatement was interposed, which sets forth (1) that the indictment was not found until March 10, 1896, more than three years after the death of said Miller on land in Cuba on January 21, 1892; (2) that the charges in the indictment, if true, do not constitute the crime of "willful murder," and that under section 1043 of the Revised Statutes, the defendant cannot be prosecuted or tried; (3) that "from the 17th day of January, 1892, until the date of the finding of the said indictment, he had not fled from justice, but that he had been in the meantime and at all times between said dates confined in the prison at Havana, Cuba, under a charge and conviction for an assault inflicted in the city of Havana, and that the offense with which he is charged in the said indictment is barred by the statute of limitations." To this plea the government interposed a demurrer.

The argument upon the demurrer having been heard before one of the judges of the circuit court and the district judge, sitting together, upon their failure to agree, the question was certified, upon the request of the counsel of the United States, to the supreme court, which, on the 26th of October last, dismissed the certificate and declined to entertain jurisdiction thereon. Upon remand of the cause to the circuit court, the case has been reargued before me at the present criminal term, and elaborate briefs submitted by counsel upon the questions whether the case falls within the three-years limitation of section 1043, or within the exception thereto; and whether the prisoner can be treated as a fugitive from justice under section 1045, and on that ground not within section 1043.

Section 1043 of the Revised Statutes provides that:

"No person shall be prosecuted * * * for treason or other capital offence, willful murder excepted, unless the indictment is found within three years next after such treason or capital offence is done or committed."

Section 1045 provides:

"Nothing in the two preceding sections shall extend to any persons fleeing from justice."

1. I do not see how it is possible to find the prisoner "a fugitive from justice." The offense charged was not complete until Miller's death, on January 21, 1892. At that date, and prior thereto, viz., from the date the shot was fired, according to the facts admitted by the demurrer, the defendant was imprisoned in Havana under a charge and conviction for an assault, and so continued until long after the lapse of three years from the commission of the offense. Unless the offense be that of "willful murder," the statute limits the indictment to three years "next after * * * such capital offence is done or

committed"; i. e., next after the death, whereby the offense becomes complete. It contains no exception of cases arising on shipboard, or of death beyond seas. So far as I can see there is nothing resembling flight or voluntary withdrawal by the prisoner.

In a somewhat similar case before Judge Lowell (*U. S. v. Brown*, 2 Low. 267, Fed. Cas. No. 14,665), the prisoner had committed an assault on board of an American vessel, but remained on her until she returned to port, at which time the statutory period of limitation had expired. It was held that there was no flight from justice, and that the statute was a bar. In the recent cases cited (*Streep v. U. S.*, 160 U. S. 128, 16 Sup. Ct. 244; *Roberts v. Reilly*, 116 U. S. 80, 97, 6 Sup. Ct. 291; *In re White*, 5 C. C. A. 29, 55 Fed. 54, 57), there was an actual voluntary withdrawal of the prisoner from the jurisdiction. Here there was none; and I find no authority for construing, nor is it rational to construe, as a flight from justice, a case in which there has been no withdrawal at all, but the accused has been a prisoner during the whole period.

2. The principal question remains, whether upon the facts admitted by the demurrer the case is one of "willful murder," so as to be within the exception to the three-years limitation under section 1043. If the matter were determined upon first impression only, and according to the popular meaning of the term "murder," it might be so considered; but more careful examination of the question has satisfied me that this would be erroneous. In some statutes that have been referred to, ancient and modern, the term "murder" is, perhaps, used in a general sense by way of recital or reference only, meaning, possibly, any malicious homicide. But the term "murder" in its strict and legal sense, and as importing a legal offense, has a more limited meaning. Apart from some special statute, it is said to be necessary, in order to constitute the offense of "murder," that the blow and the death happen under the same sovereignty, and that the death occur within a year and a day after the felonious act.

There can be no doubt that in section 1043, the term "willful murder" is used in its strictly legal sense, and not in a merely popular sense. The section is dealing only with offenses against the United States. What is excepted, therefore, is the offense of "willful murder," committed against the sovereignty of the United States, indictable as willful murder under some statute of the United States, and cognizable as murder by its courts.

As there is no statute of the United States defining what shall constitute the legal offense of murder, resort must be had to the common law, which it is said requires, among other elements, the two conditions above named.

In the recent case of *Ball v. U. S.*, 140 U. S. 118, 133, 11 Sup. Ct. 761, Chief Justice Fuller observes:

"By the common law both time and place were required to be alleged; it was necessary that it should appear that the death transpired within a year and a day after the stroke, and the place of death equally with that of the stroke had to be stated to show jurisdiction in the court. The controlling element which distinguishes the guilt of the assailant from a common assault, was the death within a year and a day, and also within the same jurisdiction."

The disposition by Mr. Justice Bradley of the writ of habeas corpus in the case of *U. S. v. Guiteau*, 1 Mackey, 498, is referred to by the court in the case last cited with evident approval, in which the denial of a writ of habeas corpus was grounded on the provisions of the statute of 2 Geo. II. c. 21, which was in force in that part of the District of Columbia where the crime was committed, because that statute was adopted by Maryland before the cession of that district to the United States, and was continued after the cession by the express acts of congress. And in reference to the elaborate examination of the subject by the present Mr. Justice Gray in *Com. v. Macloon*, 101 Mass. 1, it is said that the conclusion reached was "that the inquiry was properly determined by the existence of statutory provisions"; and the decisions of Mr. Justice Washington and Judge Peters in *U. S. v. McGill*, 4 Dall. 426, 1 Wash. C. C. 463, Fed. Cas. No. 15,676, and of Mr. Justice Curtis in *U. S. v. Armstrong*, 2 Curt. 446, Fed. Cas. No. 14,467, are also referred to with apparent approval.

In *U. S. v. McGill*, the deceased died on shore at Cape Francois, from a blow inflicted by the mate of the American brig Rover, two days before, on board the brig while she lay there at anchor. The prisoner was indicted for having committed murder on the high seas, under the eighth section of the act of April 30, 1790 (1 Stat. 113), which corresponds with section 5372 of the Revised Statutes; and it was held that the indictment could not be sustained, because the death was on shore in a foreign jurisdiction. Peters, Justice, says:

"The court could only take cognizance of a murder committed on the high seas; and as murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas to give jurisdiction."

Mr. Justice Washington says:

"We have no doubt that the death as well as the mortal stroke must happen on the high seas to constitute a murder there. * * * It would be inconsistent with common-law notions to call it [i. e. the existing case] 'murder;' but congress, exercising the constitutional power to define felonies on the high seas, may certainly provide that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony."

Similarly, Mr. Justice Curtis in *U. S. v. Armstrong*, 2 Curt. 451, Fed. Cas. No. 14,467, in reference to the crime of manslaughter under similar circumstances observes:

"Manslaughter is the unlawful killing of a human being without malice; and there is no such killing on the high seas, if the death takes place on land."

And with reference to the nature of the offense, Mr. Justice Curtis further says:

"It is true the offense described in the statute (Act 1825; 4 Stat. 115, § 4) is not strictly murder, for it punishes the malicious stroke given at sea, when the death occurs on land."

These decisions must be controlling here, unless some later statute is pointed out which makes the offense in this case strictly and properly murder. There is no such statute. The only statute invoked is section 5339 of the Revised Statutes, which provides as follows:

"Sec. 5339. Every person who commits murder—

"First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the exclusive jurisdiction of the United States;

"Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state;

"Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

The first clause of the above section is the same as section 3 of the act of 1790 (1 Stat. 113); the second and third sections are the same in substance as the fourth section of the act of 1825, above cited (4 Stat. 115); except that punishment for the crime of rape is transferred to another part of the Revised Statutes. On referring to the fourth section of the act of 1825, it becomes evident that no change in substance was intended by the revisers; and it makes clear also that the grammatical connection of the words "who commits murder" in the first line of section 5339 was intended to be precisely as it reads, viz., with the first two clauses only, and not with the third, except as to its last part, which prescribes the punishment. The fourth section of the act of 1825 reads as follows:

"Sec. 4. And be it further enacted, that, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state (a) shall commit the crime of willful murder, or (b) rape, or (c) shall, willfully and maliciously, strike, stab, wound, poison, or shoot at, any other person, of which striking, stabbing, wounding, poisoning, or shooting such person shall afterwards die, upon land, within or without the United States, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death."

This section manifestly creates three distinct offenses, (a) murder, (b) rape, (c) malicious wounding, etc., from which death ensues on land without the United States; and each of these offenses is declared to be, not murder, but a "felony." This statute would seem to have been drawn with the language of Mr. Justice Washington in view. It follows his language in providing that the last offense shall be adjudged a felony, though "it is inconsistent with common-law notions to call it murder." The statute of 1825, in providing first for "murder on the high seas," evidently did so in reference to the adjudication that to constitute murder there, the death as well as the stroke must be on the high seas. The third clause supplements the case of strict murder, by imposing capital punishment also in cases where the death occurs on land; but it does not declare the latter offense to be murder, but a "felony." The revisers probably omitted the designation "felony" as immaterial; but they also omitted to describe this offense as murder, although in the next section but one (section 5341), containing a precisely parallel provision in respect to manslaughter, where the death occurred without the United States, the offense is declared to be manslaughter in the revision, as it is in the original act of 1857 (11 Stat. 250).

It is suggested that the marginal note "murder" placed against section 5339 should be construed as indicating that all the provisions of this section were intended to be treated as murder. But as the first two clauses of that section provide for cases of murder strictly, the marginal reference was appropriate, and there is no warrant for carrying its effect beyond what the body of the statute describes as murder.

In the third paragraph of section 5339, the words "who upon any such waters" have no grammatical connection with the words "commits murder" in the first line. They connect only with the words "every person"; and the effect is the same as if the third clause had read, "every person who upon any such waters maliciously strikes," etc.; and this is made perfectly clear by a reference to the fourth section of the act of 1825, as above quoted.

Now, it was in reference to this very statute, transferred without any substantial change to the Revised Statutes, that Mr. Justice Curtis, in the case of *U. S. v. Armstrong*, supra, said: "It is not strictly murder, for it punishes the malicious stroke given at sea, when the death occurs on land."

I ought to hesitate long, and especially in a capital case, before departing from the judgment of so eminent a jurist as Mr. Justice Curtis, and the more so when the case in which the above passage occurs has received so recent an approval of the supreme court. And if the case is "not strictly murder," then I have clearly no right to treat it as within the exception of section 1043.

There is an additional circumstance also in the third clause of section 5339, which prevents that offense from being deemed murder; viz., that it is not a condition of the offense there described, that the death should occur within a year and a day; while that limitation, as we have seen, is an essential condition of the offense of murder. Congress not having inserted any such time limitation, the court has no authority to insert it by construction, because that would materially limit the scope of the act, and correspondingly raise the offense. The offense, therefore, is a statutory offense, broader than murder, as manslaughter is broader than murder; since neither require certain conditions that are essential to constitute the offense of murder.

Nor can I extend the scope of section 5339 by implication upon the ground that morally the offense is just as heinous as when the death occurs on the high seas or within the jurisdiction where the blow was given; nor on the theory that the mischief intended to be avoided by the exception, is the same in both cases. I must be governed by the statute itself. It was in reference to precisely such a contention that Chief Justice Marshall, in the case of *U. S. v. Wiltberger*, 5 Wheat. 76, says:

"The case must be a strong one indeed to justify the court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine whether the case is within the intention of the statute itself, the language must authorize it to say so. It would be dangerous indeed to carry the principle that a case which is within the reason and mischief of a statute, is within the provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

I find, therefore, that upon the facts admitted by the demurrer, the offense in this case does not constitute willful murder, because (1) apart from statute, such an offense has never been so treated by the courts of the United States when the death was in a foreign country; (2) the only statute (originally that of 1825) under which the case can be brought, makes the case not murder, but a felony, following the ruling of Mr. Justice Washington that it could not be called "murder," but might be adjudged a felony; (3) because the revisers evidently intended to continue this distinction, and deliberately avoided calling the offense "murder," by carefully adopting a phraseology and a grammatical construction which necessarily exclude it from the designation of murder in the first line of section 5329; and (4) because the third clause of section 4 of the act of 1825, and the third clause of section 5339 of the Revised Statutes, cannot constitute murder, except by narrowing their scope through the insertion of a proviso that the death occur within a year and a day,—a limitation upon the act which I have no right to impose.

The demurrer is, therefore, overruled, and the plea in abatement sustained.

UNITED STATES v. COLLINS.

(District Court, S. D. California. January 26, 1897.)

WARRANT OF ARREST—COMPLAINT ON INFORMATION AND BELIEF.

Under the Penal Code of California, and, accordingly, by virtue of Rev. St. § 1014, in the courts of the United States sitting in that state, a complaint made to a committing magistrate, upon information and belief only, is insufficient to give such magistrate jurisdiction to issue a warrant of arrest for the accused person, or to issue a subpoena for a witness.

On Demurrer to Indictment.

George J. Denis, U. S. Atty.

Walter D. Tupper, for defendant.

WELLBORN, District Judge. Defendant is charged with violating section 5399 of the Revised Statutes of the United States, which, among other things, provides that every person who obstructs or impedes the due administration of justice in any court of the United States shall be punished by fine, etc. There are two counts in the indictment. The first count alleges substantially that on the 13th day of November, 1896, and prior thereto, Dante R. Prince was a duly appointed and qualified commissioner of the circuit court of the United States in and for the Southern district of California, at the city of Fresno, Cal., within said district, and while acting in his official capacity, at the time and place aforesaid, one B. T. Alford appeared before him, the said commissioner, and by his written affidavit and complaint, upon information and belief, accused one J. H. Terry of the crime of having deposited in the United States post office, at said city of Fresno, an obscene and lewd letter; that thereupon said commissioner issued a warrant for the arrest of said Terry, under which said Terry was arrested, and brought before said

commissioner on the 14th day of November, 1896, when said commissioner fixed the 19th day of the said month for conducting the examination of said Terry on said charge; that at the time said complaint was filed, and at all the times thereafter in said count mentioned, the letter therein referred to was in the possession of the defendant herein, John H. Collins, and after the filing of said complaint, and on the day that it was filed, said commissioner issued a subpoena in said action against said Terry, directing said Collins to appear before him on the said 19th day of November, 1896, as a witness on the part of the United States, and also issued an order, in writing, directing said Collins to deliver to Deputy United States Marshal B. T. Alford said letter, said order reciting that said letter was needed on the part of the United States in said action; that said subpoena and order were duly served upon said Collins on said 14th day of November, 1896; but that said Collins willfully and corruptly refused to deliver said letter to said Alford or said commissioner. The second count is similar to the first, except that it charges the defendant with a willful and corrupt refusal to obey a subpoena duces tecum, issued in the same action, and under the same circumstances, as were the subpoena and order mentioned in the first count. A demurrer has been interposed to the indictment, on the ground that the alleged complaint filed before the commissioner, being upon information and belief, was, in contemplation of law, no complaint at all, and therefore the commissioner was without jurisdiction to issue the subpoenas in question.

Section 1014 of the Revised Statutes of the United States provides that, for any crime against the United States, the offender may by any one of certain officers, therein named, and agreeably to the usual mode of process against offenders in such state, be held for trial before such court of the United States as has cognizance of the offense. It has been repeatedly held that it was the intention of congress, by this section, "to assimilate all the proceedings for holding accused persons to answer, before a court of the United States, to the proceedings had for similar purposes by the laws of the state where the proceedings should take place." *U. S. v. Rundlett*, Fed. Cas. No. 16,208; *U. S. v. Harden*, 10 Fed. 803; *U. S. v. Horton*, Fed. Cas. No. 15,393. To determine, therefore, the question now before the court, reference must be had to the statutes and decisions of California.

Under what circumstances, then, may a committing magistrate in California subpoena a witness? This question is answered by section 1326 of the Penal Code of said state, the pertinent provisions of which are as follows:

"Sec. 1326. The process by which the attendance of a witness before a court or magistrate is required is a subpoena; it may be signed and issued by: (1) A magistrate before whom a complaint is laid, for witnesses in the state, either on behalf of the people or of the defendant. * * *

The word "complaint" is defined in section 806 of said Code, as follows:

"Sec. 806. The complaint is the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense."

It will be observed that, according to this section, the allegation necessary to constitute a complaint is not the mere statement of an opinion, but the allegation of the fact "that a person has been guilty of some designated offense." The word "complaint," as defined in said section, includes the accusation made before the committing magistrate, and also the information filed by the district attorney in the trial court. The requirements of the law as to the information filed in the trial court are prescribed in section 809 of said Code. Verification by affidavit is not among these requirements, for the reason, I take it, that a district attorney is presumed to be acting, when he presents an information, under the sanctions of his official oath. The law, however, is different with reference to the complaint or accusation made before a committing magistrate, as appears from sections 811, 812, and 813, Pen. Code Cal., which are as follows:

"Sec. 811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

"Sec. 812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

"Sec. 813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest."

In order, then, to authorize a magistrate, for the purposes of preliminary examination, to issue a subpoena, there must be laid before him a written complaint on oath, alleging that a person therein named has been guilty of some designated offense. Does the indictment in the case at bar show such a complaint? I think not. The affidavit made by Alford before Commissioner Prince, being upon information and belief, did not allege any material fact whatever, but was simply the statement of affiant's opinion.

Referring to an affidavit of this sort, the supreme court of California has said:

"It is obvious that this affidavit does not directly charge that petitioner has committed any offense, and it would be a dangerous precedent to establish that any man may be deprived of his liberty, and removed to another state, upon such an accusation. The statement therein that affiant 'has reason to believe, and does believe,' that petitioner embezzled or fraudulently converted to his own use the property mentioned, is not the statement of any fact, and for that reason the affidavit is fatally defective. * * * But the defect in the affidavit before us is not a merely formal one. The objection to its sufficiency is substantial, and it is that, in judgment of law, it does not make any charge at all." Ex parte Spears, 88 Cal. 642, 26 Pac. 608.

And even in the case of *People v. Smith*, 1 Cal. 11, cited by the government, while, contrary to the later cases as hereinafter shown, it is held that it is too late for the defendant to object to the affidavit, on which was issued the warrant for his arrest, after examination and commitment, the court says:

"It is claimed that the affidavit in pursuance of which the warrant was issued is defective, because it is alleged to be upon information merely. If this were so, we should feel disposed to regard it as of but little value, for an affidavit which states no fact within the knowledge of the person making it can be of but little weight in any legal proceeding."

That such an affidavit does not confer jurisdiction to issue a warrant of arrest has been expressly held by the supreme court of California. *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619. In that case the court, referring to the aforesaid sections 811, 812, and 813, says:

"Under these provisions, a magistrate has no jurisdiction to issue a warrant of arrest without some evidence tending to show the guilt of the party named in the warrant. The original information may be sufficient, though made only upon information and belief, if followed by the deposition of the complainant, or some other witness, stating facts tending to show the guilt of the party charged. Of course, where there was some evidence upon which the magistrate acted, we would not interfere. It may be also true that the original information might be treated as a deposition; and in such view, if it contained positive evidence of facts tending to show guilt, it might be sufficient as a basis for the issuance of a warrant. But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime."

It is, however, urged by the government, that, while an affidavit upon information and belief may not confer jurisdiction to issue a warrant of arrest, it would confer jurisdiction to compel, by subpoenas, the attendance of witnesses before the magistrate, to enable him to determine whether or not a warrant of arrest ought to issue. The authorities cited to support this contention are *People v. Smith*, 1 Cal. 9, and *People v. Staples*, 91 Cal. 23, 27 Pac. 523. It seems to me, however, illogical to hold that a magistrate has jurisdiction to compel the attendance of witnesses to enable him to determine whether or not a person ought to be arrested for crime, and yet is without jurisdiction to order the arrest. Moreover, the doctrine of the two cases last cited, that the commitment authorizes the filing of an information, and that it is too late after the commitment to raise an objection to the sufficiency of the affidavit on which the arrest was originally made, has been practically, if not in terms, overruled by the later cases of *People v. Christian*, 101 Cal. 471, 35 Pac. 1043, and *People v. Howard*, 111 Cal. 655, 44 Pac. 342. I extract from the opinion in the latter case the following:

"It remains to be determined whether the fact that the complaint upon which a defendant is arrested and committed states no offense against him is so fatal to the regularity of the proceeding as to require the information based thereon, itself sufficient in form, to be set aside, upon the ground that he has never been legally held to answer. Some of the earlier cases, arising under the provision of our present constitution providing for prosecutions by information, seem to treat the character or sufficiency of the complaint before the magistrate as largely an immaterial or nonessential factor in determining the regularity of the proceeding for a commitment (see *People v. Velarde*, 59 Cal. 457; *People v. Wheeler*, 65 Cal. 77, 2 Pac. 892; *People v. Staples*, 91 Cal. 23, 27 Pac. 523); although none of those cases, we think, go to the extent of holding that the complaint need not state an offense. But in the recent case of *People v. Christian*, 101 Cal. 471, 35 Pac. 1043, where the latest expression of the court upon the subject is to be found, all the earlier cases are fully reviewed, and the reasoning and conclusion in that case would seem to impart more dignity and importance to the office of that pleading in criminal prosecutions than theretofore accorded it. In that case the defendant was charged with an assault with a deadly weapon upon one George Magin, and was held to answer therefor. The district attorney filed an information charging him with such an assault upon one George 'Massino.' It was held that the information must be set aside, the court, after stating the facts showing that defendant had been brought before the magistrate to defend himself against

a charge of assaulting Magin, saying: 'Under those circumstances, and under a complaint charging that offense, he could not be called upon to defend himself for assaulting one Massino, for there was no complaint on file upon which to base an examination of that character.' And, after reviewing the cases upon the subject, it is said: 'It may be laid down as an unquestioned proposition that the district attorney has no authority to disregard the commitment, and cull from the evidence taken at the preliminary examination some real or imaginary offense not included in the complaint upon which the defendant was charged and examined. * * * The district attorney is not only required to file the information for some offense included in the allegations of the complaint, but the magistrate likewise only has the power to commit for some offense included therein.' "

The court further says:

"The principles to be deduced from this case are that the complaint lodged with the magistrate constitutes the groundwork of the whole superstructure to be thereafter built thereon, and draws the lines which must circumscribe the limits the prosecution can take. The defendant, in other words, may be competently informed against and tried for any offense charged in the complaint, or included therein, but beyond that limitation the prosecution cannot go. * * * From these principles it would seem to follow as a necessary corollary that if the complaint is the measure of the people's rights in proceeding against a defendant in any case, such complaint must charge him with a public offense. If the commitment and information cannot go beyond the complaint, and the latter fails to state any crime, the logic is irresistible that the defendant has not been legally held to answer for an offense. And this must be true. It cannot be that it was ever contemplated, either by the framers of the constitution, or by the legislature proceeding under that instrument, that a party can be arrested and put to the indignity and public shame of detention and examination upon a criminal charge, to say nothing of the inconvenience and pecuniary detriment incurred thereby, without a formal complaint, which charges, at least in substantial effect, some offense known to the law; for, if the complaint need not state an offense, it would subserve no useful purpose, since a pleading which does not state a cause of action is, in legal contemplation, no pleading. That such was not the purpose or intent of the legislature is evident from section 806 of the Penal Code, which provides that 'the complaint is the allegation in writing, made to a court or magistrate, that a person has been guilty of some designated offense.' "

I have examined the federal decisions cited by the government, but do not think they antagonize my views, as above indicated.

In *U. S. v. Tinklepaugh*, 28 Fed. Cas. 193, the claim was not made that the warrant in question was a nullity. This is shown by the following extract from the opinion:

"It is admitted by the counsel for the defendants that the warrant is a valid warrant, so far as it respects the action of the marshal, or any persons acting under him, by his authority; and that he and they were not only authorized, but were bound, to execute it."

This language could hardly be applied to any process considered absolutely null and void. If, in *U. S. v. Martin*, 17 Fed. 150, or *U. S. v. Reese*, 27 Fed. Cas. 746, which are the other federal decisions cited by the government, there be anything with which this opinion apparently conflicts, it is a sufficient answer to say that the decisions of said cases did not depend upon California laws.

The conclusion is to my mind irresistible that Alford's affidavit or complaint before Commissioner Prince, being upon information and belief, did not confer upon the latter jurisdiction to make the order or issue the subpœnas set forth in the indictment, and therefore the demurrer thereto is sustained.

In re BESHEARS.

(District Court, S. D. Iowa. February 23, 1897.)

CRIMINAL LAW—REMOVAL TO ANOTHER DISTRICT FOR TRIAL—NOTICE.

Upon an application to a district judge, under Rev. St. § 1014, for an order for the removal of a prisoner in the custody of the marshal to another district for trial, the prisoner is entitled to notice, and, if he desires it, to be brought before the judge for the purpose of presenting any objections he may have to the making of the order.

On application of Frank P. Bradley, United States marshal, Southern district of Iowa, for warrant of removal to district of Kansas of John Canedy, alias James A. Beshears.

Upon February 19, 1897, J. J. Steadman, a commissioner of the circuit court in and for the Southern district of Iowa, upon information duly filed before him, charging John Canedy, alias James A. Beshears, with having committed in the district of Kansas a violation of section 5392, Rev. St., issued his warrant for arrest of said Canedy, alias Beshears. The marshal of said Southern district of Iowa thereupon arrested said defendant, and brought him before said commissioner. Upon the hearing under said information it appeared that an indictment against said Canedy, alias Beshears, had been duly found in said district of Kansas; wherefore, after due examination, said commissioner ordered said defendant to give his due bond in the sum of \$1,000 for his appearance at the next term of the district court at said district of Kansas, at Topeka, to answer said charge, and, in default thereof, that said defendant be committed to the custody of said marshal, until discharged by due process of law. Application having been made by said marshal to the district judge of the Southern district of Iowa for a warrant of removal of said defendant to the district of Kansas, it appeared that said defendant had neither notice nor knowledge of the making of said application. Thereupon the warrant of removal was refused until defendant had such notice, such refusal being announced as follows:

Mt. Pleasant, Iowa, Feb. 23, 1897.

Frank P. Bradley, Esq., U. S. Marshal, Council Bluffs, Iowa.

Dear Sir: Your letter of the 20th inst., containing papers with reference to the case of John Canedy, alias James A. Beshears, at hand. You inclose certified copy of indictment as presented by the grand jury of the First division of the district of Kansas, charging said Canedy, alias Beshears, with the crime of perjury, and also certified copy of the record of J. J. Steadman, commissioner of the United States circuit court of this district, showing the arrest of the prisoner in this district, his examination before said commissioner, and commitment for trial in said district of Kansas for the crime charged, and the fixing of bail at one thousand dollars. You further state that the prisoner is in your custody, and is unable to give said bail. You ask for an order, under section 1014, Rev. St., directing his removal to the district of Kansas for trial, and add: "I would have brought the prisoner before you, but the department intimated lately that that was an unnecessary expense."

The practice in this district, without an exception, so far as I have been able to understand, since the time of *In re Bailey* (1869) 1 Woolw. 422, Fed. Cas. No. 730, has been to have the prisoner brought before the judge for such examination as may be found nec-

essary, before the application to remove ripens into the order of removal. I have not found any decision directly upon the point here raised. Nor, in my examination of the reports of the federal courts, have I found any case where the report of the case shows affirmatively that the prisoner was not brought personally before the judge to whom the application for removal was presented. In the statement of the facts, or in the reasoning of the judge, each opinion which I have examined seems to regard as a matter of course the presence of the prisoner upon the hearing of the application for order of removal.

The authority for the order of removal is section 1014, Rev. St., latter part of section. After providing the method by which offenders against the United States statutes may be arrested, imprisoned, or bailed for trial, the section provides:

"And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

May the order for removal be made upon *ex parte* hearing in the absence of the prisoner, and upon the face of the papers from the committing magistrate, or should such order be made after the prisoner has had opportunity, if he desire, to contest the application therefor? I think it might well be assumed that the prisoner may, if he will, waive his personal appearance on the hearing of such application. Such waiving would then justify the judge, if no objections are presented, in assuming that the prisoner thereby consented to the order for removal, in that he makes no resistance thereto. But here it is also assumed that the prisoner has notice or knowledge of the making of the application. He could not fairly be held to waive that of which he had neither notice nor knowledge. He is in custody, imprisoned. How can he acquire such notice or knowledge? Only by being brought personally before the judge, or being given opportunity for personally waiving his presence. Should he desire to present objections to the application, how is the opportunity afforded him, if it be determined whether the order of removal shall issue in his absence and without notice to him that the order was about to be asked? Possibly this opportunity might be afforded him on a habeas corpus hearing, after the order of removal had been made. But in a large number of cases—perhaps the large majority—sufficient time does not elapse between the issuing of the order by the judge and the execution by the marshal to permit the ready issuing of the writ. As a general rule, the execution follows close on the issuing of the order. Again, in many, if not in most, of these cases, the prisoner is thus arrested and imprisoned away from his home and friends, and thus he has little opportunity to sue out the writ of habeas corpus. But, if he could readily sue out the writ, why put him to such necessity, when, upon the hearing of the application, substantially the same field of resistance is opened to him as upon the hearing upon the writ? As the judges are now situated, since the establishment of the United States circuit court

of appeals, such writ, especially in this circuit, must generally be sued out before the district judge who issues the order of removal. Why thus ask the judge first to make whatever investigation he may deem necessary before issuing the order, and then to traverse the same ground, though perhaps more thoroughly, in a hearing upon the writ?

One of the earliest cases which my examination of this matter has brought to my attention is that of *In re Bailey*, 1 Woolw. 422, Fed. Cas. No. 730, which came before Justice Miller, in this circuit, in 1869. In the course of his examination as to whether he should issue an order of removal for the defendant to the Northern district of Illinois, it appears he submitted the matter to District Judge Love, of this district, and in his communication to Justice Miller, Judge Love uses this language:

"I, however, without giving any opinion upon the general question, held, as I have always done in cases of indictment, that the prisoner should be brought before me in order that the fact of indentity might be inquired into. In this I proceeded upon the idea that the finding in the other district, whether by indictment or otherwise, established nothing with regard to the identity of the prisoner. The marshal, in making the arrest, might mistake the man, and remove to a remote state an individual not charged with any offense whatever."

While the case just cited does not bring directly in review the question whether there should be a hearing before the district judge in the presence of the prisoner when the committing magistrate within this district has, under section 1014, Rev. St., ordered the prisoner committed to await the order of removal, nevertheless the statement of Judge Love is very suggestive as to the practice uniformly followed by him in this district.

The case of *In re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102, contains some remarks of Circuit Judge Dillon which are pertinent to the general subject of this inquiry. This case was decided in 1875. District Judge Treat had discharged, upon habeas corpus, Buell, who had been ordered removed to the District of Columbia, under section 1014, Rev. St. The matter came before Circuit Judge Dillon upon appeal, who uses this language:

"It is argued that the question of the sufficiency of the indictment is for the court in which it was found, and not for the district judge on such application. I cannot agree to this proposition in the breadth claimed for it in the present case. This provision devolves upon a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is no light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such removal. Mere technical defenses to an indictment should not be regarded; but the district judge who should order the removal of a prisoner, when the only probable cause relied on or shown was an indictment, and that indictment failed to show any offense against the laws of the United States, or showed the offense not committed or triable in the district to which the removal is sought, would misconceive his duty, and fail to protect the liberty of the citizen."

In the case of *In re Ellerbe*, 13 Fed. 530, 532, Circuit Judge McCrary was called upon to hear a petition in habeas corpus. The judge of the district had ordered the removal of the prisoner for trial to another state. In the course of his decision, Circuit Judge McCrary remarks:

"It is next insisted on behalf of the petitioner that he is entitled to a hearing before he can be sent out of the district, and that he has not had such a hearing as the law requires. It was, no doubt, the duty of the marshal of the Eastern district of Arkansas to apply to the judge of his district for an order for the arrest of the petitioner; and it was the duty of the district judge to enter into such investigation as was necessary to enable him to determine whether the petitioner should be sent out of the district to answer the charge against him. Precisely how far the district judge was authorized to go upon such a hearing it is not necessary in the present case to determine. Certain it is that he had the right to inquire into the question of the prisoner's identity. This would be necessary in any case, for the judgment of the court in another district, however conclusive upon other questions, would establish nothing with regard to the identity of the prisoner."

In the case of *In re Corning*, 51 Fed. 205, 206, Judge Ricks, of the Northern district of Ohio, upon application for an order to remove the defendants, who had been indicted in the district of Massachusetts, uses this language:

"The order of removal is not a mere ministerial act on the part of the district judge, but is a judicial function including the exercise of a judicial discretion upon the papers presented in support of the application."

In the case of *In re Terrell*, 51 Fed. 213, 214, Circuit Judge Lacombe, on the hearing upon habeas corpus, uses these words:

"It is not disputed by the district attorney that it is not only the right, but the duty, of the district court, before ordering removal, to look into the indictment so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may lawfully be tried in the forum to which it is claimed the accused should be removed; and the same right and duty arises upon habeas corpus, whether the petitioner is held under a warrant issued by the district judge whose action is thus reviewed or under a warrant of the commissioner to await the action of the district judge. The later decisions of the circuit court abundantly establish this position."

After citing various cases, Circuit Judge Lacombe proceeds:

"There is good cause for holding that this power should be exercised liberally whenever the judge before whom the questions are raised on application for a warrant of removal or on habeas corpus is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses, committed perhaps in some place he had never visited, he were removed to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency to be tested only in the particular court in which it is pending."

In *U. S. v. Brawner*, 7 Fed. 86, 87, Judge Hammond was considering an application for an order for removal under section 1014. In the course of his opinion, when considering the power of the district judge with reference to the order of removal, he remarks:

"The very purpose of conferring the power is to secure the judicial sanction of a supervisory judge for the action of the committing magistrate in so important a matter as that of removing a citizen from one state or district to another for trial upon a criminal charge. If the warrant of removal is to be issued mechanically, and as a mere ministerial act, there is no reason why the committing magistrate should not have been required to issue it at once upon neglect or refusal to give bail. The necessary implication from the method of procedure adopted by the statutes is that the judge of the district * * * must judicially determine whether the prisoner shall be taken to another district for trial, and that he may refuse his warrant where it appears that the removal should not be made, or where he would admit the party to bail. Doubtless the action of the committing magistrate is *prima facie* sufficient as a basis for the warrant, but

It is not conclusive. While the judge should not unnecessarily require another or further preliminary examination, if it appear to him necessary that the bail should be reduced, or that for any reason the prisoner should again be heard in defense, I have no doubt that it is his duty to pass fully upon the case, and determine for himself whether he should be further held or removed."

Other decisions might be quoted containing points pertinent to the general features under consideration (*U. S. v. White*, 25 Fed. 716; *In re Wolf*, 27 Fed. 606, 609; *U. S. v. Rogers*, 23 Fed. 658, 661; *In re Graves*, 29 Fed. 60, 66; *U. S. v. Horner*, 44 Fed. 677), whose general trend is with the extracts above quoted. All the cases recognize not only the right, but the duty, of the district judge to examine into the merits of the matter as presented to him to such an extent as may be necessary to enable him to pass satisfactorily upon the question, and determine intelligently whether the prisoner shall be removed. If granting the application for removal could be considered a matter merely of course, no investigation would be necessary by the district judge; but he may not delegate his duties in this regard to the commissioner who has acted as an examining magistrate in the matter within his district. He must determine and act for himself in the line of his judicial duty. How can he know whether the prisoner desires to present objections to the application, if his hearing be *ex parte*, and without notice to the prisoner? While the matter of expense is not to be overlooked, nevertheless expense is of secondary importance where the liberty of the citizen is involved. In my judgment, the prisoner should have an opportunity to be heard in the matter of the application, if he so desire. Possibly, the question of his identity may be regarded as concluded for the purpose of removal by the decision of the committing magistrate. See *Horner v. U. S.*, 143 U. S. 207, 215, 12 Sup. Ct. 407, 522. But, were this point conceded, the prisoner should be permitted to urge in person and by counsel whatever further objections he may desire to present with reference to the validity of the indictment, its sufficiency to place him upon trial, and whether he can be tried thereupon for the crime therein charged in the district to which his removal is sought. Opportunity can be afforded him to present his objections to the application only by his being apprised that the application is to be presented. In the case named in your letter, as well as in all other cases where, after commitment by a magistrate in this district, an order for removal is thus sought, I desire that you shall notify the prisoner of the time when such application will be presented to me, with a statement of his right to be present, and present objections thereto, if he so desire. If he shall waive objections to the application, it may be presented without his presence. Let the waiver be in writing, signed by him, and presented with the application. Or you may serve such notification upon him, and your return thereon may show the fact of such waiver, if it exists. But in any case where the prisoner shall object to his removal, and express his desire to present objections at the hearing, you are hereby authorized and directed to bring him personally before me with the application for his removal. In all cases where no previous examination has been made by a magistrate of this district, the pris-

oner should be brought personally before me with the application for his removal. This may be considered by you as a standing order in the respects above noted.

Sincerely yours,

JNO. S. WOOLSON, U. S. District Judge.

UNITED STATES v. DUDLEY.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—DRESSED LUMBER.

Boards and planks of uniform length, width, and thickness, planed and matched for splines, are not dutiable as "manufactures of wood," under paragraph 181, Act 1894, but are entitled to free entry as "dressed lumber," under paragraph 676. 74 Fed. 548, affirmed.

Appeal from the Circuit Court of the United States for the District of Vermont.

This is an appeal from a decision of the circuit court, district of Vermont, reversing a decision of the board of general appraisers which affirmed a decision of the collector of customs classifying certain importations for duty under the tariff act of August 28, 1894. The articles imported were boards and planks, each piece of a specified length, width, and thickness, planed on one side, and matched or grooved for splines. The collector classified some of the importations under paragraph 181, as "manufactures of wood not specially provided for," and others under section 3, as "articles manufactured in whole or in part, not provided for in this act." The importers claimed that their importations were free from duty, under paragraph 676, as "lumber, dressed."

John H. Senter and Edward B. Whitney, for appellant.

J. P. Tucker and C. A. Prouty, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Inasmuch as the judges who heard this appeal are divided in opinion, the decision of the circuit court is affirmed.

GATES IRON WORKS v. KIMBELL & COBB STONE CO.

(Circuit Court, N. D. Illinois. March 8, 1897.)

PATENTS—INVENTION—INFRINGEMENT—STONE CRUSHERS.

The Gates patent, No. 259,681, for an improvement in stone and ore crushers, whereby, instead of the ball and socket bearing of the prior art, there is used a conical crusher-head, fitting into a cylindrical bearing, so that the pressure is along a line of some length, instead of upon a single point, covers a useful and patentable invention, and is infringed by a crusher having a cylindrical crusher-head and a conical bearing to receive the same.

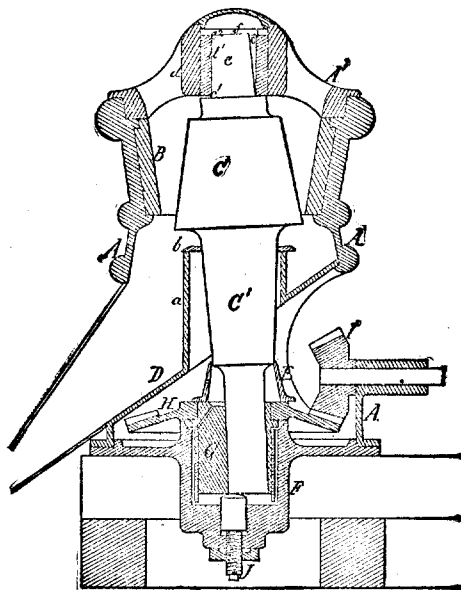
This was a suit in equity by the Gates Iron Works commenced against the Kimball & Cobb Stone Company for alleged infringement of a patent relating to stone crushers. Frazer & Chalmers were afterwards substituted as party defendant.

Abner & Strong, for complainant.

Bond, Adams, Pickard & Jackson, for defendant.

SHOWALTER, Circuit Judge. The bill in this case alleges the infringement of a number of patent monopolies. On the final hearing, all issues were abandoned, except upon letters patent 259,681, dated June 20, 1882. That patent concerns journals and journal bearings for stone and ore crushers. The patentee, P. W. Gates, says in his specification:

"My invention relates especially to a shaft having a conical crusher-head between its ends, and which has its lower end connected to a revolving eccentric, which gives the shaft and conical crusher-head a revolving gyrating movement, while its upper end is fitted to move in a stationary journal bearing; and the object of my invention is to secure a continuous straight bearing during the action of the crusher-head from the bottom to the top of the journal bearing along the working surface of the journal of the shaft, while the requisite accommodation for the gyratory movement of the shaft is afforded; and this object I attain by the means hereinafter described, represented in the accompanying drawings, and claimed."



In the machine as shown in Fig. 1 of the patent in suit, the upper end of the shaft spoken of as the journal, *c*, is a truncated cone. The bearing for this journal is a cylinder, the diameter of which is the same as the major axis of the ellipse formed by a plane cutting the cone horizontally, and at the base or lower edge of the cylinder. As the journal rests in its bearing, it touches the base of the cylinder, theoretically, only at the opposite extremities of the said major axis. Thence upward, the place of junction is, theoretically, a line in a plane with the axis of the shaft. In the second form described in the patent, wherein the bearing is conical and the journal a cylinder, the line of junction referred to is exactly parallel with the axis of the shaft. The shaft does not, necessarily, rotate on its longitudinal axis. When the lower end of the shaft is gyrated, the successive

positions of the lowest portion of the journal would be indicated by a series of ovals or ellipses. The manner of progressive contact between the journal and its bearing at the base of the latter is that of a rolling wheel, rather than a sliding runner. The sliding of one surface over another enters gradually into the adjustment to successive positions above the base, since the circumference of the bearing is greater than that of the conical journal at its upper end. But the junction in any position is, theoretically, a line. The strong and direct pressure is along this line. From this line horizontally on either side, the pressure, while it decreases, becomes more and more oblique. But vertically there is no tearing or expanding force on the cylinder, and no force tending to contract or to lessen the longitudinal bearing surface of the journal.

The structure which was in the art, and which that indicated in the patent was intended to supersede, was a ball and socket. In a ball and socket the direct pressure is, theoretically, upon a single point in the socket, and, theoretically, the contact between the ball and the inclosing sphere is not upon a line, but at a point. From this point the pressure decreases in all directions between the curved surfaces, but becomes more and more oblique with respect to the line of direct pressure; that is, a line at right angles to the axis of the shaft. The strain which would tear from each other the particles of the socket or inclosing sphere, and compress the ball into smaller dimensions, is exerted as much vertically as horizontally; and the tendency of the one surface to enlarge and of the other to diminish is aided by the complex sliding or abrading process which necessarily takes place in the operation of the machine. These structures are applied to stone crushers. The pressure, it is stated in the testimony, between the ball and its socket, may, in the operation of such a machine, easily exceed 100,000 pounds to the square inch. The large stones are first caught between the upper portion of the flaring concave, B, in the figure, and the crusher-head, C. The crushing movement of the crusher-head is imparted by the gyration of the lower end of the shaft. This crushing movement is, at the upper portion of the crusher-head, very slight in extent. An abrasion, wear, or enlargement of one-fortieth of an inch in the surface of the socket, and a like amount on the ball, would, as it is testified, reduce the usefulness of a No. 6 machine by one-half.

In theory, the structure of the patent would seem to be—and in fact, as shown by the testimony, it is—in a high degree useful, as giving permanent efficiency to the machine. The conception of the patent was to distribute the pressure, and give it such direction that the bearing surfaces would, during the operation of the machine, retain their consistency and integrity, while holding the upper end of the shaft so that the crushing angle is preserved. The difference in result between the efficiency of the ball and socket machine and that of the patent is one of degree. But the difference in structure, as already described, is a difference in kind,—a difference in the application and play of mechanical forces. The claim in controversy is in words following:

"A gyrating crusher-shaft having the tapering journal, c, in combination with a journal bearing, whereby only a portion of said tapering journal stands parallel and in contact with the vertical surface of said bearing during the gyration of the shaft, substantially as described."

Counsel argue that this combination is unpatentable, because it expresses merely the law of the machine, meaning that if the lower end of the shaft is to gyrate, and the upper end to be a journal, that journal must have a bearing which will permit the gyratory motion. But is not its mode of operation the law of every combination? Prior to this construction, as said, the upper end of the gyrating shaft was a ball, and its bearing was a socket. The new idea in connection with the gyratory crusher shaft was the journal with the long vertical contact or pressure in each and every position against the journal bearing; and this to overcome a specific difficulty with which the conception of journals and journal bearings, as distinguished from balls with socket bearings, had not before been associated. The distribution of the pressure along the vertical line from bottom to top of the journal bearing, said line of contact being exactly parallel in one form, and in another but slightly inclined to the axis of the shaft, is functional in this device, to avoid or retard disintegration of the contacting surfaces. The words "whereby only a portion of said tapering journal stands parallel and in contact with the vertical surface of said bearing during the gyration of the shaft, substantially as described," indicate this function. I do not find the combination of claim 1 in the prior art. Certainly, no use at all analogous is shown; nor is anything shown which would seem to involve the specific function and purpose of the combination, as already explained.

The defendant used the cylindrical journal with the conical journal bearing. The specification of the patent contains the statement:

"The taper which is imparted to the journal of the gyrating crusher-shaft may be imparted to the bearing surface of the journal bearing, while a cylindrical, instead of a tapering, form, may be imparted to the journal. With this change in construction, the operation and result of my invention will be substantially the same as with the special construction described and shown."

While "the tapering journal, c, in combination with a journal bearing," is the language of the claim, yet, obviously, the cylindrical journal, in combination with a tapering journal bearing, would be the same thing. It seems to me, if the claim be valid, the infringement is made out.

Must I dismiss this bill because, in a suit against other defendants pending in the Fifth circuit while this suit has been pending here, this patent was not sustained? The question whether or not a claim is invalid for want of novelty or utility depends on the evidence in the particular case. Counsel concede that the evidence here is not the same as that in the case in the Fifth circuit. I think, upon the showing in this record, a decree should go in favor of complainant.

EVERETT PIANO CO. et al. v. BENT.

(Circuit Court, N. D. Illinois. February 6, 1897.)

PATENTS—VALIDITY AND INFRINGEMENT—PIANOS.

The French & Nalence patent, No. 515,426, for a piano attachment, whereby a flexible strip, carrying a metallic striker, is interposed between the hammer and the string, so that the hammer strikes the strip on one side of the striker, for the purpose of modifying the tone by a secondary or double stroke on the string, *held valid*, and *infringed*.

This was a suit in equity by the Everett Piano Company, La Martine M. French, and Charles Nalence against George P. Bent for alleged infringement of letters patent No. 515,426, issued February 27, 1894, to La Martine M. French and C. Nalence for a piano attachment. On final hearing.

Bond, Adams, Pickard & Jackson, for complainants.
Coburn & Strong, for defendant.

SHOWALTER, Circuit Judge. Complainants sue for the infringement of the first and third claims of letters patent of the United States numbered 515,426. These claims are in words following:

"(1) In a piano, in combination with the strings, a series of non-resonant, soft, flexible strips having hard strikers or buttons on that face next to the strings, and hammers to act upon the strips to one side of the said buttons."

"(3) In a piano, the combination with the strings of a series of flexible strips having on that face next the strings hard buttons or contacts, and a series of hammers adapted to strike the strips to one side of the said buttons."

The patentees say in their specification:

"Our invention relates to piano attachments for changing the tone of a piano, causing it to resemble a guitar, mandolin, zither, etc. To this end we arrange on the piano a series of strips of flexible material, each having on it a metallic striker. These strips are connected to a bar operated by a pedal, by which they can be moved so that the ordinary hammer of the piano will strike the flexible strip. The strip thus kills the tone which would otherwise be produced by the string, but the metallic striker on the strip striking the string produces the modified tone which we desire. A reverse movement of the pedal withdraws the strips, leaving the hammers free to strike the strings in the ordinary manner and produce the ordinary tone of the piano. * * * The operation of the invention is as follows: A pressure on the pedal moves the bar, 3, and strips, 4, within the action of the hammers, 2, so that the hammers strike the material of the strips above the striker, 5, and press it against the strings, 1. The soft strip kills the effect of the blow of the hammer on the string, but the hard striker, 5, is thrown against the string, and produces a tone."

Several prior devices are shown in the evidence, but in each instance the interposed medium for modifying the vibration of the string, and so changing the tone, is directly between the hammer and the string. In the case of the patent in suit, what is called the "metallic button" in one place in the specification, and the "hard button" in another and in the claims, is not interposed so that the stroke of the hammer is directly against such button. The idea of modifying the tone by a secondary or double stroke on the string, in the manner described in the patent in suit, is not found in the prior art. The novelty of this construction is rather emphasized than otherwise by the prior devices. In the structure complained

of, the leather tongue at its lower extremity is tightly folded and secured around a small metallic cylinder placed transversely. The stroke of the hammer is against the tongue, and above this leather-covered cylinder. The mode of operation and effect are substantially the same as in the patent in suit. I think, therefore, the injunction must go as prayed.

STIRLING CO. v. ST. LOUIS BREWING ASS'N.

(Circuit Court, E. D. Missouri, E. D. March 4, 1897.)

No. 3,876.

1. PATENTS—PRIOR USE—DIVISIONAL APPLICATIONS.

A claim was erased from the original application by an amendment stating that it was for the purpose of being made the subject of a divisional application. The divisional application was accordingly made, and a patent issued thereon containing claims covering the matter in question. *Held* that, so far as regarded a defense of two years' public use, this claim related back to the first application.

2. SAME—VALIDITY AND INFRINGEMENT—STEAM BOILERS.

The Pell patent, No. 539,189, for an improvement in water-tube steam boilers, whereby the water tubes are made to sustain the weight of the mud drum and its contents, so that their expansion and contraction produces no injurious results, shows a patentable combination as to the second claim, which is infringed by a boiler having three mud drums, one of which is sustained by the tubes.

This was a suit in equity by the Stirling Company against the St. Louis Brewing Association, for alleged infringement of a patent for an improvement in steam boilers.

Banning & Banning and Carr & Carr, for complainant.

W. Bakewell, T. W. Bakewell, and Paul Bakewell, for defendant.

ADAMS, District Judge. This suit is founded on the second claim of letters patent of the United States No. 539,189, issued to Harry S. Pell, May 14, 1895, for an improvement in steam boilers. The application on which the patent was issued was filed June 5, 1894, but the record shows that an application for the same subject-matter, so far as regards the second claim, was filed December 22, 1893. The invention is shown to have gone into public use in the early part of 1892,—“somewhere between January and May of that year.” The first application was rejected January 27, 1894, and again March 31, 1894; and on April 5, 1894, an amendment was filed erasing its first claim, the one covering the subject-matter in controversy. As a reason for erasing such claim, this amendment stated: “The subject-matter of claim 1 is thus taken out of this case, in order that it may be made the subject of another or divisional application.” On May 2, 1894, an interference was declared between the first application and another pending application; and on June 5, 1894, the second application—the one in which the patent sued on was issued—was filed, covering the subject-matter now in controversy and other subject-matter. On these facts I hold that, so far as regards the defense of

two years' public use, the claim sued on relates back to the first application, and hence that the defense of public use is not made out. *Godfrey v. Eames*, 1 Wall. 317, 325; *Smith v. Vulcanite Co.*, 93 U. S. 486, 500; *Graham v. McCormick*, 5 Ban. & A. 244, 248, 11 Fed. 859.

The claim sued on relates to supporting the lower mud drum of water-tube boilers. The specification describes, and the claim calls for, a combination in which the water tubes are required to sustain "the weight of the mud drum and its contents, whereby provision is made for expansion and contraction of the drums and pipes." Prior to the invention, the mud drum seems to have been supported rigidly on a chair or masonry, and some patents show the elevated steam and water drums resting on the tubes or suspended from columns or girders. In these boilers the expansion or contraction of the metal necessitated a corresponding disturbance or movement of the upper drums and upper ends of the tubes; and, as one witness says, "this lifting and bending caused a great many cracks to occur in the tubes, more especially in the front row," "the tubes loosening in the tube sheets, the bending and breaking of the tubes, and the cracking of the brick settings." In the patented boiler, however, it is the lower mud drum and lower ends of the tubes that are subjected to this disturbance or movement; and, these parts being free to move as required, this disturbance produces no injurious results. On the case as presented, I hold that changing the construction and operation as described amounted to a material and patentable difference over everything shown in the prior art. The boiler shown in the patent sued on has but a single mud drum; but the specification states "that more than one may be used as desired," and that "when more than one is used they may all be supported as above, or some of them supported in this way and others otherwise." The defendant's boiler has three mud drums, at least one of which is suspended or sustained by the tubes connecting it to the elevated steam and water drums. I therefore hold that the defendant's boiler is an infringement of the second claim of the patent sued on.

LETTIELIER v. MANN et al.

(Circuit Court, S. D. California. February 1, 1897.)

No. 697.

PLEADING IN PATENT INFRINGEMENT SUITS—ALLEGATIONS OF OWNERSHIP.

A bill by the patentee for infringement must allege that he owned the patent at the time of filing the bill. It is not sufficient to show merely that the patent was issued to him at a certain prior date, and that, on filing the bill, he had possession, and made profert thereof.

This was a suit in equity by John G. Lettelier against William Mann and George E. Johnson, co-partners, etc., for alleged infringement of letters patent No. 482,484, issued September 13, 1892, to complainant, for an improvement in machines for forming channel strips, etc. The cause was heard on demurrer to the bill.

H. C. Dillon, for plaintiff.

James E. Knight and C. K. Holloway, for defendants.

WELLBORN, District Judge. This is a bill in equity, to enjoin the defendants from using a certain patent, and to recover damages for past infringements. The bill alleges:

"That your orator is the original and first discoverer and inventor of a new and useful improvement in machines for forming channel strips for use in the manufacture of open-topped fruit baskets and boxes. That he filed his application for a patent on said discovery and invention in the United States patent office on the 28th day of March, 1891. That thereupon such proceedings were regularly had and duly taken that a patent was duly issued to your orator from the United States of America for his said discovery and invention on the 13th day of September, A. D. 1892, which said patent was and is numbered 482,484, and which said patented improvement in machines for forming channel strips had not been known, used, or published prior to the said discovery, invention, and application of your orator. That a description and specification of the aforesaid discovery and invention is given in the schedule to the aforesaid letters patent, and the aforesaid patent and the specification thereto annexed (which, or a copy of which, duly exemplified, your orator will produce, as your honors may direct) were duly recorded in the patent office of the United States, duly signed and authenticated, as by the said letters patent and specification in due form of law, ready in court to be produced, will fully appear."

Then follow allegations as to infringement and damages.

A demurrer has been interposed on several grounds, the first of which is:

"That it does not appear by the said bill of complaint that the letters patent therein alleged to have been issued to John G. Lettelier were owned by the said Lettelier at the date of filing the said bill of complaint."

In support of his bill, as against this ground of demurrer, plaintiff alleges that said bill shows that said letters patent, long prior to the commencement of the suit, were duly issued to him by the United States government, and "that a status once established is presumed by law to remain until the contrary appears"; citing *Kidder v. Stevens*, 60 Cal. 414, and *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647. While these cases support complainant's contention, later California decisions are directly to the contrary.

In *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466, the court says:

"Appellant contends that the judgment must be reversed because there is no averment in the complaint that respondent was the owner or entitled to the possession of the property sued for at the time the action was brought; and, under the authorities, the contention must be sustained. In a suit to recover personal property, the complaint must show the ultimate fact that plaintiff was the owner or entitled to possession at the time of the commencement of the action; and it is not sufficient to merely aver that he was the owner or entitled to possession at some period prior to that time. It was so expressly held in *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750, *Afflerbach v. McGovern*, 79 Cal. 269, 21 Pac. 837, and *Masterson v. Clark* (Cal.) 41 Pac. 796; and the two first-named cases were referred to approvingly in the still more recent case of *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595. Counsel for respondent seek to show us a distinction between those cases and the case at bar, but we are not able to see it. In *Afflerbach v. McGovern*, *supra*, there was no demurrer to the complaint. In the case at bar the only averment of the respondent's ownership or right of possession is 'that on the 22d day of April, 1895, plaintiff was the owner and entitled to the possession of the following described personal property, to wit.' And the action was not commenced until after the said 22d day of April. Under the authorities above cited, the complaint does not state facts sufficient to constitute a cause of action; and, of course, that objection can be taken at any time."

Substantially to the same effect are *Vance v. Anderson* (Cal.) 45 Pac. 816, and *McCaughey v. Schuette* (Cal.) 46 Pac. 666. In the former the court says:

"It will be observed that while the complaint avers seisin and possession in the plaintiff on the 1st day of May, 1894, it fails to state that she was so seised at the date of the suit brought, which was May 19, 1894, or at any time after May 1st. This was, we think, a failure of an essential allegation in the complaint. It is true that in some of the earlier cases in this court a complaint in ejectment was, in effect, differentiated from those in other actions, and precisely similar complaints with this were held sufficient. * * * *Kidder v. Stevens*, 60 Cal., at page 420."

In harmony with these later California cases is the case relied on by defendants,—*Krick v. Jansen*, 52 Fed. 823.

Complainant, however, further insists, that:

"The ownership of the patent and title in complainant is further shown by his allegation, from which it appears that complainant is in possession of the letters patent, and makes profit of them. This allegation alone, Mr. Foster says in his *Federal Practice* (section 77), is sufficient allegation of title."

That part of said section 77 of Foster's *Federal Practice* to which complainant refers, I presume, is the following:

"It has been held to be a sufficient allegation of title and infringement for the plaintiff to allege that he 'was the true, original, and first inventor of a certain new and useful improved application of steam power to the capstan of vessels, not known or used before'; 'that a description or specification of the aforesaid improvement was given in his schedule to the aforesaid letters patent annexed, accompanied by certain drawings referred to in said last-mentioned schedule, and forming part of said letters patent (the said letters patent and the said specification thereto annexed—which, or an exemplified copy of which, your orators will produce, as your honors may direct—were duly recorded in the patent office)'; and 'that the defendant is now constructing, using, and selling steam-power capstans for vessels in some parts thereof substantially the same in construction and operation as in the said letters patent mentioned.'"

The citations of the author in support of said text are *McMillin v. Transportation Co.*, 18 Fed. 260, 261, and *McCoy v. Nelson*, 121 U. S. 484, 7 Sup. Ct. 1000. In neither of these cases, however, was the objection made that the bill did not adequately allege complainant's ownership. Moreover, in the latter case, as appears from the opinion of the court, the allegation of ownership was expressly made. After enumerating some of the allegations of the bill, the opinion proceeds thus: "The bill then alleges that the plaintiff was, and is, the owner of the patent."

Without passing upon the other grounds of the demurrer, I hold that the first is well taken. Demurrer sustained, with leave to the complainant to amend within 10 days, if he should be so advised.

MacLEOD et al. v. GRAVEN.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1897.)

No. 354.

APPEAL—JURISDICTION OF SUPREME COURT.

A writ of error from the supreme court does not lie, by virtue of the last paragraph of section 6 of the circuit court of appeals act, to review a judgment of the circuit court of appeals which is not a final judgment.

In Error to the Circuit Court of the United States for the District of Kentucky.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. In this case a writ of error was sued out to a judgment in favor of Mrs. Graven, administratrix, against MacLeod, receiver, rendered by the circuit court below for damages for the wrongful death of plaintiff's intestate. On April 14, 1896, this court reversed the judgment of the circuit court, and remanded the case, with instructions to award a new trial. *MacLeod v. Graven*, 19 C. C. A. 616, 73 Fed. 627. An application was made to Judge LURTON, as a member of this court, to allow a writ of error to the judgment of this court so as to permit a review thereof by the supreme court of the United States. The application has been referred by Judge LURTON for the consideration of the whole court. The right to such a writ of error is asserted upon the ground that MacLeod, the defendant in the court below, was a receiver appointed by that court; that the injury complained of was caused by the operation of an electric railroad by him as such receiver; that the suit against him was therefore one arising under the laws of the United States (*Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905); that on appeals or writs of error in such suits the judgments of this court are not final; and that, as this case involves more than \$1,000, by the express terms of the last paragraph of section 6 of the circuit court of appeals act a review of the case by writ of error from the supreme court is provided.

The application presents the question whether, conceding that a writ of error from the supreme court will lie in this class of cases, it can lie in any case where the judgment of this court is not a final judgment. It is well settled that a judgment of an appellate court reversing the judgment of the trial court, and remanding the cause for further proceedings, is not a "final judgment," as that term is used in federal appellate procedure. *Insurance Co. v. Kirchoff*, 160 U. S. 374, 16 Sup. Ct. 318; *Werner v. Charleston*, 151 U. S. 360, 14 Sup. Ct. 356; *Brown v. Baxter*, 146 U. S. 619, 13 Sup. Ct. 260; *Meagher v. Manufacturing Co.*, 145 U. S. 608, 12 Sup. Ct. 876; *Rice v. Sanger*, 144 U. S. 197, 12 Sup. Ct. 664; *Johnson v. Keith*, 117 U. S. 199, 6 Sup. Ct. 669; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15; *Houston v. Moore*, 3 Wheat, 433.

Section 6 of the court of appeals act (26 Stat. 826) provides that "the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for" in the fifth section. The section then provides that in certain cases the judgment of the courts of appeal shall be final. The section further provides that in "all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed \$1,000 besides costs." The contention is that this language does not require that the judgment of the court of appeals to be reviewed in the supreme court shall be final, as expressly required in section 709, Rev. St., which confers jurisdiction on the supreme court to review judgments of state courts, and under which the cases above cited arose and were decided. The contention cannot be sustained. In *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, it was held that under section 5 of the court of appeals act, which provides that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in any case in which the jurisdiction of the court is in issue, and that in such cases the question of jurisdiction shall be certified for decision, the supreme court had no jurisdiction to review the question until the case had proceeded to final judgment. Said Mr. Justice Lamar, speaking for the supreme court:

"It is manifest that the words in section 5, 'appeals or writs of error,' must be understood within the meaning of those terms as used in all prior acts of congress relating to the appellate powers of this court and in the long-standing rules of practice and procedure in the federal courts. Taken in that sense, those terms mean the proceedings by which a cause in which there has been a final judgment is removed from a court below to an appellate court for review, reversal, or affirmance."

If such is the construction to be put on these words when used in the fifth section, certainly the same words, when used in the sixth section in *pari materia*, are to receive the same interpretation. The application for the writ of error must be denied.

BRUNSWICK-BALKE-COLLENDER CO. v. PHELAN BILLIARD-BALL CO.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

PATENTS—INVENTION—NOVELTY.

The Collender patent, No. 228,879, for a pool-ball frame with rounded interior and exterior corners, and made of layers of wood bent into triangular shape, and glued or fastened together, the layers preferably breaking joints, is void, as being the result of mere mechanical skill. 76 Fed. 978, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by the Brunswick-Balke-Collender Company against the Phelan Billiard-Ball Company for alleged infringement of a patent for an improvement in pool-ball frames. The cir-

cuit court held that the patent was void for want of invention, and dismissed the bill. 76 Fed. 978. The complainant has appealed.

M. B. Phillips, for appellant.

Henry A. Forster, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bill in equity of the complainant charged an infringement by the defendant of letters patent No. 228,879, issued on June 15, 1880, to Hugh W. Collender, as assignee of Stephen De Gaetano, for an improvement in pool-ball frames. The circuit court for the Southern district of New York dismissed the bill. 76 Fed. 978. The following extracts from the specification describe the invention with sufficient fullness:

"Previous to my invention, it has been customary to make the triangular ball-holders, used in placing the balls for the game of 'fifteen ball pool' (and other games played with fifteen balls) on billiard tables, of three straight strips or pieces of wood, joined at their adjacent ends to form the angles of the frame, and to strengthen the frame at these angles by interiorly-placed corner-blocks, glued or otherwise fastened in, and sometimes to further strengthen the angles or corners by metallic angle-plates applied exteriorly to the frame. My invention has for its object to produce a 'triangle' or ball-frame which can be made much lighter, and also much stronger and more durable, than those heretofore manufactured, while at the same time its manufacture can be accomplished at much less cost than that of the construction or kind of frames heretofore made, and in its use it will be free of all the objections found in the use of the old-fashioned ball-frame. To these ends and objects, my invention consists in a triangle or ball-frame composed of several layers or thin strips of wood bent round into the requisite shape, and glued (or otherwise fastened) together. My new frame is composed of several or numerous strips or thin layers of wood, or of several strips of veneer, which are placed in close contact and perfectly united throughout their lengths, by preference in such an arrangement that no two of the end jointures of the strips occur at the same locality. My improved ball-frame, instead of having angles, has three rounded corners, so to speak, the circular curvature of each of which (at the inner surface of the frame) should correspond substantially with the curvature of the pool-ball."

The claims of the patent are as follows:

"(1) A ball-frame or triangle composed of wood or other suitable material, and formed with three interior and exterior curved or rounded corners, substantially as and for the purposes set forth. (2) A ball-frame having curved or rounded corners, and made of a series of layers of wood bent into triangular shape, and having their adjacent surfaces glued or otherwise fastened together, as and for the purposes set forth."

The gist of the improvement was a frame which, abandoning angles or sharp corners, should be a continuous, hoop-like structure, instead of a frame of three separate pieces joined at the three corners. Whether the inventor had in his mind, or in his specification, the idea of a frame composed of a single piece of wood, is denied by the defendant and is affirmed by the complainant. We assume that such a construction was sufficiently disclosed in the specification, and was described in the first claim. It is admitted that before the date of the alleged invention there were pool-ball frames which had their corner pieces made with interior curved surfaces, so as to conform substantially to the curvature of the balls. This fact destroys any patentable novelty in making a pool-ball frame with interior and exterior curved or rounded corners, and restricts the patentable character of the invention of the first claim to a frame made of a con-

tinuous strip or band of wood, or other suitable material, instead of a frame made of three strips joined together at the corners. Nothing of an inventive character can exist in the change from a triangular shaped frame made of three separate pieces of wood into the same general style of frame made of one bent piece of wood. The second claim is for a frame of curved or rounded corners, and made of a series of layers or veneers of wood, glued or fastened together, and bent into triangular shape. Preferentially, the ends can be joined together at different places on the frame, so as to break joints and secure greater strength. The novelty, in addition to the rounded corners, consists in the method of construction, whereby additional strength is imparted to the frame. It would hardly be claimed that the described mode of construction, by layers of wood joined together, is a new method of making any wooden article or structure, but it undoubtedly was a new method of making this article; and it made the frame stronger, and less liable to crack or to be strained at the corners. In like manner, the iron curve of the wagon reach in *Hicks v. Kelsey*, 18 Wall. 670, made a better, more durable, and more solid wagon reach than the pre-existing reach, which had a wooden curve, with or without strengthening straps of iron. But these advantages, the court thought, resulted from superiority of construction, and were the product of mechanical judgment in regard to the use of materials. The improvement in this case is of the same mere mechanical character. The decree of the circuit court is affirmed, with costs.

PENNSYLVANIA SALT MANUF'G CO. v. MYERS.

(Circuit Court, E. D. Missouri, E. D. March 3, 1897.)

No. 3,905.

1. UNFAIR COMPETITION IN TRADE—IMITATION OF LABELS AND PACKAGES.

Complainant had long sold concentrated lye in cylindrical packages, with labels having a white background and black lines around the margin, and bearing in large black letters the word "Saponifier." Defendant adopted a similar package, and a label with the same word in prominent black letters, placing his own trade-name on the label, and otherwise differentiating the reading matter appearing in small type. He deliberately sought out the localities in which complainant had created a demand for "Saponifier," with the purpose and result of enabling retailers to pass off his article for complainant's. *Held*, that this was unfair competition, and defendant should be enjoined.

2. TECHNICAL TRADE-MARKS—"SAPONIFIER."

"Saponifier," while perhaps suggestive to a Latin student of an article used in soap making, is yet not so descriptive, to ordinary purchasers, as to prevent its appropriation by the coiner of the word as a technical trade-mark for his concentrated lye, especially where his right thereto has been acquiesced in for 35 years.

This was a suit in equity by the Pennsylvania Salt Manufacturing Company against Emanuel Myers, doing business as E. Myers & Co., to enjoin alleged unfair competition in trade, and infringement of a trade-mark.

John M. Holmes, Geo. H. Knight, and Stanley Stoner, for complainant.

Geo. W. Lubke and Winkler, Flanders, Smith, Bottum & Vilas, for defendant.

ADAMS, District Judge. The complainant invokes the aid of this court to restrain the defendant from unfair competition in trade, and to protect its trade-mark or label upon a package of concentrated lye.

1. Complainant's package is cylindrical in form, about two inches in height and two inches in diameter. Its label consists of a wrapper surrounding this package horizontally. The wrapper has a white background, with black lines around its margin, and two or three black lines extending vertically from top to the bottom. These vertical black lines serve as divisions of the subjects treated of on the label. The word "Saponifier," in large, prominent black letters, runs horizontally about halfway around the periphery of this circular package, midway its height. The word "Saponifier" is the striking feature of the label. The complainant adopted this word, as indicating its particular lye, more than 40 years ago. It became many years ago, and has continued to the present time to be, the word designating complainant's lye, and distinguishing it from the lye of other manufacturers. It has been for many years recognized by all lye manufacturers (except defendant and his family) as the property of complainant, and has been generally recognized by the trade, retail dealers and consumers, as the distinguishing word denoting complainant's ownership of the lye on which it appears. Complainant, by judicious and expensive advertisement, has secured a large demand in different localities of this country for its lye, under the name "Saponifier." The defendant some six or seven years ago put up a lye manufactured by him at St. Louis in a package of similar shape and size as that of complainant's. He employed a label with white background, black marginal and intersecting lines, and the word "Saponifier," in large-sized black letters, prominently upon the periphery of his package, in substantially the same relative position as complainant had done. While defendant placed his own trade-name upon his label, and in other respects differentiated the reading matter, appearing in smaller type, from that found on complainant's package, the proof shows that he intended to and did make his article known to the public and to purchasers as "Saponifier." The proof, in my opinion, further shows that defendant deliberately sought out and found the localities in which complainant had created a demand for its "Saponifier," and shipped his own article, under the same distinguishing and prominent name, to the retail dealers of such localities with the intention, in its least obnoxious phase, "of putting into the hands of retail dealers the means of deceiving the ultimate purchasers, and of encouraging them in the use of such means." This is condemned as unfair competition in the very recent case of *N. K. Fairbank Co. v. R. W. Bell Manuf'g Co.* (U. S. Ct. App., 2d Cir.) 77 Fed. 869. The proof further shows that retail dealers

have zealously employed the opportunity so offered them. They have purchased defendant's "Saponifier" for less than they had been in the habit of paying for complainant's; and, when a purchaser inquired for "Saponifier," they have frequently handed out defendant's article, without comment, charging the same price which consumers had been in the habit of paying for complainant's. In this way the proof shows that the retail dealers have deceived and defrauded the unsuspecting and generally ignorant classes who are the purchasers and consumers of lye. The proof further shows that the defendant and his agents have made use of the possibility of deceiving consumers in the way already stated as persuasive and effective arguments for retail dealers to purchase his "Saponifier" instead of complainant's. He therefore has not only offered the retail dealers an opportunity to mislead and deceive the purchasing public, but the proof shows that he deliberately adopted this scheme of deception for the purpose of taking advantage of complainant's reputation and palming off his own goods as the goods of the complainant. This amounts to unfair competition, in its most aggravated form, and for this reason complainant is clearly entitled to the relief prayed for. *McLean v. Fleming*, 96 U. S. 245; *N. K. Fairbank Co. v. R. W. Bell Manuf'g Co.*, *supra*; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966; *Celluloid Manuf'g Co. v. Cellonite Manuf'g Co.*, 32 Fed. 94. For a very interesting collection of cases on this subject, reference is made to the note at the end of the case of *Scheuer v. Muller*, 20 C. C. A. 161, and special attention is called to a recent case in the house of lords, of *Reddaway v. Banham*, referred to in the note, wherein a defendant was enjoined from describing his belting, although made of camel's hair, as "camel hair" belting, on the ground that complainant, by long use of such descriptive term, had become exclusively entitled to it, as designating his own particular belting, and that customers understood it to mean complainant's belting and nothing else, and that permitting the defendant to apply the term to his belting would deceive purchasers. While this last-mentioned case marks quite an advance in the law under consideration, its tendency to prevent unfair competition is in the right direction.

2. Now, as to the complainant's right to the word "Saponifier" as a technical trade-mark: I was at first impressed with the idea that the word was so descriptive of the article to which it is affixed that it could not be exclusively appropriated by any one, but I think this impression was wrong. To a student who is familiar with the Latin language and the rules of etymology, it may be true that the word "Saponifier," made up of the words "sapo" (soap) and "facere" (to make), would suggest some of the characteristics and qualities of the article to which it referred. It doubtless would suggest that the article had something to do with soap making. The formation of the word indicates that it is a soap maker, but, taken by itself, it imparts no information as to whether such soap maker is a machine, a man, a woman, or a chemical agent. It therefore would not, even to the most erudite, necessarily describe a chemical agent like concentrated lye. But the proof shows that students rarely ever purchase a soap-

making agent. The uneducated part of the community alone generally deal in this article. To them the word "Saponifier," in itself, would probably have no special etymological signification. It would be considered as a fanciful or arbitrary term, and in no sense descriptive of the quality, characteristics, or ingredients of the article. Even if the word did of itself suggest to the ordinary purchaser the chemical action of lye upon grease, such suggestiveness is not fatal to its appropriation as a part of a trade-mark. *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. 133. In the last-mentioned case it is held that although the word "Cottolene," designating a substitute for lard, composed of cotton-seed oil and the product of beef fat, is suggestive of the compound, it is not so descriptive of the substance and quality of its component parts that it cannot be used as a trade-mark. At the time the complainant adopted the word "Saponifier," no such word had found its place in any lexicon. As already seen, the word was coined by complainant and applied to its lye as early as 1855, and has been in constant use, as designating complainant's particular ownership, since then. By this word its lye became known to the manufacturers, dealers, and consumers long before defendant or any one else undertook to make use of it. The proof shows that all manufacturers of lye throughout the United States, with the exception of the defendant and his family, have for a long time recognized, and now recognize, that the word "Saponifier" belongs to complainant; that it affords a ready, short, and effective means of indicating that the lye to which it is affixed was manufactured by complainant. In other words, there seems to have been a general acquiescence in complainant's right to this word as a trade-mark from 1855 until 1890. Such long and exclusive use of the word, and such general acquiescence in complainant's exclusive right to it, are facts which the court cannot overlook, and, were the conclusion otherwise doubtful, would certainly turn the scale in favor of complainant. It is said in the case of *Bennett v. McKinley*, 13 C. C. A. 25, 65 Fed. 505:

"Whether a word claimed as a trade-mark is available because it is a fanciful or arbitrary name, or whether it is obnoxious to the objection of being descriptive, must depend upon the circumstances of each case. The word which would be fanciful or arbitrary when applied to one article may be descriptive when applied to another. If it is so apt and legitimately significant of some quality of the article to which it is sought to be applied that its exclusive concession to one person would tend to restrict others from properly describing their own similar articles, it cannot be the subject of a monopoly. On the other hand, if it is merely suggestive, or is figurative only, it may be a good trade-mark, notwithstanding it is also indirectly or remotely descriptive."

There is no pretense that the word "Saponifier" is a particularly apt description of concentrated lye, or that its exclusive concession to complainant would tend to restrict the defendant or any other manufacturers from properly describing their own goods. I think the only criticism that can be made of this word, affixed to a can of concentrated lye as a trade-mark, is that it is suggestive of one of the uses to which lye can be devoted. But considering the facts of this case, as already partially detailed, I cannot hold that it is so descriptive as to be an invalid trade-mark. The fact that defendant and his father made some use of the word "Saponifier" as early as 1890 cannot affect

the result of this case, when it is considered that their right to do so was at once challenged by complainant, and some supposed temporary adjustment of their differences made. I can find nothing in the leading case of *Canal Co. v. Clark*, 13 Wall. 311, usually referred to as an authoritative expression of the law on the subject of strict trade-mark, to incline my mind against the complainant in this case. On the contrary, that case, as I understand it, holds that, as a general rule, any word may be the subject of a trade-mark (that is, to point out the origin or ownership of articles to which it is affixed) which, at the time of its adoption as such, had not been employed to designate or describe the same or like articles of production. Applying this rule, the case presents no difficulty. As already seen, the word "Saponifier" was a coinage of and appropriation by complainants as early as 1855. It had not before 1855, or until 1890, been used by any other person in connection with any products,—much less as descriptive of any products. The complainant is entitled to the relief prayed for on both grounds stated in its bill, and a decree may be prepared in conformity with this opinion, and submitted to me for consideration.

THE ASPASIA.

STEINWENDER et al. v. THE ASPASIA.

(District Court, S. D. New York. January 7, 1897.)

CARRIAGE OF GOODS—SEA PERILS—EXTRAORDINARY WEATHER—DUNNAGE INSUFFICIENT AROUND THE MASTS.

Upon proof of extraordinary sea perils and of damage to the ship, which was accompanied by considerable damage to cargo in the hold on the side of the vessel: *Held*, on proof of usual good dunnage, that the ship was not liable for such damage; but that the ship was liable for certain damage occasioned to bags stowed about the masts and pump-well, where the evidence showed that there was not the usual and customary amount of dunnage to prevent damage from leaks in heavy weather.

Black & Kneeland, for libelants.

Cowen, Wing, Putnam & Burlingham, for claimants.

BROWN, District Judge. The extraordinary weather met by the ship upon her voyage, and the damage she received from it, sufficiently show that most of the damage sustained by the cargo must be attributed to the excepted perils of the seas. It was the duty, however, of the bark to dunnage the cargo in a manner reasonably sufficient to protect it from what was to be naturally expected, and in accordance with the usages of the port of shipment. For failure to use such reasonable and customary dunnage as would have protected the cargo even from the sea perils actually incurred, the ship remains liable. I think the evidence sufficiently shows a failure of the ship to use reasonable and customary dunnage about the masts and pump-well, where there was some damage to the bags of coffee, which such dunnage would have prevented. *The Nith*, 36 Fed. 86; *The Sloga*, 10 Ben. 315, Fed. Cas. No. 12,955. For so much of the damage, the libelants are, I think, entitled to recover. I should fix the amount, if

the evidence was sufficient to enable me to do so, as it must be in any event comparatively small. If the parties do not agree, a reference may be taken upon this item of damage.

The damage to cargo in the other parts of the ship I must find did not arise from any lack of reasonable or customary dunnage, or insufficiency of the ship, but from extraordinary sea perils.

A decree may be entered accordingly.

Affirmed on appeal, March 19, 1897.

THE W. F. BABCOCK.

GRAVES et al. v. THE W. F. BABCOCK.

(District Court, S. D. New York, March 1, 1897.)

SEAMEN'S WAGES—DESERPTION—COMMITMENT THROUGH CONSUL—HONOLULU—FAILURE OF PROOF—CONSUL'S CERTIFICATES NOT EVIDENCE—REV. ST. § 4600—CONSULAR EXAMINATION REQUIRED.

On the ship's arrival at Honolulu, four men at different times, not appearing at the hour of commencing work in the morning, were within a few hours afterwards arrested as deserters by the police authorities at Honolulu on request of the consul, and kept in prison from 10 to 20 days, until the ship sailed. On arrival at New York, and on suit for their wages, an offset was presented for (1) rewards for detection, (2) arrest by the police, (3) board while in prison, and (4) the employment of a stevedore in place of each seaman while in prison, at \$2.50 a day. The seamen denied any intent to desert; the master had no personal knowledge, but only that desertion was reported to him; nor was any record produced of any examination before the consul, such as is required by section 4600 of the Revised Statutes. *Held*, (1) that the evidence of desertion was insufficient; that the mere certificates of the consul were not legal evidence; (3) that no such offsets as are claimed could be allowed, except on proper legal proof of their necessity, and of a substantial compliance with the statutory requirements.

Boddine & Lee, for libelants.

Jones & Govin, for claimants

BROWN, District Judge. To the claims of the above four seamen for wages, counter claims are set up for the cost of their arrest as deserters and of their confinement at Honolulu until the ship sailed for New York on February 26, 1896. The items charged in the log against Graves are as follows:

For reward paid for detection.....	\$10 00
For arrest by the police.....	6 00
For 21 days' detention in prison.....	21 00
For supply of a man in his place at \$2.50 per day, 18 days.....	45 00
For breaking window.....	20 00

\$102 00

These charges exceed the wages earned during the following four months.

The charges against the other libelants are similar, except that against two of them \$20 each is charged for detection. All the men deny any intention to desert. Three of them, as appears from the testimony, went ashore at night, by leave, but got into a drunken

spree with friends on vessels near by; and not having returned at the hour when work was resumed on the ship the next morning, complaint was immediately made against them as deserters before the consul, and before noon they were arrested and lodged in jail; Graves and Donnelly on February 5th, and confined 21 days; and Bauer on February 20th, and confined 6 days. The fourth man, Bradley, had been ashore without leave early in the morning of February 10th to see the British consul, and was arrested by the police as a deserter on his way back to the ship.

There is no proper or sufficient proof of an intention by any of the men to desert. The master's testimony on this point is all hearsay, depending on reports of the mate, who left the ship and was not examined. The mate, he says, reported the men absent and their clothes missing. The weight of evidence certainly shows that the report in the latter respect was mistaken; the men's clothes were in bags in the forecastle all the time (except a couple of articles which one of the men had taken ashore to sell), and were there when the men returned to the ship February 26th.

The evidence does not satisfy me that there was any proper inquiry or finding by any one as to the fact whether the men, or any one of them, had deserted. Section 4600 of the Revised Statutes makes it the duty of consular officers "to reclaim deserters," and to employ the local authorities to that end. No express authority is given to lodge deserters in foreign prisons. But that section requires that "in all cases where deserters are apprehended, the consular officer shall inquire into the facts."

In the master's deposition appears a copy of a letter stating as follows:

"Shortly after the arrival of the ship W. F. Babcock several of the crew deserted. At the request of this office they were arrested and lodged in jail, where they complained to me of ill treatment at the hands of the mate. I summoned the master, and mate, also the men to appear before me. After a full investigation found the charges to be without foundation. Their jail fees, rewards offered for them, etc., have been looked over by me and found to be correct as per vouchers.

"[Signed]

Ellis Mills, General Consul."

This letter was objected to, and it is not legal or competent evidence as to the matters of fact stated in it. I have deferred the decision of the cause to permit evidence of any docket or record of inquiry as to the alleged desertion to be offered; instead of that a further certificate is offered under the seal of the consul, dated January 19, 1897, stating that in the month of February, 1896, complaints were successively made to him by the master that the above-named libelants had deserted,—

"Whereupon at the request of the master I issued requests to the marshal of this government for the arrest and detention of these men, and they were afterwards brought before me, and it then and there having been made to appear to my satisfaction that the aforesaid complaints were true * * * and that the seamen had deserted said vessel, and absented themselves without leave, whereupon at the request of the said master the said seamen were remanded to the jail at Honolulu to remain there until the said vessel should be ready to proceed on her voyage or till the master should require their discharge, and then to be delivered to the said master, he paying all the costs of said commitment and deducting the same out of the wages due to said seamen. And I

further certify that the reason for my action was because I was satisfied that unless they were so detained they would again desert.

"Ellis Mills, Consul General."

This paper has not the appearance of having been prepared from any docket, record, or notes remaining in the consul's office. It does not purport to be a copy of any such record or notes; no dates, other than the month are given, and there is no direct statement that the consular officer made any inquiry into the facts. The latter part seems intended to follow the provisions of section 4598, which does not apply to proceedings before consular officers, but to proceedings before justices of the peace within the United States. In the case of *The Coriolanus*, Crabbe, 239, Fed. Cas. No. 7,380, Judge Hopkinson said: "I never suffer these certificates to be read; they are infinitely weaker than *ex parte* depositions."

To make proceedings before the consul evidence, there must be either a duly-proved copy of his record, or else his deposition, as in the case of other witnesses. These papers are neither, and must, therefore, be disallowed as evidence.

The testimony of all the men, moreover, is very explicit that there was no examination before the consul as to the fact of desertion; but only a hearing upon a complaint of ill treatment made to him by Burns, another seaman, upon which three of the men were called before him while they were in jail, and before Bauer was arrested, as witnesses on that charge. The master's testimony confirms this fact, and supports the testimony of the libellant Bauer, that he was never taken before the consul at all; and if that was the case with Bauer, it is fair to conclude that it was the same with the others, and that they were sent to jail on the master's complaint alone, without inquiry before the consul into the fact of desertion either before imprisonment or afterwards. This is not such an inquiry as section 4600 demands. All the items charged against the seamen based upon the ground of alleged desertion must, therefore, be disallowed.

The haste with which the proceedings against these men were taken; the absence of any genuine inquiry into the fact of desertion; the disclaimer of the men at the time of any intent to desert; the lack of any request and even of any option given to the men when arrested to return to the ship, or opportunity to show that the delay of a few hours in returning was due to drunkenness only, render the procedure against these seamen apparently a very harsh one, and make quite natural, if not legally justifiable, their subsequent violence in speech and act. Whether the men were deserters or not, they could not lawfully be thrown into prison without such an inquiry and opportunity to be heard as the statutes provide. And when such measures are taken by the master with a view to confiscating the wages of seamen for several months succeeding, he must take good care to collect and preserve for his defense, and for the defense of the ship, sufficient legal evidence to show both the necessity for such proceedings, and a substantial compliance with all the statutory requirements to justify it.

Under sections 4603 and 4596 I might impose a small discretionary fine for the two or three hours, which is all the voluntary absence

proved against these men; but in view of their imprisonment, no fine should be imposed. When the ship was ready to sail on February 26th, the men were brought on board in irons. On the way to the ship, Graves, Donnelly, and Bradley, for the purpose of securing their further detention in Honolulu, broke a plate-glass window in one of the stores, for which the captain was obliged to pay \$60. For this unlawful act, each of the three men should be charged with his share, viz. \$20. No other offsets being legally established, they are entitled to the residue of their wages, as follows:

To Graves	\$62 67
“ Donnelly	61 27
“ Bradley	61 17
“ Bauer	67 62

—with interest from June 29, 1896.

A decree may be entered accordingly, with costs.

DAVIDSON et al. v. BALDWIN.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1897.)

No. 433.

1. SHIPPING — MORTGAGEE HOLDING LEGAL TITLE — PERSONAL LIABILITY FOR REPAIRS.

One who purchases a vessel at marshal's sale, takes the legal title, and is registered as owner at the customhouse, but who, in fact, purchases for another, and holds the title merely as collateral security for a debt, is a mere mortgagee; and if he is not in possession, and does not appoint the master, he is not personally liable for repairs or supplies furnished on the order of the master. And when it is sought to hold him liable he is not estopped from showing his true relation to the vessel.

2. SAME—APPOINTMENT AND AUTHORITY OF MASTER—ENROLLMENT.

When one is acting as master by appointment of the real owner, his status and authority as such are not affected by the fact that his name has not been inserted as master in the enrollment, for the registry and enrollment are only for the protection of the revenue.

3. SAME—ESTOPPEL.

B. was the registered owner of a vessel, but in fact held the legal title as security for a debt. R. & Sons were the real owners, and R. was enrolled as master, and had full possession and control. Without changing this enrollment, he appointed one M. as master, himself doing the business of the vessel, as managing partner of R. & Sons. As such, he ordered repairs of libelants, they understanding that he did so simply as “manager.” Held, that on these facts, in the absence of any other evidence of a holding out by B. of R., as his manager, B. was not estopped from denying that R. was his agent.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The record includes three libels in personam, filed by persons doing repairs or furnishing material to the tug Sea Gull, for which it is sought to make the appellee, Stephen Baldwin, liable as owner. These libelants were James Davidson, the Bay City Iron Company, and Charles and William F. Jennison. The record also includes a libel filed by James Murdock, who seeks to recover his wages as master of the Sea Gull. All of these libels were by agreement consolidated and heard together. The facts necessary to be stated, as we find them to be, are these: The tug Sea Gull was originally owned by the Reid Towing & Wrecking Company, a corporation of the state of Michigan, of which

one-half the capital was owned by James Reid, who was the president and manager of the corporation. Under proceeding against the tug in the district court, the Sea Gull was sold at marshal's sale to satisfy sundry decrees of that court. At the sale she was bought by the appellee, Stephen Baldwin, at the price of \$14,000, and a bill of sale executed to him. This purchase was made by Baldwin for James Reid, under an agreement by which he was to advance to Reid \$12,500 of the purchase money, and take and hold the legal title until Reid's note for that sum should be paid, and another note for \$1,000, due Baldwin upon another transaction. Baldwin paid \$12,500 of the price bid at marshal's sale, the remainder of the purchase money being paid by Reid or by another for him. Reid gave to Baldwin the note of James Reid & Sons, a firm composed of himself and two sons, formed for the purpose of carrying on the business originally carried on by the Reid Towing & Wrecking Company, for the sum thus loaned, which the latter indorsed to a bank as a means of raising money thereon. Baldwin gave to Reid an obligation to convey the vessel to him upon payment of that note, and another for \$1,000, made by James Reid alone. That paper was in these words:

"I hereby agree to transfer the tug Sea Gull, all her equipment, all booms, boom chains, pumps, and anything else that I may now have or hereafter come into my possession, upon the payment of two notes held by me. Twelve thousand five hundred dollars is now held by the Preston National Bank, and indorsed by me. This note to be paid by James Reid & Sons, or by James Reid. One of twelve thousand five hundred (\$12,500) dollars, made by James Reid & Sons, and one for one thousand (\$1,000), made by James Reid. Also the interest on said notes, and any other obligation that may be incurred by James Reid that I may become responsible for. Also sufficient to pay me for any trouble that I may be to.

"[Signed]

S. Baldwin. [L. S.]"

The tug was enrolled and registered in the name of Stephen Baldwin as owner, "whereof James Reid was at present master." This enrollment was at Detroit, the place of the residence of said Baldwin. The tug, from the time she was turned over by the marshal, remained in the sole possession of James Reid or James Reid & Sons, and was by them used in connection with two other tugs, owned in whole or part by Reid, in a wrecking and towing business carried on by the firm of James Reid & Sons. The bill of sale to Baldwin and the registry bear date in May, 1891. During most of the season of 1891, Reid himself sailed the Sea Gull; but late in 1891 he hired the appellant James Murdock to sail her, and from then until her destruction by fire, in 1893, Murdock was the acting master, and it is for his wages as master that he has filed his libel. From some time in 1891 (time not ascertainable) Reid was the managing partner of James Reid & Sons, a firm whose place of business was at Bay City, Mich. The business he conducted as "James Reid & Sons," and under this title he managed each of the tugs owned or controlled by James Reid & Sons, and under that style kept his bank account, and bought supplies for his wrecking business and for the tugs, and under the same designation ordered the repairs for the Sea Gull for which the libelants below preferred their several claims. In each instance these supplies and repairs were charged to the Sea Gull, as other supplies or repairs were charged by them to the particular tug to which they were furnished. Under the same designation, Murdock was hired to sail the Sea Gull. Baldwin was not engaged in any sort of maritime business, and was a capitalist. He had nothing whatever to do with the Sea Gull, was never in possession, had no interest in her earnings, and knew nothing of her employment or situation. He gave Reid no employment or authority to act for him, or in any way charge him for supplies or repairs, and was never consulted about the repairs now sued for by either Reid or any of appellants. He knew nothing of Murdock's employment as master. When he entered upon this agreement to aid Reid in buying the Sea Gull, the latter agreed to keep her insured, and did take out insurance to the extent of about \$27,000 in Baldwin's name as owner. Baldwin was ignorant of the fact of such insurance until after the loss of the boat by fire. Upon being apprised of the loss and insurance, he made regular proof of loss, and has collected the greater part of the insurance money. Judge Swan, of the district court, dismissed the several libels, and appeals have been perfected and errors assigned.

F. H. Canfield, for appellants.

T. E. Tarsney and W. W. Wicker, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Under general maritime law, there would be no lien upon the ship for repairs made on order of her master at a home port. The General Smith, 4 Wheat. 443; The Lottawanna, 21 Wall. 559; The Edith, 94 U. S. 518; The Samuel Marshall, 6 U. S. App. 389, 4 O. C. A. 385, and 54 Fed. 396. The repairs made which constitute the basis for the claims here asserted were made at Bay City, a port within the state of the residence of Baldwin, the person sought to be made liable as owner. Bay City was therefore a home, and not a foreign port, whether Baldwin or Reid be treated as owner. The Samuel Marshall, supra. If any lien was fastened upon the Sea Gull to secure the debt for repairs, it would arise alone upon the statute law of Michigan, and then only if the repairs were made upon the credit of the vessel. The Samuel Marshall, supra. The J. E. Rumbell, 148 U. S. 1-19, 13 Sup. Ct. 498. As the Sea Gull was totally destroyed before any libel, it is unimportant to consider whether or not any lien was acquired under the local law, for a lien on the res, dependent alone on local law, would not make the owner liable in personam, unless he would be so upon general principles of law. The evidence makes it clear that the real relation which existed between Reid and Baldwin was that of mortgagor and mortgagee. Baldwin held the legal title as mere collateral security for the payment of debt, and upon payment was obligated to convey the Sea Gull to Reid. That it is competent to show by parol evidence that, although Baldwin had the title, he was, nevertheless, only a mortgagee, is well settled. That the tug was registered in his name does not prevent proof of the real relation. Morgan's Assignees v. Shinn, 15 Wall. 105; Winslow v. Tarbox, 18 Me. 132; Philips v. Ledley, 1 Wash. C. C. 226, Fed. Cas. No. 11,096; Howard v. Odell, 1 Allen, 85; Mitcheson v. Oliver, 5 El. & Bl. 419. Baldwin, as mortgagee, never had actual control of the vessel, never had possession, and was in no way interested in her earnings. That a mortgagee who holds the legal title, but who is not in possession, is not liable personally for supplies and repairs furnished the ship upon order of the mortgagor or master, is now well settled. Winslow v. Tarbox, supra; Howard v. Odell, supra; Philips v. Ledley, supra; 3 Kent, Comm. 134; McIntyre v. Scott, 8 Johns. 160.

But appellants claim that the evidence shows that Reid told some of them that Baldwin had purchased the vessel at the marshal's sale, and led them to believe that he was the owner; that they all knew that Baldwin appeared on the customs' registry as the owner, and Reid as the master; and that none of them knew that Baldwin only held the title as collateral security, or knew of the obligation to convey to Reid when his debt was paid. In support of this position, counsel for appellants rely upon Story, Ag. § 298, where it is said:

"It will make no difference in respect to the liability of the owner, in case of repairs to ships, that by private agreement or charter party, between the owner and master, the latter is to have the entire ship to his own use for a specified period, and is to make all the repairs at his own expense, for such a private agreement cannot vary the rights of third persons."

This text is supported by the well-known case of *Rich v. Coe*, Cowp. 636. But the case cited and the doctrine stated apply only where the person sought to be made liable is the real owner, and the person ordering the repairs was the master appointed by the owner. In such case the existence of a secret agreement by which the master was to sail the ship on his private account, and himself keep her in repair, would not affect the rights of third persons ignorant of the charter party, and guilty of no negligence. This is the rule applied in the case of *The Samuel Marshall*, 6 U. S. App. 389, 4 C. C. A. 385, and 54 Fed. 396. The rule stated by Judge Story has its foundation in the liability of the owner for the engagements of the master within the well-defined limits of the authority implied from the office of master. But the real question in all such cases is, who is the contracting owner made liable by the master's conduct within the well-defined scope of a master's implied authority? The mortgagor, although he holds the title, and appears in the registry as the owner, is, if out of possession, not the owner whom the master is authorized by law to bind for repairs made on his order. Whatever doubt may have been entertained at one time, it is now well settled that a mortgagee out of possession is not the owner made liable by repairs made on order of the mortgagor or the master. 3 Kent, Comm. pp. 133, 134. Neither is the case altered because the mortgagee holds the legal title under a bill of sale absolute on its face, and stands upon the registry as the owner. The latter circumstance does not change the real relation of the mortgagee, and does not by itself estop him from showing that he was not the owner when sought to be made liable for repairs. The owner who is made liable by the master's act is the owner whose agent he is, and from whom he derived his authority.

The books contain many cases in which there concurred the facts here relied upon to estop the defendant from denying his liability. Thus, in the case of *Mitcheson v. Oliver*, 5 El. & Bl. 419, the action was for repairs, and work done, and materials furnished to fit out the ship *Progress* on order of one who appeared on the registry as her master. The defendant appeared on the same registry as owner. But the defendant showed in defense that he had agreed to sell the *Progress* to one G., by a contract in writing, unregistered and unknown to the plaintiffs, and that the master had actually been appointed by G., though circumstances, including the enrollment, led plaintiffs to suppose him to have been appointed by O. A verdict in favor of plaintiffs was set aside by the court of queen's bench, upon the ground that there had been a misdirection, and that the jury had come to a wrong conclusion, and that the verdict ought to have been for the defendant. Park, B., among other things, said:

"None of us, I believe, have doubted that the jury came to the wrong conclusion, and that the verdict ought to have been for the defendant, on this single ground that no contracts can bind a defendant unless made by some

one who had real authority to bind him, or unless the defendant is precluded from denying that there was authority in the person who made the contract. It is perfectly settled now that the liability to pay for supplies to a ship depends upon the contract to pay for them, and not on the ownership of the ship. We are all satisfied that, on this evidence, the jury ought not to have found Thomson really agent for the defendant in making this contract, nor that the defendant held out false colors, representing that Thomson had authority to bind him, when in point of fact he had not, so as to induce the plaintiffs to believe that he could make the contract for the defendant, and that the plaintiffs acted in the supply on that belief."

Touching the summing up of the trial judge, the court said:

"Lord Campbell told the jury that 'the defendant would not be liable to the plaintiffs' demand, merely as owner of the ship, nor by reason of this being registered as such owner; nor would he be liable merely by the orders being given to the plaintiffs by the registered master of the ship,' and so far the direction is perfectly accurate; but then comes an enumeration of the circumstances under which the defendant 'might be liable,' which must be understood as meaning that, if the jury found that these circumstances all existed, they should find for the plaintiffs. We think that this enumeration is defective. The circumstances enumerated are: If the defendant 'remained in possession of the ship, and held himself out as owner, and if a person acted as master of the ship with his privity and consent, and the goods and work were supplied to and done upon the ship upon the credit of the owner, by the bona fide orders of the master, given with the privity of the owner, and if the goods and work were fit, necessary, and proper for the ship, under the circumstances in which she was placed, and fit and necessary for the purposes of the ship, at the time of the orders.' Now, we think that, though all these circumstances existed, yet it would not be enough to render the defendant liable, unless the person acted as the defendant's master of the ship with his privity and consent, and the goods and work were supplied to and done upon the ship, not merely 'upon the credit of the owner, by the bona fide orders of the master given with the privity of the owner,' but as on a contract with the owner on orders given by the master as for him. Now, in this case, on the evidence, it appears that the defendant did not, by word or deed, in any way hold out Thomson as his master; and therefore the defect in this part of the summing up is material, and would influence the verdict."

The mere fact that one stands on the registry as the owner by no means determines that he is the contracting owner made liable through the agency of the master. 3 Kent, Comm. pp. 133, 134.

In *Howard v. Odell*, 1 Allen, 85, the facts were these: The ship was registered as owned by Odell & Kidder. The plaintiff sold supplies for the ship to Odell. Upon inquiry made when the first bill was made, Odell said that the ship was owned by Odell & Kidder. Afterwards plaintiff sent to the customhouse, and found her so registered. The charge was made to the ship. The fact was that Kidder held a bill of sale absolute on its face for one-half of her from one Wilson, which was duly recorded. But it was shown that in fact Kidder only held this title as collateral security for the payment of a debt due him from Wilson, and never exercised any acts of ownership over her, nor authorized Odell to in any way incur liability for him. Upon the facts, it was sought to hold Kidder personally liable for repairs and supplies ordered by Odell. The court held Kidder not liable. Bigelow, C. J., delivering the opinion of the court, after saying that it was settled that the mortgagee of a vessel not having her in his possession or control was not liable for supplies or repairs furnished on the order of the master or mortgagor, said:

"Nor does the fact that the register or enrollment of the vessel stands in the name of the mortgagee, and that his apparent title on the record is by a conveyance absolute in form, of itself operate to render him liable for debts contracted for supplies and repairs. The real question in all such cases is: With whom was the contract made, and was the person who made it authorized to bind the mortgagee? If the mortgagee was not in possession of the vessel, and did not receive the benefit of her earnings, or exercise any control over her, but only held his title as collateral security for his debt, then it is very clear that neither the master nor the mortgagor could claim to act as his agent, or bind him by their contracts. In such case there is no authority, either express or implied, by which they can undertake to act in his behalf. Doubtless the mortgagee may, by his acts, hold himself out as the real owner of the vessel in such a way as to lead persons to believe that the master or mortgagor is his agent, authorized to make contracts concerning the vessel. He would then be bound by them, under the ordinary rule of law regulating the relation of principal and agent. * * * Indeed it would be giving altogether too much weight to the registry and enrollment of vessels to hold that persons whose names appeared therein as owners were thereby made liable for repairs and supplies. Every one conversant with shipping and commercial dealings knows that vessels are often employed under charter parties, by which even the real owners are exempted from all charges incurred in their management and navigation. Whenever the charterer is, by the terms of his contract, deemed to be owner *pro hac vice*, no liability for supplies or repairs attaches to the actual owner of the vessel in whom the legal title is vested. It is therefore well understood among all persons engaged in the business of making repairs or furnishing supplies that their right to recover payment therefor does not depend on the registry or enrollment, but on the right and authority of the person with whom they deal to act as agent for the owners, and to bind them by his contracts. The real transaction between the parties is to be looked at, in order to ascertain whether that which appears by the registry to be a legal title in a particular person is or is not such an ownership as will authorize the person making the contract to act as agent. An equitable title in one person, having the control and possession of the vessel, may well consist with a documentary title at the customhouse in another person." *Philips v. Ledley*, 1 Wash. C. C. 226, Fed. Cas. No. 11,096; *Winslow v. Tarbox*, 18 Me. 132; *Duff v. Bayard*, 4 Watts & S. 240; *McIntyre v. Scott*, 8 Johns. 159; *Wendover v. Hogeboom*, 7 Johns. 308.

In the case before us, it turns out that, though Reid stood on the enrollment as the master, he was not acting as master when these repairs were ordered. James Murdock was actually the master controlling the navigation of the Sea Gull, and was appointed to that place by Reid. That Murdock was acting as master was known to appellants. That his name had not been inserted in the license does not affect his actual status as master, for the registry and enrollment statutes are only for the protection of the revenue, and failure to have his name inserted as master would not affect Murdock's actual authority as master. *The Boston*, 1 Blatchf. & H. 309, Fed. Cas. No. 1,669; *Steamboat Co. v. Scudder*, 2 Black, 385. If one holds and exercises the position of master of a ship, the position at once gives him authority, and at the same time defines it. But here appellants cannot rely upon the implied authority of Reid as a master, because he was not in fact master, and was not at the time these repairs were made acting as master. These repairs were ordered by him in the character, as libelants understood, of "manager." Now, this is an agency unknown in general maritime law, and the authority implied from such a position is in that law undefined. There is evidence in the record that there is a custom on the lakes for lines of boats to be placed under the general direction

of an officer representing the owner, called a "manager," and that such managers contract for supplies, repairs, etc. It is also shown, though the matter would be evident without proof, that the principals represented by such manager are sometimes mere charterers of vessels. That, at last, would only bring us back to the point from which we started, namely, that the persons bound by the acts of such an agent would be those appointing him to the place. Now, there is not the slightest doubt of the fact that Baldwin never did appoint Reid to the place of "manager." Neither did Reid represent himself as managing for Baldwin. The clearly-established facts are that James Reid and his sons were partners, under the firm name of Reid & Sons, and under this firm name were engaged in wrecking and towing. In this business they employed two tugs, the Sea Gull and the Parker, and sometimes a third, the Manistique. Of this business James Reid was manager. The appellants have chosen to regard him as manager of the Sea Gull for Baldwin, who they understood was her owner. Now, there are three ways in which a person can be bound on a contract: First, when he himself has made it; second, when an agent really authorized to bind him has made the contract for him as principal. There is no evidence to support a liability based upon either of these grounds. The third and last method by which one may be bound is where a person has made a contract for him as principal, not really having authority to do so, but that the conduct of the supposed principal has been such as to preclude him from denying that there was authority.

This brings the case down to this question: What did Baldwin do which amounted to such a holding out of Reid as his manager as that he should now be precluded from denying that he was his agent in fact? The facts that he held a bill of sale absolute on its face, and that the vessel stood on the registry in his name as owner, were not of themselves such a holding out of himself as owner and Reid as his master as to preclude him from showing that he was not the owner, and that Reid was not his master; yet there is much more color for claiming that he ought to be estopped from denying that he was the real owner, and Reid his master, than there is for precluding him from denying that Reid was his "manager." The circumstance that in the enrollment he had stated that Reid was then the master might plausibly lead one to suppose him to be his master, and preclude him from denying liability within the well-defined limits of a master's office for his acts as master. But at the time Reid was doing business as "Reid, Manager," he was no longer exercising the authority of master of the Sea Gull. Another was in that situation, and exercising its authority. It is very clear that something more must be shown than that the title and registration stand in his name in order to preclude him from denying that Reid was his manager. No one pretends that Baldwin, by any affirmative act or word, held him out as managing the Sea Gull for him. Reid himself made no such representation. There was nothing in the circumstances, other than the condition of the legal title and the enrollment, calculated to lead libelants into believing that Reid was "managing" the Sea Gull for Baldwin. The general busi-

ness conducted by Reid, and his employment therein of other vessels known not to belong to Baldwin, were calculated to make them believe that Reid was managing the Sea Gull, as he was the other tugs, for himself and those connected with him in the business of Reid & Sons. It is indeed difficult, on the evidence in this case, to believe that libelants supposed that they were extending credit to Baldwin, and that he was the person with whom they were dealing as the contracting owner. If it is sought to charge Baldwin with a contract for him as principal, made through one not really having authority to bind him, it is absolutely essential to show two things: First, that libelants at the time supposed him to be the contracting person or one of the contracting persons; and, second, that the conduct of the supposed contracting principal has been such as to preclude him from denying that there was authority. Now, the evidence falls far short of what is necessary in respect to both divisions of the question. To say that credit was given to the Sea Gull, or that credit was given to the vessel and her owner, or that credit was given to Baldwin, is quite unsatisfactory. In the case of *The Samuel Marshall*, heretofore cited, where the question was as to whether certain supplies had been furnished upon the credit of the vessel, this court, speaking through Judge Taft, said:

"The fact that the supplies were charged against the vessel on the books of the libelants is evidence only of a self-serving practice which has no particular weight in the determination of this question." 6 U. S. App. 401, 4 C. C. A. 392, and 54 Fed. 403.

The evidence in this case shows that such a charge was habitual without regard to the circumstances. So, the statement that credit was given to Baldwin is even less satisfactory, for no corresponding charge was made, and no statement was made by either party indicating that such credit was asked or given. Indeed, the practice of saying to juries, in cases where it is sought to charge one other than the person actually procuring the supplies or repairs, that the question is, "To whom was the credit given?" has been most pointedly condemned as misleading.

In *Mitcheson v. Oliver*, 5 El. & Bl. 419-437, where the question was whether the ostensible owner of the vessel was bound by repairs made on order of the master, Park, B., said in regard to the liability of Oliver, the defendant sued as contracting owner:

"Supposing that Oliver had said or done something inconsistent with the true facts, which does not appear to be the case, still it would not bind him unless the plaintiff supplied the goods on the faith that Oliver was the contracting person. I purposely avoid saying 'on Oliver's credit,' a phrase which I wish were never used, as it constantly misleads juries into thinking that something short of being the contracting party will make a person liable."

Upon the other branch of the evidence necessary to make out a case which should preclude the appellee from denying Reid's authority, appellants have failed more signally. That Reid took out insurance upon the Sea Gull in Baldwin's name is of no significance upon this question of false colors held out by Baldwin, for the reason that this insurance was not procured until after the repairs were made. As evidence of an agency in fact, it has some weight, but could not have been a misleading circumstance inducing them

to believe that Reid was managing for appellee. That insurance was procured by Reid for his own benefit. It is true that Baldwin was collaterally interested, but that is wholly due to his creditor relation. That it was taken out in his name, and that he has collected it, is due to the situation of the title. Baldwin's ratification of Reid's act in taking this insurance in his name cannot help appellants in any view of the case. The subsequent ratification of an originally unauthorized act operates as a previous authority only as between the parties to the contract ratified. But, were it otherwise, an authority by a mortgagee to the mortgagor to take insurance in the mortgagee's name would not include an authority to bind the mortgagee for extensive repairs upon the property to be insured, even though without such repairs the vessel was uninsurable. The agency for such a purpose would not bring within its scope so foreign a matter as repairing the subject-matter of insurance.

The libel of James Murdock stands upon even less firm ground than those of his co-appellants. The decree dismissing all of the libels must be affirmed, with costs.

THE ISABEL.

CHAPMAN DERRICK & WRECKING CO. v. THE ISABEL.

(District Court, D. Connecticut. March 8, 1897.)

No. 1,097.

UNITED STATES MARSHALS—COMMISSIONS IN COMPROMISED ADMIRALTY CASES.

On a libel in rem for salvage, no monition was served, but the claimant appeared, gave bond, and consented to a decree for a specified sum, which he paid to libellant in settlement of the case. *Held*, that the marshal was not entitled to any commission thereon, as he had incurred no responsibility.

This was a libel by the Chapman Derrick & Wrecking Company against the steamboat Isabel to recover compensation for salvage services. The cause was heard on the marshal's appeal from the clerk's taxation of costs.

Samuel Park, for libellant.

R. C. Morris, per se.

TOWNSEND, District Judge. In the above-entitled cause a libel in rem for salvage services was filed, but no monition was served. The claimant appeared, filed a bond with libellant in the sum of \$7,000, and consented to a decree for \$2,500, which amount was paid to libellant in settlement of the case. The marshal included in his bill for taxation of costs a charge for a commission on said amount, which was disallowed by the clerk. The marshal contends that he is entitled to said commission by virtue of the provisions of section 829, Rev. St., which is as follows:

"When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars: provided,

that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof."

In *The Russia*, 5 Ben. 84, Fed. Cas. No. 12,170; *The City of Washington*, 13 Blatchf. 410, Fed. Cas. No. 2,772; *The Clintonia*, 11 Fed. 740; *The Morgan City*, 39 Fed. 572; and *The Captain John*, 41 Fed. 150,—such commissions were allowed on the amount demanded in the libel. In each of these cases, however, the vessel had been seized by the marshal. In *The Acadia*, 10 Ben. 482, Fed. Cas. No. 23; *Robinson v. 15,516 Bags of Sugar*, 35 Fed. 603, and *The Scottish Dale*, 65 Fed. 811, a commission was allowed, not on the amount demanded, but on the amount paid in the settlement of the claim. As no specific debt or claim was fixed in the libel herein, and as there was no appraisal of the value of the property libeled, the marshal would, in no event, be entitled to a commission other than on the amount paid in settlement. There is considerable force in the suggestion of counsel for claimant that, inasmuch as the marshal has incurred no responsibility, he is not entitled to any commission. I understand that the clerk, in disallowing the charge of the marshal, has followed the prevailing practice in the Southern district of New York. The disallowance is therefore affirmed. Let an order be entered accordingly.

THE MARION.

TIBBOL et al. v. THE MARION.

(District Court, N. D. California. March 5, 1897.)

1. SEAMEN'S WAGES—LIEN ON CARGO BELONGING TO SHIPOWNER.

Where the owner of the ship is also owner of the cargo, the seamen have a lien on the cargo for wages in the nature of a charge on the freight.

2. ADMIRALTY PLEADING—VERIFICATION OF LIBEL.

Under rules 3 and 5 of the district court for the Southern district of New York, which were adopted by the district court for the Northern district of California, an amended libel to enforce an alleged lien on the cargo for wages need not be verified, when such cargo has been released on stipulation under the original libel, and libelants are beyond the jurisdiction.

This was a libel by J. T. Tibbol and others against the barkentine *Marion* and her cargo of 850 barrels of salmon, to enforce a claim for wages. The cause was heard on exceptions to an amended libel filed against the cargo.

H. W. Hutton, for libelants.

A. P. Van Duzer, for claimants of cargo.

MORROW, District Judge. This case comes up on exceptions to the second amended libel. The original libel was filed on October 27, 1896, and was brought against the barkentine *Marion*, her tackle, apparel, furniture, etc., and the cargo of said vessel, consisting of 850 barrels of salmon, to recover for seamen's wages. The libelants shipped on a fishing voyage from the port of San Francisco to Cook's Inlet, Alaska, and other Alaskan ports. They did not ship on a lay, but were to be paid a definite sum per month as

wages. No one appeared to claim the barkentine. The 850 barrels of salmon, the proceeds of the voyage, were claimed by C. E. Whitney & Co. as their property, and were released upon their giving a good and sufficient bond in the sum of \$2,000. The vessel, not having been claimed, was sold by the United States marshal. The proceeds of the sale, however, were insufficient to satisfy in full the claims of the libelants for wages, and they now seek, by these supplementary proceedings, to obtain full satisfaction from the cargo—the 850 barrels of salmon caught on the voyage—for the several balances due them. For this purpose an amended libel was filed on November 17, 1896, seeking to reach and subject the cargo to the several deficiencies in favor of the libelants. Exceptions were presented to the amended libel, and, after hearing duly had, these were sustained. A second amended libel was thereupon filed on January 5, 1897, to which exceptions have again been presented. These exceptions raise two questions: (1) Whether the libel sets out any facts sufficient to entitle the libelants, or any of them, to any lien on the cargo or any portion thereof; (2) whether the libel should have been verified.

The second amended libel, after alleging that the libelants shipped as seamen and fishermen on board the barkentine Marion, the nature and extent of the voyage, the rate of wages, and the several amounts due them, less deductions for slops and advances, and the further fact that the vessel was, upon the original libel, sold to satisfy their claims, and that the amount realized was insufficient to pay in full their respective claims for wages, sets forth:

"Seventh. That at said Cook's Inlet, Alaska, the said owners of the said vessel caught, by and through the aid of the libelants, and as the property of the said owners, a large amount of salmon, which were salted, cured, and barreled by the said libelants for the said owners at said Cook's Inlet, and the said vessel proceeded from said Cook's Inlet to San Francisco with the said cargo on board, at which place the same was safely brought, libelants, and each of them, assisting to bring the same, as seamen on the said vessel; the total amount of salmon so caught, cured, barreled, and brought into San Francisco being 850 barrels, and at all of said times being the property of the said owners of said vessel. Eighth. That the said salmon owes freight money to the said vessel, which has not been paid, the freight money so owing being, as libelants are informed and believe, and on information and belief so aver the fact to be, the sum of \$1,750, which said amount would be a reasonable sum as freight money for bringing the same into San Francisco as cargo of said vessel; and libelants aver that they further have a lien thereon for their services in catching, curing, barreling, and bringing the same into San Francisco as aforesaid."

The only question is whether, under these allegations, the libelants have a lien upon the cargo which will be recognized and enforced in the admiralty. The general rule with respect to the lien of seamen for their wages is that they have a lien upon the ship and freight. Pars. Mar. Law, 579; *Brown v. Lull*, 2 Sumn. 443, 452, Fed. Cas. No. 2,018. Rule 13 of the general admiralty rules of the supreme court provides that:

"In all suits for mariners' wages the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or master alone in personam."

It will be noticed that nothing is said in this rule about any proceeding against the cargo to enforce the lien. In the case of *Sheppard v. Taylor*, 5 Pet. 675, where it was sought to enforce the lien for seamen's wages upon the cargo, it was said by the court, through Mr. Justice Story:

"We think there is no claim whatsoever upon the proceeds of the cargo, as that is not in any manner hypothecated, or subjected to the claim for wages."

But it has been decided that where the owner of the ship is also the owner of the cargo, the seamen have a lien on the cargo in the nature of a charge upon the freight. *Poland v. The Spartan*, 1 Ware, 130, Fed. Cas. No. 11,246; *Skolfield v. Potter*, 2 Ware, 402, Fed. Cas. No. 12,925; *In re Low*, 2 Low. 264, Fed. Cas. No. 8,558; *The Antelope*, 1 Low. 130, Fed. Cas. No. 484; *Story v. Russell*, 157 Mass. 157, 31 N. E. 754. The reason for this is clear. The sailor has a paramount lien on the ship and freight. If the owners of the vessel be also the owners of the cargo, no freight *eo nomine* is earned, unless we assume that the owners of the cargo pay to themselves, as owners of the vessel, the freight which is due. The seamen, therefore, in such a case, would be deprived of any recourse against the freight, upon which, by the general admiralty law, they have a lien. As was said in *Sheppard v. Taylor*, 5 Pet. 675, "freight is the natural fund out of which seamen's wages are entitled to be paid." To protect the seaman against such a contingency, thereby depriving him virtually of his lien on the freight, the rule referred to in the cases cited has been evolved; that is to say, his lien upon the cargo is recognized and enforced where the owner of the ship is also the owner of the cargo. It is, in effect, a lien on the cargo for a charge in the nature of freight. *Poland v. The Spartan*, *supra*. I find nothing inconsistent with this doctrine in the case of *Sheppard v. Taylor*, *supra*, cited by counsel for claimant of the cargo. While it is true that the owners of the ship in that case were also the owners of the cargo, and no freight *eo nomine* was earned, still there were three distinct funds, representing respectively the value of the vessel, the cargo, and the freight. It is obvious, therefore, that no recourse could be had against the cargo. Nor can rule 13 be deemed to conflict with the views stated; for, while the rule says nothing about any proceeding against the cargo, yet the distinction must not be overlooked or confounded that the proceeding against the cargo, in this and other cases of a similar nature, is really against the freight which the cargo has incurred. As was aptly said by Judge Ware, in *Poland v. The Spartan*, *supra*:

"If the seamen can enforce their claim against the goods taken on freight, I see no reason, in principle, why they may not against the goods of the owner or charterer of the ship. The nature of their service is the same, and if it gives them a *jus in re*—if it creates a lien which adheres to the thing—it adheres to it, whoever may be the owner. Their own labor has been incorporated into the value of the merchandise in one case as it has in the other. The authorities go directly and fully to the point. The merchandise is declared to be hypothecated for wages, as well as the freight,—that is, as I understand the law, hypothecated to the wages to the amount of freight due upon it; and the merchant is not entitled to receive his goods until the lien is discharged."

I am of the opinion that the allegations of the second amended libel are sufficient to base a proceeding against the cargo to enforce the lien of the libelants for their balance of wages.

With respect to the verification of the libel as amended, rule 3 of the rules of the district court of the United States for the Southern district of New York, which were adopted as the rules of this court, provides:

"Libels (except on behalf of the United States) praying an attachment in personam or in rem, or demanding the answer of any party on oath, shall be verified by oath or affirmation."

Rule 5 provides that:

"Libels, informations, or petitions, praying a monition or citation only without attachment, need not be sworn to."

The libel, in its amended form, does not pray for any attachment, the cargo having been released upon a stipulation given therefor upon the original libel; nor does it require an answer under oath. As I understand that all the libelants are absent from the jurisdiction of the court, and the original libel was sworn to, I shall not require the amended libel to be sworn to in the absence of any special reasons therefor. The exceptions to the second amended libel will therefore be overruled.

VAN DEN TOORN v. LEEMING et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

GENERAL AVERAGE — WHEN ALLOWED — REPAIR OF CRACKED SHAFT — SUBSEQUENT BREAKDOWN.

A steamship bound for New York discovered a crack in her shaft when about 316 miles from Sandy Hook. The shaft was strengthened by bolts, and she proceeded at reduced speed until 16 miles from Sandy Hook, when the shaft broke and greatly damaged the machinery. Contribution was claimed on the ground that the risk to the ship was foreseen, and deliberately undertaken in order to save the ship and cargo the great expense of towage. The evidence showed, however, that, while the officers recognized the possibility of a new breakdown and further damage, they confidently believed that it could be avoided. *Held*, that there was no such voluntary sacrifice of the ship to save cargo as was necessary to make a case of general average. 70 Fed. 251, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in personam by William H. Van Den Toorn, as agent and trustee, against Thomas Leeming and another, to enforce contribution in general average from defendants as consignees of certain cargo shipped on board the steamship Schiedam. The district court rejected the main item of damage for which contribution was claimed (70 Fed. 251), and the libellant has appealed.

Harrington Putnam, for libellant.

Clifford A. Hand, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libellant, in behalf of the steamship Schiedam, filed a libel to recover from the respondents \$1,-

158.90, as the contribution from their part of the cargo for general average expenses incurred by the ship. The district court decreed payment of \$181.21, which was the amount admitted to be due after the rejection of the damages which were held not to be properly included in general average. From this decree the libelants appealed.

The facts of the case are succinctly stated by the judge of the district court, as follows:

"The above libel was filed to enforce the payment of general average contribution against one of the consignees of cargo on board the steamship Schiedam, which arrived in this port from Rotterdam on July 14, 1891. When 316 miles to the eastward of Sandy Hook, on the evening of July 10th, between half past 7 and 8 o'clock, a crack 18 inches long was discovered on one side of the main shaft, mostly inside of the after bearing, and about 2 feet from the crank. This was temporarily repaired during the 24 hours following by drilling the shaft, which was 14½ inches in diameter, and inserting two iron bolts, 11 inches long and 1¾ inches in diameter, across the line of the crack. The ship then proceeded on her voyage at about three-fourths of full speed (making 37 or 38 revolutions per minute, instead of 50 to 52, full speed), without interruption, for 38½ hours, to within about 16 miles of Sandy Hook Lightship, when, after having thus made about 300 miles, the shaft suddenly broke wholly off at about 10 a. m. of July 13th, at the original place of fracture. The fractured parts, riding each other, carried away the bearings, damaged the bed plate and channel way, and did much other injury to the machinery. At about 2 p. m. of the same day the ship was taken in tow by a tug, and reached Quarantine, at Staten Island, at 9 p. m. For this latter service \$1,000 was allowed as salvage compensation. The Schiedam, 48 Fed. 923. A general average account was afterwards adjusted, amounting in all to \$17,508.65. In this charge was included, not only the expense of the towage last named, with other items concerning which there is but slight difference, but also charges to the amount of about \$13,000 on account of the damage done to the vessel and machinery by the last violent breakdown of the shaft. No charge was made for the cracked shaft itself, nor for any injury supposed to have been done to the bearings before the repair to the shaft was made."

The only matter in controversy was the liability of the cargo to pay its proportional part of the damage to the ship which resulted from the final break of the shaft. The claim for general average was founded upon the alleged fact that the risk of a great injury to the vessel was foreseen, and was deliberately undertaken in order to protect the cargo and ship from the large salvage expenses which would be incurred if towage was accepted as an alternative, and that thus the consequences of the final breakdown were a sacrifice voluntarily undertaken for the benefit of cargo and vessel.

The principles which are at the foundation of general average were elaborately discussed before the supreme court in the cases of *Barnard v. Adams*, 10 How. 270; *Dupont de Nemours v. Vance*, 19 How. 162; and in *The Star of Hope*, 9 Wall. 203. In the first-named case, the court announced, with precision, the three things which must concur "in order to constitute a case for general average," which can be summarized as follows: (1) A common, imminent danger, to be overcome by voluntarily incurring the loss of a portion of the whole to save the remainder; (2) a voluntary casting away of some portion of the joint concern for the purpose of saving the residue; (3) the attempt must be successful. The controversy in this case is not in regard to the principles which are applicable to it, but it is whether the facts are those which ought to exist in order to create a case for general average. We say "ought to exist," for it is worthy of

note that the tendency of modern adjustments is to enlarge the boundaries of expenses which are included in the adjustment. The question of fact is whether there was, at the time of the repair of the shaft and the decision to proceed to New York under the vessel's steam, a voluntary, expected sacrifice of anything; whether there was even a decision to enter upon a peril to the ship; or whether it was the usual case of repair, in the belief that the port of destination, 316 miles distant, could be reached in safety. Upon this point we fully concur in the conclusion of the district judge that:

"The evidence going to show any expected sacrifice on the part of the ship, or an expectation of such damage as actually happened, is not as strong or as convincing as is stated in the libellant's argument. The evidence hardly shows more than the recognition of a possibility of injury, but with a confident expectation that any breakdown would be avoided."

The testimony of the chief engineer, who was, presumably, the officer most conversant with machinery, is significant. In reply to the question by the counsel for the libellant, "Why was it that you decided to make these unusual repairs, and take these risks of proceeding under your own steam, instead of taking a tow?" he said: "In the first place, I knew that I could make the repairs, and that it could do the work, as was evident by its going 300 miles. And, in the second place, it was for the purpose of saving the expense of being towed." Both the captain and the engineer knew the possibility of a new breakdown, and the probabilities of further damage if the renewed break occurred; but that their decision amounted to a determination to sacrifice the vessel, if need be, in order to save towage, does not seem to have occurred to them. The efficiency of the repairs was not as lasting as the engineer expected, for an injury to the ship subsequently happened; but this unsuccessful result does not entitle the ship to classify the use of the machinery and its injury, after a repair which was entered upon without foreboding, as a voluntary sacrifice for the purpose of rescue from a common danger. Our attention has been called to the provisions of the seventh York Antwerp rule, as indicating the recognition of the principle that the damages to the machinery of the Schiedam should be allowed. The rule is as follows:

"Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage."

The circumstances to which that rule is limited did not exist in this case. The decree of the district court is affirmed, with costs.

HURON BARGE CO. v. TURNEY et al.

(District Court, N. D. Ohio, E. D. March 3, 1897.)

DEMURRAGE—DETENTION IN LOADING, ETC.—MEASURE OF DAMAGES.

The measure of damages for detention of a vessel, in loading or unloading, beyond the time stipulated in her charter, is the probable net earnings of such vessel during the period of her detention, and an inquiry into a subsequent period is inadmissible.

Hoyt, Dustin & Kelley, for libelant.
Squire, Sanders & Dempsey, for respondents.

SAGE, District Judge. This case is before the court upon exceptions to the commissioner's report. Exceptions are filed by libelant, and also by respondents.

The case was brought by the Huron Barge Company, as owner of the steamer Pathfinder and her consort, the Sagamore, a tow barge, against Turney and Jones, upon a contract of charter party, made in the fall of 1893, whereby said two vessels were to transport cargoes of coal for respondents from Cleveland, Ohio, to Manitowoc, Mich. Respondents were to furnish separate docks for the vessels, and load them at Cleveland in three days, and furnish them with separate docks at Manitowoc, and unload them in two days.

Upon the hearing before Judge Ricks, he found the charter to be as stated above, and that its terms were not complied with by respondents. A decree was entered against respondents, and the case referred to the commissioner to ascertain the amount of the damage.

The only questions left by the court to be determined by the commissioner were: First, how long the vessels were delayed at Cleveland and Manitowoc beyond the time fixed by the charter; and, second, the value of the time of the vessels, so lost, which is the proper measure of the damage suffered by the libelant by reason of the breach of the charter party.

The entire evidence adduced at the hearing was, by stipulation, to be treated as evidence before the commissioner. The respondents offered no additional evidence before the commissioner.

The case is now before the court upon the testimony taken before the commissioner on behalf of the libelant, and so much of the testimony which was before the court at the hearing as is relevant to the question of delay and the conditions of navigation during that time. The commissioner finds that the vessels were delayed at Cleveland and Manitowoc seven days beyond the time when they should have been loaded under the charter. But for that delay, the vessels would have been unloaded at Manitowoc, and free for other uses, on the afternoon of November 28, 1893. By reason of the delay, they did not get away from Manitowoc until December 5th,—seven days later.

The commissioner finds that the claim for delay is just, and that, had the vessels been loaded and unloaded as agreed, the libelants could have received cargo at Chicago, and delivered it at Buffalo before the expiration of their insurance; that the libelants claimed that it was their intention to take the cargo from Chicago to Buffalo, and discharge it, and then bring their vessels to Cleveland, and lay them up, unless they should receive a good rate for the winter storage of grain at Buffalo.

He further finds that, had the delay not occurred, and had the vessels arrived in Chicago on the 29th of November, they could hardly have made the trip to Buffalo, discharged their cargoes, and returned to Cleveland before the expiration of their insurance, as it would have taken six days to load the vessels at Chicago and make the run

to Buffalo, which would have brought them there on the morning of the 5th of December, not quite allowing them time to unload at Buffalo and return to Cleveland under insurance; that, therefore, they would have had to lay up at Buffalo, or take a cargo for winter storage. As it was, they were obliged to lay their boats up in Chicago, and store them with grain for delivery at Buffalo in the spring. He further finds that, while they did not make the trip from Chicago to Buffalo in the fall, they received winter storage in Chicago, where they laid up, and went to Buffalo in the spring; and, further, that the libellant suffered by this change, and delays in Buffalo in the spring, which they would not have suffered had they made the trip in the fall. For these reasons, he finds that the libellant is entitled to recover for the delay in the loading and unloading, and for the detention at Buffalo, but not for the full charter value of the vessel, as claimed for the libellant. He proceeded to make a finding that the fixed charges or expenses of the two vessels were \$136.32 per day during their detention, and that they were entitled, for seven days' detention in loading at Cleveland, to these fixed charges or expenses, amounting, for seven days, to \$954.24, and for nine days' detention at Buffalo, in the spring of 1894, at the same rate of \$136.32 per day, \$1,226.88; making a total of \$2,181.12,—assuming that the fixed charges per day at Buffalo would be the same as they were at Cleveland and Manitowoc. He also allowed interest on \$3,477.96, the net freight of the cargoes, from December 6, 1893, to April 10, 1894, being the estimated time the freight was earned in the spring, allowing five days from Chicago to Buffalo; the testimony showing that the boats left Chicago on the morning of April 5, 1894.

The objection to these findings is that they are based upon a departure from the established rule of damages. That rule is, as was laid down in *Williamson v. Barrett*, 13 How. 101, that the amount of the loss is the market value of the use of the vessel, or her probable net earnings during the period of her detention. The supreme court, in passing upon that case, said:

"If there is no demand for the employment, and, of course, no hire to be obtained, no compensation for the detention during the repairs will be allowed, as no loss would be sustained; but, if it can be shown that the vessel might have been chartered during the period of repairs, it is impossible to deny that the owner has lost, in consequence of the damage, the amount which he might have thus earned. The market price, therefore, of the hire of the vessel, applied as a test of the value of the service, will be, if not as certain as in the case where she has a charter party, at least so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made. It can be ascertained as readily, and with as much precision, as the price of any general commodity in the market, and affords as clear a rule for estimating the damages sustained on account of the loss of her services as exists in the case of damage to any other description of personal property of which the party has been deprived."

In the case of *The Cayuga*, 2 Ben. 125, Fed. Cas. No. 2,535, the libellant's craft was a ferryboat; and the court held that:

"There being no market price, a judgment as to her value, given by men having experience upon the ferries, founded upon their knowledge of the business, is the natural way to ascertain the loss."

This case was affirmed by the circuit court (see Fed. Cas. No. 2,537), and by the supreme court in 14 Wall. 270.

Spencer, at section 204 of his work on Marine Collisions, states the rule as follows:

"A convenient method of determining such loss, and one often resorted to by the courts, is by ascertaining what the vessel was earning at the time of or immediately before the collision; and by ascertaining what, if any, provisions have been made for the continuance of such earnings. Where there is no other evidence of the earning capacity of the ship than is shown by the charter or contract under which it is employed at the time of the collision, the average daily earnings under it may be taken as a standard of measurement. It is not necessary, to entitle a recovery for damages, to show that the injured vessel was actually under charter during the time of the detention. If it is clearly shown what the market value of the use of vessels of the class in question was or is during the time, recovery may be had for such sum, where it is shown with a reasonable degree of certainty that the vessel would have been actually employed, but for the detention."

In *The Margaret J. Sanford*, 37 Fed. 148,—a circuit court case, decided by Wallace, J.,—it appears from the syllabus that:

"The *T.* was a 'tramp' steamer, occasionally visiting the port of New York, and was under a charter for a voyage to Bombay, on which she would have earned, above expenses, \$70 per day. The charter stipulated for demurrage at the rate of £45 per day, while it appeared that the customary allowance at the port of New York for the detention of vessels the size of the *T.* was \$262 per day. The vessel had no engagement beyond the immediate voyage, and it was shown that after her arrival at destination she found immediate employment. Held, that neither the demurrage rate specified in the charter nor the customary demurrage rates at the port of New York supplied a satisfactory criterion of the loss sustained by the vessel's detention during repairs; that the amount of consequential loss was the market value for the use of the vessel, or her probable net earnings, during the period of detention; and one way of ascertaining this was by finding what she was earning at the time, or immediately before and after the collision; and that if, at the time, she was employed under a charter for a long period of time, the average daily earnings under the charter may be taken as a criterion."

Spencer, in his treatise on Marine Collisions, speaking of loss of anticipated profits in cases of collision, says, in section 203:

"There must, of necessity, be some limit beyond which recovery for prospective profits cannot be permitted, beyond which inquiry as to probable results would partake too much of the fanciful or speculative to afford a safe guide to conclusions. In the absence of a better limitation of inquiry, the courts have limited recovery to the voyage entered upon when collision occurs, and only then upon proof so clear that it is divested of all substantial doubts that, had the collision not occurred, profits for the voyage would have resulted to the ship."

This rule is in harmony with the rules stated in the authorities above, and the circumstances of this case, as developed before the commissioner and made the basis of his report, illustrate the wisdom of the rule, and the difficulties which result from a departure from it.

The commissioner found it necessary to consider the probability of detention of the vessels at Buffalo in the spring of 1894. In other words, he was at once forced to give attention to uncertain and speculative conditions which laid him open to the criticism that if his investigation was at all proper he should have extended it so as to have included a loss of one-half cent per bushel on 242,400 bushels of grain on the rate of winter storage at Chicago compared with the rate of winter storage at Buffalo,—that loss amounting to \$1,212; also extra expense of laying up at dock, transportation of crews to and from Chicago, tug bills from Chicago to South Chicago, estimated at \$1,000, which should be added to the commissioner's allowance.

My conclusion is that the libellant's exceptions to the commissioner's report are well taken; that the rule of damages is the probable net earnings of the vessels during the period of their detention, and that inquiry into a period subsequent is inadmissible.

Respondents' exceptions call into question rulings made by the judge who presided at the hearing. Those rulings will not be reviewed upon these exceptions. This court is not now sitting in error upon the decision made by the learned judge who ordered the decree under which the commissioner acted. The respondents' exceptions are therefore overruled.

The case will be remanded to the commissioner, with instructions to prepare a report in accordance with this opinion.

THE FRANCISCO R. v. THE WATERLOO and THE GLENALVON.
THE NORWOOD v. SAME. SAME v. GIRARD POINT STORAGE CO.
(District Court, E. D. Pennsylvania. February 19, 1897.)

Nos. 44, 49, and 50.

1. COLLISION—VESSELS BREAKING FROM WHARF IN STORM.

Two large vessels were moored side by side to a wharf in the Schuylkill river, off Point Breeze. Heavy rains had fallen, and the water was rising, when, during a storm, one of the posts of the wharf pulled out. A careful examination of the remaining posts was made, but nothing was found to create a doubt of their sufficiency. The water continued to rise, increasing the vertical strain, accompanied by high winds, and on the next day another post pulled out. The vessels could not then be moved without peril to themselves and to others, but new lines were taken to the only other available post. The flood and wind still increased, and, on the following morning, the remaining posts pulled out in succession, the vessels swung out from the wharf, and their sterns struck and injured two vessels on the opposite side of the river. *Held*, that the vessels doing the injury were not liable, as they had taken all the precautions practicable; that they were not blamable for mooring side by side, as was customary; and that it did not appear that it would have been either practicable or serviceable to carry an anchor ashore, and imbed it in the earth, after the first posts gave way.

2. WHARVES—INSUFFICIENT POSTS — VESSELS BREAKING AWAY — DAMAGE TO OTHER VESSELS.

The posts of a wharf on the Schuylkill river, to which two large vessels were moored, pulled out under the vertical strain caused by the rapid rise of the water due to heavy rains, accompanied by high winds, so that the vessels swung across the river, and damaged other moored vessels. *Held*, that the wharfinger was liable for the damage, it appearing that the wharf was old, and had been insufficiently repaired, and that the posts were so short as to extend only about five or six feet below the upper surface of the wharf, instead of being driven deep into the earth.

John Q. Lane, for the Francisco R.

John F. Lewis and Horace L. Cheyney, for the Norwood.

J. Rodman Paul, for the Waterloo.

Francis C. Adler and Theo. M. Etting, for the Glenalvon.

J. Hampton Barnes, for Girard Point Storage Co.

BUTLER, District Judge. On Monday, May 21, 1894, the Francisco was lying at the Ballast wharf, on the western side of the Schuylkill, off Point Breeze. A short distance below at this wharf,

the Norwood was lying. At the same time, the Waterloo and Glenalvon were moored at the storage company's wharf, on the eastern side of the river, opposite the Francisco, the Glenalvon lying next the wharf and the Waterloo by her side. The latter vessels are very large and heavy, and were attached to the wharf in the usual manner, with lines fastened to eight of its posts. For several days prior to the 21st rain had fallen almost constantly, and the water was high and rising. The preceding Saturday was clear until the afternoon, when a thunderstorm of short duration occurred, accompanied by a severe blow from the east. The consequent strain upon the posts at this time drew one of them out. A careful examination of the remaining posts and attachments was then made and nothing was discovered to create doubt of their sufficiency. On the following night rain commenced again and continued pretty steadily throughout Sunday, accompanied by high wind. In the afternoon of Sunday another of the posts pulled out, when additional lines were taken to the only other available post on the wharf. The character of the weather and condition of the river were such that the vessels could not be moved without peril to others as well as themselves, after the storm of Sunday night. On Monday morning the flood was very great and the wind high. Early in that day other posts pulled out, one after another in pretty rapid succession, until all were gone; and the vessels swung out from the wharf with their sterns across the river, striking and damaging both the Francisco and the Norwood. For this damage the Francisco libeled the Waterloo, charging her with failure to adopt proper measures to secure herself from drifting; and the Norwood proceeded against the Waterloo and the storage company, making a similar charge against the former, and charging the latter with negligence as respects its mooring posts. Thereupon the Waterloo brought the Glenalvon in, charging her with negligence contributory to the collision.

I think it sufficient to say without entering upon a lengthy discussion of the evidence, that I do not believe either the Waterloo or the Glenalvon guilty of fault. They appear to have done everything reasonably practicable to secure themselves against breaking away. As before stated they could not move without serious peril after the danger became apparent; indeed it was not urged on the argument that they could; and I am unable to see what additional efforts they could have made to secure themselves to the wharf. The pulling out of a post on Saturday in the squall of that date, was not an indication that the remaining posts were unsafe; their successful resistance of the strain on that occasion and their appearance after it justified a belief that they were safe. Subsequently when another gave way as the water rose and the vertical strain increased, the only additional post available was used. The claim that an anchor should have been carried ashore and imbedded in the earth, cannot be sustained. I see no reason to believe that an effort to do this would have been serviceable. The use of an anchor under such circumstances, for the purpose indicated, is probably unprecedented. The opinions of inexperienced persons on this subject are hardly worthy of consideration. The small anchor used by the little ves-

sel lying above, to assist in keeping her head to the wharf, where the strain was slight, may have been useful; but such an anchor carried ashore from the stern of these large vessels, where the strain was greatest, and hastily imbedded, even if practicable in their positions, would have been useless. No complaint can justly be founded on the fact that the vessels were moored side by side. This is a usual and approved method of mooring, and is practiced at all wharves where there is much commerce in this country, and probably elsewhere. Without it vessels could not, at many times, find wharfage. It follows that the Francisco's libel must be dismissed, with costs.

The Norwood, however, as we have seen, libeled the wharfinger (the storage company) also. Was it guilty of negligence in the provision made for mooring? Were the posts insufficient as charged? It is the duty of wharfingers to provide safe places for vessels, in storm as well as in fair weather. They are not insurers, but are held to a high degree of care in providing against all the perils that vessels may be expected to encounter at their wharves. *Allegheny City v. Campbell*, 107 Pa. St. 530; *Willey v. Allegheny City*, 118 Pa. St. 490, [12 Atl. 453]; *Crawford v. Allegheny City* [(Pa. Sup.) 16 Atl. 476]. No part of a wharf more especially demands care than the means provided for mooring. If these are equal to the best employed, such as experience has proved to be safe under all circumstances at similar wharves, the wharfinger cannot be complained of on this account. Here the vessels trading are of the largest and heaviest character, and provision for mooring should have been made accordingly. Posts sufficient to hold small vessels would be inadequate. The evidence respecting the posts which gave way, is conflicting; but in my judgment its weight is against the wharfinger. It shows, I believe, that the posts were too short, that an insufficient length was imbedded, and that proper means were not employed to guard them against the danger of lifting out under vertical strain, such as they were subjected to in this instance; and must always encounter in times of flood and storm. While they appeared to the eye to be safe, the result proved that there was substantially nothing to hold them down; and the evidence which this result affords is entitled to greater weight than the statements of witnesses who repaired the wharf. It is a significant fact that the wharf was constructed in 1865, when the adjacent channel (as was asserted on the argument without contradiction) was sufficient only for the passage of small vessels, and that the posts then inserted remained in use until the date of this accident, notwithstanding the fact that the channel had in the meantime been deepened and improved so as to accommodate the class of large vessels to which the Waterloo and Glenalvon belong. It appears that in 1893 repairs were made to the wharf by removing rotten parts, inserting a few new posts a little longer than the old ones, and resetting those of the old which were allowed to remain; but notwithstanding these repairs Mr. Pringerhoff, who superintended the work, says the wharf was not brought up to its original standard. It was mainly, if not entirely, the old posts, which were not over I think 12 feet long, and did not extend

below the upper surface of the wharf more probably than 5 to 6½ feet, and not below the framework at all, that drew out on this occasion. They seem to have come up clearly without tearing away any material part of the framework, as if no adequate means had been employed to hold them down. I say this notwithstanding the declarations of witnesses who assisted to make the repairs, because it seems to be fully warranted by the circumstances of the case. After a careful examination of all the evidence on the subject I am convinced that the posts were insufficient; that they should have been much longer and, as I believe, should have extended through the cribbing of the wharf, been driven deeply into the earth below, and been securely fastened to this cribbing as well. I have not overlooked what the wharfinger's witnesses say respecting the usual and proper method of securing posts, but other evidence is, in my judgment, entitled to greater weight. The indisputable circumstances of the case—the ease with which these posts were lifted out, and the wharfinger's subsequent acts in repairing the wharf seem to leave no room for reasonable doubt that the statements of these witnesses on their examination in chief are not reliable. The acts of the company in repairing the wharf are a virtual admission of the insufficiency of the old posts. Instead of again inserting similar ones, or securing those inserted in a similar way, they inserted new posts several times longer, passing the lower ends entirely through the frame of the wharf and imbedding them deeply in the earth below. It is true that the storm was extraordinary, though not much more so than occurs annually, and it is urged that the company learned something from it, and repaired accordingly. They could not, however, have learned anything on the subject involved that previous storms should not have taught. In all times of high flood and wind the posts are subjected to vertical strain. It is true that these posts were not previously lifted out, but it is probable they were never before subjected to the united strain of two such vessels in unusual flood and storm. The storage company cannot of course object that these vessels were moored side by side. It invited them to moor in this manner and received compensation accordingly. It will not avail the company to say that better posts would not have withstood the strain on this occasion, and that the accident must, therefore, be ascribed to the "act of God." The posts being insufficient and this insufficiency furnishing an adequate cause for the accident it must be ascribed to this cause and not to an "act of God." The storage company must, therefore, be held responsible for the consequences.

I do not think there is any justification for the charge that the Norwood threw off her stern line as the Waterloo swung towards her, and thus contributed to the injury. I believe the witnesses who say she did are mistaken. The men upon her at the time say she did not, they explain what was done, and what may possibly have led to the mistake. There was no motive for casting off the line. The act would necessarily increase her danger, and I do not believe she did it. The Norwood's libel against the storage company must, therefore, be sustained with costs.

THE TITAN.

LEGG et al. v. THE TITAN et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

COLLISION—TUGS AND TOWS.

A steamer, with tows lashed to her side, and a tug aiding her on a hawser ahead, after passing up the eastern side of Blackwell's Island, with a flood tide of about five miles an hour, turned to cross the head of the island, to make a landing at Eighty-Sixth street, New York. In so doing, they attempted to cross the bows of a small tug, with two heavy tows, which was coming up the west side of the island, and which failed to hear their first signal. A collision resulted, causing the loss of a tow. *Held*, that the first-mentioned steamer and tug were guilty of contributory fault, in failing to observe that the other tug would be unable to check her tows sufficiently in the strong tide to pass behind them, and in not keeping further away and allowing a wider margin of safety.

Appeal from the District Court of the United States for the Southern District of New York.

Goodrich, Deady & Goodrich, for appellants.

James J. Macklin and Louis B. Adams, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the owners of the steam vessels the Titan and the Thomas Hunt from a decree condemning them, together with the steam tug Unit, for the loss of the schooner Isle of Pines and her cargo in consequence of a collision between the schooner and a barge in tow of the Titan and the Hunt. The owner of the Unit has not appealed, and the sole question, therefore, is whether there was contributory fault on the part of the appellants' vessels in causing the collision. The collision took place in the East river in the forenoon of June 19, 1893, in the westerly channel, near the upper end of Blackwell's Island, and opposite Eighty-Sixth street, New York City.

The steam tug Unit, having in tow the schooner Isle of Pines, lashed on her starboard side, and the schooner Ella Frances, lashed on her port side, was proceeding up the westerly channel of the river, between New York City and Blackwell's Island, on a flood tide of about 6 miles an hour, making a speed in addition of about 2 miles an hour. The steamboat Thomas Hunt, with the steam tug Titan ahead, attached to the Hunt by a hawser about 30 fathoms long, the Thomas Hunt having two barges in tow,—the Vanderbilt, lashed on her starboard side, and the Warren, lashed on her port side,—each projecting about 25 feet beyond her stem, were proceeding up the easterly channel of the river, intending to land at Eighty-Sixth street, on the westerly side of the East river. The Hunt, with her fleet, was making a speed of about 10 miles an hour with the tide, which was running in that channel at about 5 miles. Shortly before reaching the upper end of the island the Hunt discovered across the island the Unit and her tow; the latter at the time being nearer the Blackwell's Island shore than the New York shore, nearly opposite Eighty-Fifth street, and not far behind the Hunt. Before turning to cross the head of the island, the Titan

had blown a long whistle, indicating her intention to land at Eighty-Sixth street, but this was not heard by the Unit. After she had turned to cross the river to her landing, and while the Hunt was rounding the head of the island, the Titan blew another whistle to the Unit, indicating her intention to cross the river in front of the Unit. The Unit immediately answered the signal with a single blast of her whistle, and followed this very quickly with alarm whistles, and reversed her engine. The Titan cast off the hawser of the Hunt, and the Hunt reversed her engines; but the bow of the Isle of Pines came in collision with the bow of the Vanderbilt, causing the Isle of Pines to sink. When the alarm signals were given, the Titan was making directly across the river, and had passed or was passing in front of the Unit, and the Unit had headed somewhat to the easterly in the attempt to pass astern of the Hunt.

We are satisfied, upon a careful reading of the proofs, that, when the Titan rounded the head of the island to cross the river, she did not make sufficient allowance for the inability of the Unit to control her tows in the strong tide and reduce her speed sufficiently to pass between the Hunt and the head of the island, and that this was due to the failure of the pilot of the Titan to vigilantly observe the Unit. The Unit was an old and small tug, and both of her tows were deep-laden with cargo, and her power was insufficient to hold her tows against the strong flood tide. If the pilot of the Titan had carefully observed her when he began to shape the course of his vessel to cross her bows, he would have discovered that, incumbered as she was, she could not check her speed efficiently and quickly change her course, and that unless she could she would be unable, within the time required, to pass astern of the Hunt without risk of collision. There was plenty of room for the Titan to allow a larger margin of safety for the maneuver. If the Titan had kept further away in the direction of Mill Rock, as she might have done, all hazard would have been avoided. This would have been more inconvenient for the Titan, but it was obviously the more prudent course. The answering signal from the Unit, given as it was when the risk of collision was so obvious that it was immediately followed by her alarm whistles, had no appreciable effect upon the conduct of the Titan or the Hunt. We agree with the district judge that the attempt by the Titan and the Hunt to cross the bow of the Unit was dangerous and unjustifiable, in the circumstances of the situation.

The decree is affirmed, with interest and costs.

THE MOUNT HOPE.

GARFIELD & PROCTOR COAL CO. v. THE MOUNT HOPE.

(District Court, D. New Hampshire. February 24, 1897.)

No. 302.

1. COLLISION—SCHOONER AND TOW—SPEED IN FOG.

Four and one-half to five miles an hour, in much-frequented waters, during a fog, *held* not immoderate speed for a schooner, which was able by prompt action to avoid actual collision with a tow of unusual length, though she approached so close that the last barge, as an act in extremis, was cut adrift, and ultimately driven ashore and lost.

2. SAME—BARGE CUT ADRIFT IN EXTREMIS AND DRIVEN ON SHORE—PROXIMATE CAUSE.

A barge cut adrift from the rest of her tow in extremis, through fear of collision with a schooner alleged to have been moving at immoderate speed, was lost in the fog, and came to anchor for some three hours. The wind and sea increasing, she got under way with such sails as she had, to seek shelter, but after a time encountered a current which compelled her to anchor again. The wind rose to a gale, her cables parted, and she was driven ashore and lost. *Held*, that the speed of the schooner, even if excessive, was not the proximate cause of the loss, and she was not liable therefor.

This was a libel in rem by the Garfield & Proctor Coal Company against the schooner Mount Hope, to recover for the loss of a barge which was cut adrift through fear of collision with the schooner.

Chas. Theodore Russell, for libellant.

Carver & Blodgett, for defendant.

ALDRICH, District Judge. The Fantee was a coal barge engaged in carrying coal under tow from Southern to Northern ports, and at about half past 7 o'clock in the morning of September 19, 1896, left Vineyard Haven in tow of the steam tug Orion, for Baltimore. The tow consisted of the barges Lone Star, Macauley, and the Fantee, in the order named. At about half past 10 o'clock, when near Gay Head, the weather became thick and foggy, and so continued into the afternoon. There was a strong wind ahead from a southerly direction and some sea running. Each vessel in the tow was secured to the vessel immediately ahead by a hawser something like 160 fathoms in length (that between the Macauley and Fantee was somewhat longer), and the tow altogether was about three-fourths of a mile in length. The schooner Mount Hope (the alleged offending vessel) left Portsmouth, N. H., September 17, 1896, in ballast, bound for Baltimore, Md. On September 18th she came to anchor in Vineyard Sound, and at about 8:30 in the morning of September 19th left Tarpaulin Cove, and proceeded on her voyage in a southerly and westerly direction. At 10:30 she was closehauled on the starboard tack, with her lower sails set and her topsails and staysails furled, and her mechanical fog horn was being regularly sounded, and the wind was about southwest. At about 10:45, and while proceeding outside the sound south of the Vineyard Haven light ship, she heard the fog whistle of a steamer on her port bow. Very soon a dark object loomed up a little ahead, on her starboard bow, and at about the same time another on her port bow. The master of the Mount Hope, act-

ing upon the assumption that the objects which he had seen were barges in tow of the steamer from which he had heard the fog whistle, and fearing collision, put his helm hard to lee, let go the sheets of his sails, and at once brought his vessel around on the other tack. This maneuver avoided a collision, which was imminent, and which would have taken place but for prompt action. As it was, she was passed by the barge Macauley at a distance of about 100 feet. The Mount Hope did not come in actual contact with any of the vessels, and did not cross the line of the tow at any time. When she sighted the two objects, the one on her port bow and the other on her starboard bow, she maneuvered promptly, going into stays while abreast the Lone Star, came around on the port tack, and went clear. She then drifted past the Macauley in close and dangerous proximity, the situation of the vessels being such as to threaten danger to the Fantee, the rear vessel in the tow. At this time the hawser by which the Fantee was held in tow was cut by the Macauley. There is a conflict upon the evidence whether this action was taken by the Macauley upon her own motion or at the suggestion of the Mount Hope; but I look upon this conflict as immaterial, for the reason that the hawser was cut in reasonable apprehension of danger, and under such circumstances as to be treated as an act resulting from the exercise of judgment in extremis. The Mount Hope drifted with the wind without collision, but in dangerous proximity, across the port bow of the Fantee, which, although without motive power, was still making some headway, and the vessels parting were lost to each other in the fog. The Fantee had no sufficient means for signaling her condition to the Orion, but anchored, expecting her to return, sounding whistles until she anchored, and then bells. The Orion would have come to her rescue if she had known her condition, but the whistles did not reach her, and she was not aware of the fact that the hawser had been cut. The Fantee remained at anchor about three hours. The fog clearing in the afternoon, she found herself in an exposed situation, in the track of vessels, with the wind and sea increasing. About 3 o'clock she got under way with such sails as she had, and made for shelter, and at about 5 o'clock she encountered a current against which she could not make headway, and was forced to anchor off Nashawena. The wind became a gale, and at about 7 o'clock her cables parted, and she went onto the rocks, went to pieces, and became a total loss.

No complaint is made against the maneuvers of the Mount Hope, or her conduct subsequent to the time at which she sighted the tow. The only complaint is that she was negligent in running through water much frequented, at an immoderate rate of speed, in the fog, and that, although actual collision was avoided, her immoderate speed brought her into such dangerous proximity to the other vessels as to precipitate action in extremis, which set in motion a chain of causes from which the loss resulted; the primary fault, as is claimed, being the immoderate speed, which compelled the cutting of the hawser, and from which the chain of events leading to the loss naturally and necessarily followed. The probabilities are that the speed of the Mount Hope was from four and one-half to five knots per hour, quite likely five; but in view of the fact that she was able to avoid the

objects which she made out, and to go clear, and that the dangerous condition resulted from the fact that she was subsequently involved in an unexpected length of tow, I find that her speed was not immoderate. Moreover, if I were to assume that her speed was immoderate under the circumstances, and that the hawser was reasonably cut to avoid apparent danger presented by her precipitate and perilous proximity, still I should find and hold that her negligence was not the proximate cause of the loss, but that the loss resulted from other and intervening causes not foreseen, and for which the Mount Hope was not responsible. Libel dismissed.

THE NANNIE LAMBERTON.

THE FANNIE P. SKEER.

THE ROLLIN H. WILBUR.

EMPIRE TRANSP. CO. v. THE NANNIE LAMBERTON et al.

KIERNAN v. SAME.

(District Court, S. D. New York. December 11, 1896.)

TUG AND TOW MEETING STORM—DUTY TO MAKE EXAMINATION BEFORE ENTERING ROUGH WATER.

The tug N. L., with two other tugboats, came up through the Kills in threatening weather, with a large number of canal boats in tow. They went out of the Kills between 12 and 1 a. m. in a westerly gale, blowing 31 miles an hour, and in the rough weather of the upper bay the tugs were unable to handle the tow well, and several of the boats foundered from the rough seas. *Held*, that the tugs were in fault for leaving the Kills in such weather without the customary previous examination of the condition of the water and weather outside.

Macklin, Cushman & Adams, for libelants.

Goodrich, Deady & Goodrich, for claimants.

BROWN, District Judge. I do not think it necessary to make any extended reference to the testimony in the above cases. I am persuaded that there was not on the part of the tugs the exercise of that reasonable prudence which is necessary and customary before taking a tow out of the Kills into the bay in threatening weather. It is evident that after this fleet got into the bay, it experienced very rough weather. The three tugs were, in fact, insufficient to handle the tow efficiently. While in the Kills, the wind was naturally much less felt, as is well known. The necessity of caution in leaving the Kills when the weather is unpromising is well understood; and in many cases the practice of sending out a tug in advance to observe the weather in the bay, before taking out the tow, has been proved before me; and if there were no such proof, considering the dangers likely to be encountered in the bay on moving from a partly sheltered to an exposed situation, the necessity of such examination would be an obligation of reasonable prudence. The evidence indicates also that on this same night at about the time the defendants came out, a Pennsylvania tow made

such previous examination, and did not come out till morning, though better equipped in force than the defendants' tugs.

The weather in this case was unpromising from the time the tow left Perth Amboy. It was rough, and blew a gale when crossing Newark Bay. This was itself sufficient notice of the necessity of special caution before leaving the Kills. Between 12 and 1, when the tow left the Kills, it was blowing 31 miles an hour—a smart gale from the westward—altogether dangerous for such a tow of open boats to meet. I do not find sufficient evidence to charge the tow injured with any fault, or with any degree of unseaworthiness. The very rough night affords, it seems to me, a reasonable explanation of all the defendants' criticisms.

Decrees for the libelants, with costs.

THE VICTORIA.

THE POCAHONTAS.

THE KOMUK.

MINCH v. THE VICTORIA et al.

(District Court, S. D. New York. February 15, 1897.)

TUG AND TOW—DUTY OF EXAMINATION BEFORE ENTERING ROUGH SEA AND WEATHER.

The tug V., with two other tugs coming down the North river with a fleet of canal boats, ran into a violent southeast storm and rough water in Haverstraw Bay, in which the tow was afterwards broken up. There was abundant previous warning of storm, both from the ordinary indications and from cautionary signals displayed, and the tug entered Haverstraw Bay without previous examination of the condition of the bay. *Held*, that the tug was liable for lack of reasonable prudence with such a tow, and was responsible for the damage.

Carpenter & Park, for libellant.
Stewart & Macklin, for respondents.

BROWN, District Judge. The above libels were filed to recover for the injuries to and loss of certain canal boats and their cargoes, in Tappan Zee, in a storm, while coming down the Hudson river in tow of the above-named tugs on the morning of the 29th of August, 1893.

The libellant's boats were part of a fleet of 32 boats, i. e., 8 tiers of 4 boats each, which came from Albany in tow of Ronan's Line, on a hawser. On reaching West Point, in the evening of August 28th, the 3 tugs above named, which had come up from New York that afternoon and evening, took the tow, relieving the tugs that had brought it down from Albany. On the 28th, cautionary signals were given in New York, indicating the approach of a violent southeast storm. In crossing Newburg Bay considerable rough weather was met, with indications of storm. The tow, however, proceeded on from West Point, being more or less in the shelter of the Highlands until they reached Stony Point, at about 1 a. m.

At that time the wind was blowing strong from the southeast. Two hours before, it was blowing 21 miles an hour at New York, and at 1 o'clock it was blowing 31. The tugs, however, continued on past Stony Point without pause, or examination below to see if the weather was fit to proceed, and speedily ran into a heavy wind and sea, on a course nearly southeast, across Haverstraw Bay into Tappan Zee, until by the swamping and sinking of the canal boat Anthony, in the hawser tier, the tow was broken up. The subsequent damage was, I think, the incidental result of that breaking up of the tow, and of the endeavors of the tugs to take care of the boats.

A great deal of testimony has been taken, conflicting as usual, as regards the condition of the weather before and after passing Stony Point. I am satisfied that the tugs had abundant reason, through the cautionary signals that had been displayed, and from the signs of storm from the time the tow arrived at West Point, to require them to examine the state of the weather below Stony Point, before entering Haverstraw Bay. Above Stony Point there was abundant means of anchorage until the storm had subsided.

It is true the storm was one of unusual violence for the summer season; but this had been predicted. The testimony of the captains of the tugs indicates that they were not accustomed to pay attention to cautionary signals. If this is the practice, it must certainly be at their risk. In approaching exposed situations with boats of this character, not able to withstand heavy seas, it has often been shown before me that tugs are accustomed to go out ahead and make examination before taking tows out into an exposed situation (see *The Bordentown*, 40 Fed. 682); and this is required by reasonable prudence (*The Nannie Lamberton* [Dec. 11, 1896] 79 Fed. 121).

I must, therefore, hold the tugs liable on the ground that they did not use the reasonable caution required of them, nor heed the express evidences of a storm before reaching Stony Point, nor regard the previous public notice of a coming violent southeast storm, with which they must stand chargeable. In *re McWilliams* (*The Vandercook*) 65 Fed. 251, affirmed 20 C. C. A. 580, 74 Fed. 648.

The libellant is entitled to a decree, with costs.

THE HELGOLAND.

NEW YORK, N. H. & H. R. CO. v. THE HELGOLAND.

(District Court, S. D. New York. February 13, 1897.)

COLLISION—DAMAGE TO VALUABLE BARGE BY TWISTING—PERMANENT DEPRECIATION.

Where a new and valuable boat has received a permanent twist from a severe collision, and the boat in other respects has been repaired, but without complete straightening, in consequence of the great expense that complete repair would involve, *held*, that \$1,800 for damage or depreciation not covered by the repairs made was a reasonable allowance, and was upheld.

Henry W. Taft, for libellant.
Benedict & Benedict, for claimant.

BROWN, District Judge. Upon examining the testimony, I am of opinion that the allowance of \$1,800 for depreciation in this boat should be affirmed. I thus hold upon the ground that the twist given to the boat remained evident and palpable, notwithstanding all that could be done to correct it. The longitudinal bulkheads remained nearly five inches out of place; the deck resting upon the edges of the bulkheads, which were canted to starboard. Repair so as to make the boat completely straight, and in her former condition, would have been attended with very great expense,—far beyond the sum of \$1,800 allowed by the commissioner. It seems to me manifest from the nature of the case, as well as from the testimony, that a boat thus sprung and twisted has not the endurance, or the life, of a boat not thus strained and out of shape. The qualifications in Mr. Pierce's testimony, reading it all together, show, I think, that what he means is, that for present actual use she has all-sufficient strength to sustain contacts and collisions as before; but that she was built with a considerable surplus of reserve strength, which does not remain in the same degree as before.

In the case of *Petty v. Merrill*, 9 Blatchf. 447, Fed. Cas. No. 11,050 (the case chiefly relied upon by the respondents), Woodruff, J., observes:

"There may be proof of injury, which, though known, cannot be repaired without unreasonable cost, where the party in fault will be benefited by an allowance for actual depreciation, because an attempt to make complete repairs would involve an expense greatly disproportionate to the amount of such depreciation."

That, it seems to me, is precisely the present case. The allowance here is not on the vague notion that she is not as good, or will not sell for as much, simply because she has been in collision, when everything discoverable has been apparently rectified and repaired. Here what remains is palpably not repaired, and could not be, without great expense. This boat was one of the finest of the kind ever built, costing about \$21,000 a few months only before the accident. An allowance of between 8 and 9 per cent. for the inferior value and enduring power of the boat is, it seems to me, a fair and moderate allowance, of which the defendant should not complain.

Report confirmed.

ANDERSON LUMBER CO. v. GREENWICH INS. CO.

(District Court, S. D. New York. February 11, 1897.)

TUG AND TOW—TOP-HEAVY—DUMPING CARGO—INSURERS DISCHARGED.

The barge K., loaded with lumber, while being towed down the narrow channelway from West Duluth, rolled so as to dump her deck cargo partly to starboard and partly to port. On a conflict of testimony, *held*, that the circumstances showed that the barge was top-heavy and not loaded in a safe or seaworthy condition for the contemplated voyage to Tonawanda, and the insurers of the cargo were, therefore, discharged under the terms of the policy.

Hyland & Zabriskie, for libellant.

Butler, Notman, Joline & Mynderse, for respondent.

BROWN, District Judge. The above libel was filed upon a policy of insurance issued by the defendant to recover \$1,441.65 for the loss of a part of the deck load of the barge or schooner Knapp at Duluth, between 3 and 4 o'clock in the afternoon of August 22, 1895. The policy permitted a deck load. There were 220,600 feet of lumber in the hold, and 312,900 feet on deck. The load was about 12 feet high on deck, and she drew 12½ feet of water. She was taken in tow on a hawser by the tug Abbott at the upper dock of Merrill and Ring between 2 and 3 p. m. After going down the narrow channel about half a mile, i. e. about a quarter of a mile after passing the second bend, the barge rolled so as to dump a part of her deck load to starboard, and on recovery rolled to port and dumped another portion on the port side. The captain of the barge returned to Duluth and had an interview with Davis & Hunter, the shippers named in the bill of lading, in reference to saving the lumber that had been dumped overboard; but the cargo being covered by insurance, the shippers, conceiving that they should not meddle, refused to give any instructions, and according to the captain's testimony forbade doing anything. This last statement is, however, denied by the shippers. Notice by telegraph was immediately given to the insurers, who gave instructions for saving the lumber; but before anything could be done it was scattered and lost. The lumber was in fact owned by the libellant, a New Jersey corporation, who had bought it from the Cranberry Lumber Company of Duluth through Davis & Hunter, acting as inspectors or brokers; and who, in accordance with the custom at Duluth, after having measured the lumber, shipped it on board the Knapp, and forwarded to the libellant the bill of lading. In strictness, the duties and the legal authority of Davis & Hunter ended from the moment the shipment was completed. The libel alleges that the loss was by a sea peril within the policy. The evidence on the libellant's part tends to show that the dumping of the deck cargo was in consequence of some lack of care in towing the barge too fast down the narrow channel; causing her to roll by touching the bank first on one side and then on the other, or by touching some obstruction in the channel, as the barge

captain says; and finally by running the barge on the port bank, causing the final loss. The defendant contends that the barge was improperly loaded, so as to be top-heavy and cranky, and that the accident was attributable to this cause; and second, that but a small portion of the loss would have been incurred had proper attention been given to saving the lumber by the shippers, or by the carriers after it was dumped.

It is unnecessary to consider the second defense, as I am satisfied that the barge was top-heavy and cranky from the start, and unfit for the trip to Tonawanda, for which she was bound. On almost every material point the witnesses on the opposite sides are in flagrant contradiction of each other; they agree that at the time of dumping to port, the barge was either on or near the port bank. The testimony in behalf of the libellant is that the barge had carried heavier loads before without accident; that she was full under deck; and that there was no rolling, except when the barge touched bottom, causing it to careen a little. Capt. Powell, of the barge, testifies as follows:

"Q. What effect did it have on your vessel when she struck in the channel first with her starboard bow? A. It caused her to sheer quickly to port. * * *

"Q. If your vessel started for the port bank after striking on your starboard bow, what, if anything, did you do so far as the tug is concerned? A. I hailed them to stop pulling.

"Q. What reply did you get? A. I didn't get any. * * *

"Q. What was the effect of the tug pulling on your vessel while you were running across on that sheer from starboard to port? (Objected to as immaterial.) A. It was forcing her out on the bank further.

"Q. State what would cause that, both as regards the tow line and as regards any other cause? A. Both the propeller wheel and the line; the tug couldn't get out in the channel to get a cross line to pull on her and the current of the wheel and the line were forcing the vessel on the bank.

"Q. In what direction would the tow line be off your vessel? A. It would be leading off the starboard bows of the vessel a little.

"Q. What was the effect of the tug pulling on your vessel while you were running on that angle and after you touched the bank? A. It would force her out further.

"Q. Whether or not that is what caused her to careen over to starboard. A. That is what was the cause of it.

"Q. When she went over up on that bank that way and after she had gone up on the bank, did the tug stop pulling? A. No, sir.

"Q. What would have been the result if the tug had stopped when you hailed her? A. She wouldn't have gone out so far, consequently she wouldn't have dumped her load; I don't think she would, she would have lost her way more readily and stopped.

"Q. What was the effect then on your vessel going up on the bank and the tug continuing pulling? A. She carried away her stanchions and rail and dumped the load.

"Q. What effect, if any, would the pulling of the tow line at that angle on your boat have in causing her to roll over to starboard? A. It would assist her to roll over to starboard.

"Q. What part of the vessel was it that the stanchions and rail and bulwarks were carried away from her? A. From the fore rigging and the main rigging, a little abaft the main rigging.

"Q. On what side? A. Starboard side. * * *

"Q. After the vessel was relieved of the lumber on the starboard side what was the effect upon her? A. She threw off the port side.

"Q. How did she do that? A. She just rolled back as quick as a flash."

On cross-examination he says:

"Q. You had gone about 1,500 feet and you made your second turn and then you were in a straight channel? A. Yes.

"Q. You think then you went about two-thirds of a mile? A. Yes.

"Q. And then the boat struck? A. She struck an obstruction of some kind which we couldn't see.

"Q. And lost the other part of the load? A. No, the moment she struck this she sheered across the channel, and ran up on the bank, she gradually crawled up on the bank, she didn't do it instantly, she kept crawling up although going very fast, she went up until she lost her balance and threw her load, and back she came as quick as that, and threw the other."

The witnesses from the tug on the contrary state that they were proceeding slowly, and as carefully as possible; that the channel was only from 60 to 100 feet wide; that the barge was cranky and rolling from the start; that each roll toward one side would cause some sheering to the other side; the tug captain testified that he saw from the beginning that she had too much load on top and would require careful handling, and that she was cranky; that the weather was moderate; that the tug kept the center of the channel, and aided all that was possible in keeping the barge up; that when she took her starboard list and dumped her lumber on that side, she was in the center of the channel, and that on recovery she rolled to port and dumped it on the other side, having then a sheer which brought her up on the port bank; that there was no obstruction in the channel; and that there was no contact with the bank which could be felt by the tug at any time, until she came up on the port bank after dumping the lumber, and broke the two lines. He says:

"Q. What part of the channel was she in when she dumped her starboard side? A. Right in the center when she began to roll to starboard, and as she listed to starboard she sheered the other way, sheered to port; it is natural when a vessel takes a bad sheer in the channel going slow—that is the reason you go slow on them, so you can pull on them to straighten them up, but she was so far gone she wouldn't straighten up.

"Q. She struck the port bank before dumping the other side? A. No, when the lumber went off the starboard side she went back the other way as quick as a shot and the line parted at the same time and then she had reached sufficient to fetch up on the port bank.

"Q. How far away from the port bank was she when she dumped the port side? A. She couldn't have been very far because the channel was narrow and she was in the center of the channel when she took the first roll; I don't believe her bow would be 25 or 30 feet off of there."

There are abundant witnesses on each side to sustain these opposite contentions. Under circumstances like the present, in a clear day, in moderate weather, in a quiet stream, the fact that a boat is so loaded as to dump a considerable portion of her deck load, is of itself persuasive evidence that the accident was because the vessel was top-heavy, in the absence of any clear proof that her navigation was such as would naturally be expected to cause a properly loaded boat to dump her cargo. "*Res ipsa loquitur.*" It is not enough to say that if the boat had been towed very slowly, and with extreme care, and had never touched bottom, she might have escaped dumping. She was loaded for a trip to Tonawanda, a distance of several hundred miles. Her loading was bound to be such as would be safe in all or-

dinary changes of weather, and with all the ordinary incidents of navigation, conducted in the ordinary manner. I am persuaded that this boat was not so loaded. See *Sumner v. Caswell*, 20 Fed. 253.

One explanation of her crankiness is that the lumber loaded above was wet, while that in the hold was dry and lighter. The libellant claims that the lumber was loaded indiscriminately. Whatever the cause, I am satisfied from the testimony that her cranky condition when she started was noted by several persons, and was a subject of solicitude to the captain of the *Abbott*, who sought as much as in his power to keep the boat straightened up in her rolling and sheering.

Even if the boat, when sheering, in so narrow a channel, occasionally touched bottom, this was but an ordinary incident of navigation with a barge of that draft. It seems to me preposterous to contend that a boat can be rightly loaded so that a touch on the bottom is likely to topple her over. As stated above, the vessel must be so loaded and trimmed as to be able to encounter without danger all the ordinary incidents of the intended voyage.

The account of the accident given by the master of the barge and others in her behalf, seems in one respect highly improbable, viz., that after having run up on the port bank sufficient to keel her over and throw her load to starboard, she should then recover "like a flash" and roll over on the port side so as to dump towards the bank, against and from off which she was inclined. This fact, which is testified to by both captains, viz., that after dumping to starboard she did recover very quickly and roll over and dump to port, better agrees with the testimony of the *Abbott's* witnesses to the fact that both dumpings were before she touched the port bank; and upon a sheer to port, a pull on the lines running "over the starboard bow," would tend to stop the sheer, not to increase it.

The master of the barge contends that the accident was caused by too great speed of the tug and unskillful pulling on the lines. The testimony on the part of the tug, however, is to the contrary; that the speed was quite moderate, and that even more than ordinary care was taken by the tug. I am satisfied that it was the cranky condition of the boat, and not the lack of due care, that caused the accident. See *The King Kalakau*, 43 Fed. 172.

The libel must be dismissed, with costs.

DODSON v. FLETCHER.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 827.

APPEAL—DEFECT OF PARTIES—VOLUNTARY APPEARANCE.

It is not competent for parties to confer jurisdiction on the circuit court of appeals to review a judgment, six months after the judgment or decree sought to be reviewed was entered, by the voluntary appearance of necessary parties to the appeal. Accordingly, *held*, that an order of dismissal of an appeal, for want of necessary parties, would not be vacated, upon their admission of service of the citation and entry of appearance.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

J. D. Cook, for the motion.

W. C. Ratcliffe and John Fletcher, opposed.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A motion to set aside the order of dismissal, which was entered in this case on January 26, 1897 (78 Fed. 214), has been filed; and the motion is supported by an acknowledgment of service of the citation, and by an entry of appearance of certain parties who were made parties to the original suit, but were not made parties to the appeal. On these papers we were asked to vacate the order dismissing the cause. The application, however, must be denied. The decree from which the appeal was taken was entered on May 1, 1896. T. M. Dodson perfected his appeal by filing the necessary bond on May 23, 1896. The only defendant who is made a party to the appeal is John G. Fletcher, trustee. The act of congress creating this court allows six months within which to perfect an appeal. When the six months limited had expired, no appeal had been perfected upon which this court could review the decree of the trial court. We think that it is not competent for parties to confer jurisdiction upon this court to review a judgment, six months after the judgment or decree sought to be reviewed was entered, by the voluntary appearance of necessary parties to the appeal. The motion to set aside the dismissal and for leave to enter the appearance of certain parties is denied.

NEAD v. MILLERSBURG HOME WATER CO.

(Circuit Court, E. D. Pennsylvania. February 23, 1897.)

No. 31.

1. TAXABLE COSTS—DEPOSITIONS NOT USED ON TRIAL.

The cost of depositions of witnesses in the penitentiary, taken in good faith, and offered on the trial, but not used because of the production of the witnesses by order of the court, may be taxed in the bill of costs.

2. SAME—WITNESS FEES OF OFFICER OF CORPORATE PARTY.

Witness fees and mileage of officers of a corporation which is a party will be taxed as costs in the federal courts, where such is the practice of the state courts, and there is no settled practice relative thereto in the federal courts of the district.

After the trial of above case, resulting in a verdict and judgment thereon against the plaintiff, the defendant company filed its bill of costs, claiming, *inter alia*, viz.: (1) The cost of the depositions of two witnesses who were confined in the Eastern Penitentiary, taken by defendant in conformity with the rules of court. These depositions were offered in evidence on the trial by the defendant, and objected to by the plaintiff. The objection was sustained, and the court ordered the issuing of a writ of habeas corpus *ad testificandum*, under which said witnesses were produced in court, and testified *viva voce*. (2) Witness fees and mileage for the president of the defendant company. Upon the taxing of the said bill, the clerk allowed the item of cost of the depositions, but disallowed the item for witness fees and mileage, because the president of the defendant company was in fact a party to the action, and not entitled thereto. To said allowance and disallowance, exceptions were filed by the plaintiff and the defendant respectively.

Ellery P. Ingham and Harvey K. Newitt, for plaintiff.

H. L. Lark and Edward L. Perkins, for defendant, cited:

Bank v. Greider, 2 Chester Co. Rep. 204; *Evans v. School Board*, Id. 205; *Mining Co. v. Dusenberry*, Id.; *Susquehanna Mut. Fire Ins. Co. v. Commercial Ins. Co.* (Com. Pl.) 18 Wkly. Notes Cas. 132; *The Elizabeth & Helen*, 4 Ben. 101, Fed. Cas. No. 4,354; *Huntress v. Epsom*, 15 Fed. 732; *Tuck v. Olds*, 29 Fed. 883.

DALLAS, Circuit Judge (after stating the facts). Respecting the cost of the depositions, inasmuch as they were taken in good faith by the defendant in the preparation of the case for trial, and were not waived at the trial, but their use was prevented by reason of the production of the witnesses under a writ of habeas corpus *ad testificandum*, issued by order of the court, the defendant cannot justly be precluded from having this item of cost taxed and allowed, and the plaintiff's exceptions are dismissed.

As to the witness fees and mileage charged for the president of the defendant corporation, it is admitted that, if he had been the party defendant, such costs would not be taxable. But a corporation is an entity distinct from its officers. The practice of the state courts, as abundantly shown by the authorities cited by the defendant, is to allow and tax as costs the witness fees and mileage for the officers of corporations, where, as here, they attend as witnesses, and not as representatives of the corporation. I find no authority showing any settled practice upon this point in the federal courts of this district, but am of opinion that the defendant's exceptions must be sustained.

FISH et al. v. OGDENSBURGH & L. C. R. CO. et al.

(Circuit Court, N. D. New York. March 26, 1897.)

FEDERAL COURTS — JURISDICTION — FORECLOSURE SUIT — POSSESSION OF MORTGAGED PROPERTY.

A federal court having possession, through its receiver, of the mortgaged property, has jurisdiction of a suit to foreclose the mortgage, regardless of the citizenship of the parties.

William D. Guthrie, Wager Swayne, and William B. Hornblower, for complainants.

B. F. Fifield and Edward C. James, for defendant Central Vermont R. Co.

COXE, District Judge. This is a suit by trustees to foreclose a mortgage made by the defendant, the Ogdensburgh & Lake Champlain Railroad Company. The defendant, the Central Vermont Railroad Company has filed a demurrer disputing the jurisdiction of the court and otherwise attacking the bill as being indefinite and defective for lack of proper parties defendant. Jurisdiction is not based upon the diverse citizenship of the parties. It rests wholly upon the fact that, prior to the commencement of this suit, the entire property involved in the controversy was taken possession of and has ever since been held by this court through its receivers, duly appointed. On two occasions this court, indirectly at least, has decided against the contention of the defendant. If not strictly *res judicata* it must be admitted that the decision permitting this suit to be brought and the decision refusing permission to sue the receivers in a state court are inconsistent with the theory of the demurrer. But, as an original proposition, it is thought that the bill must be sustained. It is conceded that full and ultimate relief cannot be had in the state court. After that court has pronounced its decree it is powerless to enforce it and must, in the language of the defendant's brief, "turn the parties over to the receivership court to satisfy or execute the decree." Granting that the state court may proceed thus far, how is the right of this court to do the same affected? Why all this circumlocution? Why two suits where one is sufficient? The process of "turning the parties over" can only be effected by bill, petition or other analogous proceeding. If this court must take jurisdiction of an action upon a judgment why may it not take jurisdiction of an action upon the instrument on which the judgment was obtained? That its jurisdiction must be invoked in the end is undisputed; that it may be invoked in the beginning would seem to follow as a logical conclusion. In both cases the power of the court to proceed depends not upon the character of the complainants' demand but upon the fact that they are seeking to reach property which is in the custody and control of the court. The rule seems to be well settled that where property is in the actual possession of the circuit court the right to decide upon conflicting claims to that property, irrespective of the citizenship of the parties, vests in that court as a necessary incident to the situation. In other words, when the court has full possession of property it is not required to yield the property and the right to administer thereon to another tribunal.

Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 201, 11 Sup. Ct. 61; Wiswall v. Sampson, 14 How. 52; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 634.

Neither of the parties mentioned in the demurrer is a necessary defendant. Neither, as disclosed by the bill, has any interest in the controversy.

The ninth clause of the bill is sufficiently explicit to be sustained as against this demurrer.

The demurrer is overruled; the defendant to answer within 20 days.

SMITH v. WESTERN UNION TEL. CO.

(Circuit Court, D. Indiana. March 15, 1897.)

No. 9,286.

REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—CORRECTION OF MISTAKE IN RECORD.

On a motion to remand, the removing party cannot sustain the jurisdiction of the federal court by contradicting the record sent up from the state court by ex parte affidavits as to the amount in controversy. If the record does not speak the truth, its correction should be sought elsewhere.

On Motion to Remand.

Pickens & Cox, for plaintiff.

Chambers, Pickens & Moore, for defendant.

BAKER, District Judge. The transcript of the record filed in this court shows that the complaint was filed in the office of the clerk of the Lawrence county circuit court on November 15, 1894. The complaint alleges that the plaintiff was damaged by the wrongs complained of in the sum of \$1,500, for which judgment is demanded. The transcript next sets out the summons, which is made returnable November 28, 1894, which summons is shown to have been served more than 10 days before the return day. The transcript then recites that on December 3, 1894, the parties came into court, and the defendant filed a petition and bond for the removal of the cause into the circuit court of the United States for the district of Indiana. There were other proceedings in the cause in the state court, which are immaterial.

The defendant has filed a motion to remand, and, in support and in opposition thereto, a number of affidavits have been filed by the parties respectively. These affidavits show that, as originally drafted and filed, the damages claimed in the complaint were \$15,000. Whether the complaint was amended as it now appears in the transcript before the petition and bond were filed in the office of the clerk of the state court is a controverted question; but there is no material dispute that the amendment was made before the attention of the court was called to the filing of such affidavit and bond.

Can the removing party sustain the jurisdiction of this court by contradicting the record sent up from the state court by ex parte affidavits? I think it inadmissible, for the purpose of conferring

or supporting jurisdiction here, to contradict, by affidavits, the record of the state court transmitted here, authenticated by the signature of the clerk and the seal of the court. If the record does not speak the truth, its correction should be sought elsewhere. It would be inconvenient and unseemly to try the truth of a record brought here from a state court upon the affidavits, and especially the conflicting affidavits, of the parties. The cause will be remanded to the Lawrence county circuit court, at the costs of the defendant.

WHITE v. TOLEDO, ST. L. & K. C. R. CO.

(Circuit Court of Appeals, Second Circuit. March 19, 1897.)

CONSTITUTIONAL LAW—EQUITY RULE 67—EXAMINERS—TAKING TESTIMONY OUTSIDE DISTRICT—COMPULSORY ATTENDANCE OF WITNESSES.

The power conferred upon the supreme court by the act of August 23, 1842 (5 Stat. 518; Rev. St. § 862), to prescribe the forms and modes of taking and obtaining evidence, is valid and constitutional, and under the amendment to the sixty-seventh equity rule, adopted pursuant to such power, the courts of the United States are authorized to appoint examiners to take testimony orally beyond the limits of the district in which a suit is pending, and the attendance of witnesses before such an examiner may be compelled by the courts in the district to which the examiner is sent.

In Error to the Circuit Court of the United States for the Southern District of New York.

J. Tredwell Richards, for plaintiff in error.

Joseph King, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is a writ of error to set aside an order of the circuit court for the Southern district of New York which adjudged the plaintiff in error to have been guilty of contempt.

Irvin Belford was appointed special master by the circuit court of the United States for the Northern district of Ohio, in a bill in equity for the foreclosure of a railroad mortgage which was pending in that court, and was directed to take testimony in the suit in the city of New York. Upon the petition of one of the parties, an order was granted by the circuit court for the Southern district of New York which directed the clerk of that court to issue a subpoena addressed to Isaac W. White, then of said city, and directing him to appear before said master at a named time and place in said city and testify in that suit. The subpoena was duly issued and duly served upon White, who refused to obey and did not obey it. Upon an order requiring him to show cause why he should not be punished for contempt, he appeared before the circuit court, and upon hearing he was adjudged guilty of a contempt of court by reason of his disobedience to the order of the subpoena.

The questions presented upon the writ of error are whether the circuit court for the Northern district of Ohio had power to appoint an examiner or a special master to take testimony in the city of New

York, to be used in a suit pending in that court, and whether the circuit court for the Southern district of New York had power, by its subpoena, to compel a witness in its district to testify under oath before such special master in a cause pending beyond its jurisdiction.

The ancient general English chancery rule excluded oral testimony, and received at the hearing only that which was contained in written depositions. 1 Greenl. Ev. § 312. But section 30 of the judiciary act of 1789 provided that "the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction as of actions at common law." Section 25 of the statute of April 29, 1802 (2 Stat. 166), modified this provision, and left "it to the discretion of the courts in those states where testimony in chancery is taken by depositions, to order, on the request of either party, the testimony of the witnesses to be taken by depositions." *Conn v. Penn*, 5 Wheat. 424. Section 6 of the statute of August 23, 1842 (5 Stat. 518), empowered the supreme court, from time to time, to prescribe and regulate the forms and modes of taking and obtaining evidence in all cases. This section is now reproduced, so far as equity and admiralty suits are concerned, in sections 862 and 917 of the Revised Statutes, so that the supreme court has been vested with sufficient apparent power upon the subject. At the December term, 1861 (1 Black, 6), the sixty-seventh rule in equity was amended by the supreme court so that, after notice by either party that he desired the evidence in the cause to be taken orally, "all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court." The amendment further provided that in case of refusal of witnesses to attend to be sworn, or to answer any question put by the examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories. This practice had long been specified in the statute of January 24, 1827 (4 Stat. 197), which is reproduced in section 868 of the Revised Statutes, and which provided, in substance, that, when a commission was issued by any court of the United States for taking the testimony of a witness named therein at any place without any district, the clerk of any court of the United States for such district should issue a subpoena to the witness, and if the witness, after service of the subpoena, refused to appear, the judge of the court whose clerk issued the subpoena could proceed to enforce obedience or punish the disobedience. The same practice is prescribed in equity rule 78, which is a reproduction of equity rule 28, announced by the supreme court in 1822 (7 Wheat. xi.), and one of the rules prescribed by the court in pursuance of the authority conferred by section 2 of the act of May 8, 1792, which will be hereafter stated (1 Stat. 272). *Story v. Livingston*, 13 Pet. 359.

This historical review of the statutes shows—what is familiar—that a court of the United States for one district had long been empowered to send a commissioner into any other district to take the testimony of a person residing in such district, and that the courts of

the United States for the district wherein such testimony was to be taken were directed to issue process to secure and enforce the attendance of such witness before the commissioner or examiner, and that he was authorized to administer an oath to the witness. It also shows that in pursuance of power for that purpose, the validity of which will hereafter be considered, the supreme court, by its amendment of the sixty-seventh rule, adapted or enlarged this statutory system of practice and rules in regard to taking testimony by written interrogatories to the taking of testimony in equity cases orally by specially appointed examiners or masters, and provided that the same system should exist to compel the attendance of a witness, and of punishment for disobedience to the subpoena, or for refusal to be sworn. That the intention of the sixty-seventh rule was to provide that examiners could be appointed to take testimony orally beyond the territorial limits of the district in which the suit was pending was decided by Mr. Justice Bradley in *Railroad Co. v. Drew*, 3 Woods, 691, Fed. Cas. No. 17,434, and was not strenuously denied upon the argument of this case. The point which was relied upon was that the jurisdiction of the courts of the United States was a statutory jurisdiction, and could not be enlarged by a rule of the supreme court. This proposition, thus generally stated, is true, but it is not an adequate statement either of the nature or the extent of the authority by virtue of which the rule was made. Congress had in 1792 exercised, to a certain extent, its authority in regard to the "forms and modes of proceeding" in equity cases, "subject to such regulations as the supreme court shall prescribe" (1 Stat. 276), intending, as increased business should indicate the need of additional rules, to intrust to the supreme court the duty of making them as necessity required. The extent of this class of powers, their character, and the propriety of committing them to the supreme court, were fully considered by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1,—an action at common law,—who said, in substance, that, while congress could not delegate to the courts powers which "are strictly and exclusively legislative," yet there were other subjects, of "less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details," but that it was true that it was not easy to draw the exact line which separates the "important subjects, which must be entirely regulated by the legislature itself," from the details, which they can properly intrust to others. The effect and the extent of the conclusions which Chief Justice Marshall reached were again considered by the supreme court in *Beers v. Haughton*, 9 Pet. 338, 359, and were stated by Judge Story as follows: "The constitutional validity and extent of the power thus given [by the statute of 1792] to the courts of the United States to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this court in the cases of *Wayman v. Southard*, 10 Wheat. 1, and *Bank v. Halstead*, Id. 51. It was there held that this delegation of power by congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it,

from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down that 'a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered,' and that 'this provision enables the courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest.' It thus appears that the constitutional character of the power under which the supreme court subsequently acted in making rule 67 was early the subject of discussion, that it was established, and that no jurisdictional question need now arise. Inasmuch as the validity of the power to appoint examiners to take testimony in another district and circuit, and of the power of the United States court within that other district to compel the witness to attend and take an oath before the examiner, is sustained by this inquiry, it seems proper to suggest that in the practical administration of this authority, and in the interest of economy, caution should be exercised not to grant too roving and unrestrained a commission to examiners to take testimony. The fear which was expressed in *Arnold v. Chesebrough*, 35 Fed. 16, lest these proceedings should become both unnecessary and expensive, is well founded. The order of the circuit court is affirmed, with costs.

MAITLAND v. GIBSON.

(Circuit Court, E. D. Pennsylvania. January 22, 1897.)

EQUITY PLEADING—ANCILLARY PROCEEDING—ENFORCING PAYMENT OF COSTS—NOTICE.

In an equity suit, where execution for costs has been issued against the plaintiff without avail, and it is sought to enforce payment from patents owned by him, this should be done by petition in the original suit; and if, instead thereof, an original bill is filed, it may be treated as a dependent or ancillary proceeding, so that no subpoena is necessary, and a mere notice of the filing of the bill and of an intended motion for injunction is sufficient.

Dyer & Driscoll, for plaintiff.

Theodore F. Jenkins, for defendant.

DALLAS, Circuit Judge. The person who is named as defendant in the present bill is in fact the plaintiff in this suit, in which he was decreed to pay costs amounting to \$2,525.55. This fact is now alleged, and also that the ordinary process of execution for satisfaction of the said decree has been resorted to without avail, and that the said George Maitland has no property subject to execution at law, but is the owner of certain letters patent, which, "if sold, would realize some money which would go in partial or complete satisfaction of the said decree." An injunction to restrain assignment of these patents is prayed, and that they may be sold and the proceeds be applied to the payment of the costs heretofore adjudged to be paid by Maitland, and those arising under the present proceeding. The existence of the right asserted

seems to be unquestionable (*Ager v. Murray*, 105 U. S. 126); but as to the mode in which, in this case, it has been prosecuted, I will have a word to say presently.

The defendant (styled "plaintiff" in this bill) having moved for a preliminary injunction, counsel for the plaintiff in the original suit, upon leave granted, appeared only for the purpose of moving "to set aside the service of the bill," and such motion has accordingly been made and argued. It has been conceded that upon the fate of this latter motion the defendant's right to injunction is dependent, and hence the single question for solution is whether or not George Maitland is to be regarded as now before this court, and liable to be affected by any order it may make in the premises. If this bill should be viewed as the commencement of an independent suit, he certainly is not; for no subpoena has been issued, or could be legally served, as Maitland is not an inhabitant of this district. If, however, this proceeding may correctly be treated as but a step taken in the original suit, then I have no doubt that the notice which has been given of the filing of the bill and of the intended motion for injunction is all that Maitland was entitled to. I think it was a mistake to put this application in the form of a bill, but, as no matter of substance will be affected by it, it is such an irregularity as a court of equity may disregard. It is true that in *Ager v. Murray*, *supra*, there was a similar bill; but the judgment to the satisfaction of which a patent right was there made liable was a judgment at law, and therefore a bill was requisite in order that the question which was presented, namely, "whether a patent right may be ordered by a court of equity to be sold," etc. (page 127), might be regularly brought before such a tribunal for adjudication. In the present case, on the other hand, the judgment sought to be satisfied is a decree in equity; and this court, by virtue of the same equitable jurisdiction which it exercised in making that decree, is competent to pass the order which is now asked. Why, then, should there be a separate proceeding? I perceive no necessity for it, and the resort to a formal bill seems to me to be clearly at variance with the practice which prevails in all other cases where a merely incidental or auxiliary order in chancery is desired. Consequently, I regard the present bill, not as an original bill invoking the general jurisdiction of the court in equity, but as an ancillary and dependent procedure, equivalent in effect and purpose to a petition in the original suit itself,—incident to and dependent upon it. *Krippendorf v. Hyde*, 110 U. S. 276-286, 4 Sup. Ct. 27. And, so regarding it, it seems to me to be clear that the question which has been made respecting its service is wholly without pertinency. Treating it as a petition in the suit to which it relates, the plaintiff in that suit is, of course, entitled to answer it, and to be heard upon it; but these rights he must exercise, if he desires to do so, upon notice merely, without subpoena, and notwithstanding the fact that he is not an inhabitant of this district. By bringing his suit in this court, he voluntarily submitted himself to its jurisdiction, and he cannot escape from the consequences of its adverse decree by asserting that he is no longer amenable to its

process. I have found no decided case in which the facts and circumstances were the same as those with which I have been called upon to deal; but, while I am aware of no authority which conflicts with the views I have expressed, there are several in addition to those already cited which I think tend to support them: *Lamb v. Ewing*, 12 U. S. App. 11, 4 C. C. A. 320, and 54 Fed. 269; *Logan v. Patrick*, 5 Cranch, 288; *Walden v. Craig*, 14 Pet. 147-155; *Freeman v. Howe*, 24 How. 450; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Ward v. Todd*, 103 U. S. 327; *Gumbel v. Pitkin*, 124 U. S. 131-146, 147, 8 Sup. Ct. 379.

1. The motion of Alfred C. Gibson for a preliminary injunction is granted.

2. The motion of George Maitland to "set aside the service of the bill" is dismissed.

JACK v. WALKER, Auditor, et al.

(Circuit Court, S. D. Ohio, W. D. March 18, 1897.)

1. TAXATION OF MORTGAGES IN HANDS OF AGENT OF NONRESIDENT.

Debts owned by a nonresident of the state of Ohio, evidenced by notes and mortgages upon real estate within the state, are not taxable there, under Rev. St. Ohio, §§ 2731, 2734, 2735, although the notes and mortgages are in the hands of a resident agent, who made the loans, and collects and remits principal and interest as they become due.

2. SAME.

A mortgage, being a mere chose in action, follows the person of the owner, and is taxable only in the state in which he resides.

Paxton, Warrington & Boutet, for complainant.

Milton Clark and Brown, Brandon & Burr, for respondents.

SAGE, District Judge. The complainant, a citizen of New York, sues to enjoin the defendants from placing upon the tax duplicate of Warren county, Ohio, the sum of \$297,794 of moneys and credits belonging to complainant, being the aggregate of promissory notes secured by mortgages given to complainant upon real estate within said county in the years 1889, 1890, 1891, 1892, 1893, and 1894 for loans made by him through George W. Carey, his agent; and from adding thereto 50 per cent. penalty,—that is to say, \$148,897,—making the total of \$446,691, upon which the defendants threaten to illegally assess taxes against the complainant. The defendants set up in their answer that the moneys and credits mentioned and specified in the bill were, in the years named, invested, loaned, and controlled by said agent, who was, during all of said years, a resident of said county and state; and that none of them have at any time been listed for taxation either by complainant or by said agent. Further answering, they say:

"That the statutes of the state of Ohio provide that every person of full age and sound mind, residing within said state, shall list for taxation all moneys invested, loaned, or otherwise controlled by him as agent, or on account of any other person or persons whatsoever, in the county in which such agent would be required to list the same if such property were his own."

Complainant excepts for insufficiency. Section 2734 of the Revised Statutes of Ohio provides that every person of full age and

sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company, or corporation whatsoever, etc.

The answer admits that the complainant is a nonresident of the state of Ohio. The exception presents the question whether debts owned by a nonresident of the state, evidenced by notes and mortgages upon real estate within the state, are there taxable by reason of the agency and control set forth in the answer. The contention for the defendants is that, although the complainant was not and is not a resident of Ohio, the authority and control vested in his resident agent to make the loans and collect and remit interest and principal as they became due constituted such a holding by such agent as under the Ohio laws subjected the property to taxation. Section 2731, Rev. St. Ohio, provides that:

"All property, whether real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state shall be subject to taxation."

This is the section which designates the property to be taxed. It is urged for the complainant that its proper construction is that all tangible property, real and personal, whether belonging to residents or nonresidents, and all intangible property belonging to residents, is subject to taxation, and that section 2734 defines who shall list personal property for taxation. This section, it is contended, can have reference only to such property as is subject to taxation in Ohio. Intangible property, such as credits belonging to nonresidents, it is claimed is not subject to taxation, and therefore directions as to how taxable property should be listed are immaterial, inasmuch as such property as that owned by the complainant, a nonresident, was not intended to be covered by the section. The notes, it is argued, are not property; they are merely evidences of indebtedness; and, if destroyed, the right of the complainant to enforce the obligation would remain intact, and could not be questioned. The supreme court, in *Kirtland v. Hotchkiss*, 100 U. S., at page 498, said:

"It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and, if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains."

In the case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, it was held that a mortgage, being a mere chose in action, only confers upon the holder or the party for whose benefit it is given the right to enforce payment of his demand by foreclosure and sale; a right which has no locality independent of the party in whom it resides. Applying that case to the present, the true property resided in the complainant, and not in his agent. This is practically the view taken by the supreme court of Ohio in *Worthington v. Sebastian*, 25 Ohio St. 10, where the court used the following language:

"Intangible property has no actual situs. If, for the purposes of taxation, we assign it a legal situs, surely that situs should be the place where it is owned, and not the place where it is owed. It is incapable of a separate

situs, and must follow the situs either of the creditor or the debtor. To make it follow the residence of the latter, is to tax the debtor, and not the creditor; to tax poverty instead of wealth. That it is the creditor, and not the debtor, that is to be taxed, and that the tax is to be imposed by the law of the creditor's place of residence, seems to be quite well settled by authority."

Counsel for defendants claim that the moneys and credits of complainant, having been invested and controlled by his agent within this state during the years mentioned in the bill, were taxable in the state under the laws thereof; citing sections 2731 and 2734 of the Revised Statutes, already quoted in this opinion. They refer also to section 2735, which enacts that "every person required to list property on behalf of others shall list the same in the same township, city or village, in which he would be required to list it if such property were his own," and they rely upon the second paragraph of the syllabus of *Grant v. Jones*, 39 Ohio St. 506 (the syllabus being, in Ohio, the authoritative statement of the ruling of the court), which reads as follows:

"Credits owned by a nonresident of this state are not taxable here, unless they are held within the state by a guardian, trustee, or agent of the owner, by whom they must be returned for taxation. The fact that such credits are secured by mortgage on real estate within this state does not change the rule that credits are to be taxed at the residence of the creditor, and not of the debtor."

In that case the court found that the complainant, who sued to recover taxes assessed against him, was a nonresident of this state, which he visited as often as once a year in his business as a peddler, and looked after his investments, remaining only so long as was necessary, then departing, and carrying his notes and mortgages with him. The court below found that his residence for the purpose of taxation was in the state and in the county where the tax was levied. The supreme court reversed that finding. There was no evidence that he had any agent, or that his money or notes or mortgages were held in any sense of the word by any one other than himself. That portion of the syllabus, therefore, which declares that credits owned by a nonresident of this state are not taxable here unless they are held within this state by a guardian, trustee, or agent of the owner, by whom they must be returned for taxation, was not, so far as the exception stated is concerned, necessary to the decision of the case, and must be regarded rather as obiter dictum than as authoritative. Even if it be recognized as authoritative, if we refer to the definition of the word "hold," we find that, as given by *Anderson* in his *Law Dictionary*, it means "possessed by lawful title," as "hold a note" or "bond"; "hold lands" or "property"; "to have and to hold" described premises; "hold" office; "hold" a fund or lien, a policy of insurance, a share, stakes, stocks, etc.; whence also "freehold" or "leasehold."

In *Witsell v. Charleston*, 7 S. C. 99, it was decided that, "as a technical term, 'hold' embraces two ideas,—that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession." A similar ruling was made in *Hurst v. Hurst*, 7 W. Va. 297. It was recognized, however, in *Witsell v. Charleston*, that the interpretation of the word might

be so controlled by the context as to require that it be construed to signify to have in possession or under control merely. In *Godfrey v. Godfrey*, 17 Ind. page 9, the supreme court referred to the statute of that state on the subject of partition, which provided that "all persons holding lands," etc., might have partition. The court said, "We do not construe the word 'holding,' thus used, as requiring actual occupancy, but as equivalent to owning or having title to lands," etc. See, also, *Smith v. Gaines*, 39 N. J. Eq. 547. This construction of holding, if applied to *Grant v. Jones*, makes the ruling of the court harmonious with the provision of section 2734 that the property of every person for whose benefit it is held in trust shall be listed by the trustee. If the word is to be construed in the popular sense of only having possession and control for certain specified purposes, as in the case of an agent acting for his principal, the ruling of the court is in conflict with the case of *State Tax on Foreign-Held Bonds*, 15 Wall. 300. In that case the supreme court limited the power of taxation of a state to persons, property, and business within its jurisdiction, but held that debts owing by corporations or by individuals were not property of the debtors in any sense, but obligations possessing value only in the hands of the creditors whose property they were, and in whose hands they might be taxed. The court, recognizing that a mortgage is a mere chose in action, conferring upon the holder nothing more than the right to proceed against the property to enforce payment of the secured demand, declared that this right had no locality independent of the party in whom it resided, and that it might be taxed by the state "when held by a resident therein, but, when held by a nonresident it is as much beyond the jurisdiction of the state as the person of the owner." That case was cited with approval in *Tappan v. Bank*, 19 Wall. 499; *Kirtland v. Hotchkiss*, 100 U. S. 497; *Hagar v. Reclamation Dist.*, 111 U. S. 709, 4 Sup. Ct. 663; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 208, 5 Sup. Ct. 826; and *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 22, 11 Sup. Ct. 876. In *State v. Ross*, 23 N. J. Law, 517, the supreme court of New Jersey said:

"A personal tax is a burden imposed by government on its own citizens for the benefits which that government affords by its protection and its laws, and any government which should attempt to impose such a tax on citizens of other states would justly incur the rebuke of the intelligent sentiment of the civilized world."

No extent of authority or power of control given to an agent in the state could divest the principal's ownership of the subject-matter of the agency, nor could any possession or holding by the agent so operate short of a holding in the technical sense above referred to. Therefore the fact, if it be a fact, that Carey, the agent, made the investments for his principal,—that is to say, loaned his principal's money, and controlled the course of the transaction relating thereto,—could not operate to bring the principal, a nonresident, within the jurisdiction or reach of a law of the state relating to taxation. What the defendants are seeking in this case is to impose the taxes on account of the mortgages, which, if complainant were a resident

of the state, would be properly classed as credits taxable against him. The Case of the State Tax on Foreign-Held Bonds is sufficient as authority for this court, but it may be proper to add that the same question was involved in the case of *Davenport v. Mississippi & M. R. Co.*, 12 Iowa, 539, where it was held that both in law and equity the mortgagee has only a chattel interest. The court said it was true that "the situs of the property mortgaged is within the jurisdiction of the state; but the mortgage itself, being personal property, chose in action, attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are nonresidents of the state. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the state, and, if not, they are not the subject of taxation." In *People v. Eastman*, 25 Cal. 603, it was held that a mortgage has no existence independent of the thing secured by it. The payment of the debt discharges the mortgage. "The thing secured is intangible, and has no situs distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may at the same time be secured by a mortgage upon land in every county in the state; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a situs subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the state, and the mortgage in one county may be a different one from that in another, although the debt secured is the same." To secure the same debt, there might be a mortgage in every state of the Union, and the aggregate of the taxes which could be levied for a single year, but for the rule above stated, might be equal to, or even exceed, the entire amount of the mortgage debt.

In *Railroad Co. v. Morrow*, 87 Tenn. 406-438, 11 S. W. 348-355, Judge Lurton, of this circuit, then a member of the supreme court of Tennessee, speaking for that court, declared that bonds held by nonresidents of the state were intangible property, which could have no actual situs; that they were mere evidences of debts by the company to the holders and owners thereof, and that by no rule of fiction could the jurisdiction of the state be held to extend to the property which a nonresident has in a debt which he holds against a resident. "The creditor," said the court, "cannot be taxed, because he is not within the jurisdiction; and his property cannot be taxed, because it is not within the jurisdiction." The supreme court of Ohio, in *Bradley v. Bauder*, 36 Ohio St. 28-36, while holding that an owner, residing in Ohio, of shares of stock in a foreign corporation (which shares the court recognized as property), are taxable in this state, held that the situs of a chose in action is, for purposes of taxation, the domicile of the owner, although it be secured by a mortgage upon realty in this state, and, by agreement of the parties, expressly made subject to its laws.

In *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796,—four years later than *Grant v. Jones*,—the supreme court held "that a loan of

money secured by mortgage on real estate is a credit, within the meaning of the statutes of this state providing for the taxation of property; and, where the creditor resides in another state, is not subject to taxation in this, although the securities are in the hands of an agent residing here, intrusted by the terms of his agency with the collection of the interest and principal when due, and its transmission to the creditor when collected." It is true, the court in that case distinguished between a power in the agent to collect loans and transmit to his principal and a power to loan or invest money for the principal. But, as we have seen, mere power conferred upon an agent cannot properly be held to vest in him any ownership or title. By way of illustration, could it be seriously and intelligently contended that a resident lawyer, who has in his possession and control, for the purposes of pending litigation, bonds or notes and mortgages or other securities belonging to a nonresident, must list them for taxation by reason of such holding and control? Whether, if a nonresident principal places money in the hands of a resident agent, who has it in his possession, and holds it under such circumstances as would make it taxable if it were his own money, he thereby subjects that money to taxation, is not a question pertinent to this case. What is sought here is to tax the credits—that is to say, the choses in action—of the plaintiff, who is a nonresident. This cannot be done upon any proper construction of the statute, nor could it be done if the statute were so amended as in terms to include such a case.

There are other forms of statement of substantially the same exception, but, as they involve the same questions, it is not necessary to refer particularly to them. They all fall within the principle above announced. The exception will be sustained, with leave to the defendants to present to the court an amended answer, and apply for leave to file the same.

COCKRILL v. COCKRILL et al.

(Circuit Court, W. D. Missouri. March 1, 1897.)

1. CANCELLATION OF DEED—LACHES.

Even though at the time of the execution of a deed the grantor may have been incompetent to transact business, and the deed may have been procured by fraud, yet as he allowed seven years to elapse after being restored to his right mind without making any complaint, and before instituting suit waited until the grantee was unable to speak in his defense, and much money had been expended in improving the property, and makes no offer to return the consideration, he is estopped from seeking to set aside the deed.

2. SAME—USURY.

Where a father-in-law demanded as a condition of a loan to his spendthrift son-in-law that the latter should convey to his own wife a certain tract of land, a conveyance executed by the son-in-law in compliance with that condition does not constitute usury, and is not a badge of fraud.

3. DEED OF PERSON UNDER GUARDIANSHIP.

The deed of a person under guardianship by reason of incapacity to manage his own affairs, in consequence of habitual drunkenness, is void.

4. INSANITY—HABITUAL DRUNKENNESS—REMOVAL OF GUARDIAN.

Under Rev. St. Mo. § 5549, which provides that "any person" may institute an inquiry as to whether one who has been declared to be of unsound mind has been restored, one who is under guardianship by reason of his being incapable of managing his own affairs on account of habitual drunkenness may, by his own petition, institute such an inquiry.

5. SAME—NOTICE.

Where one who is under guardianship as an insane person makes an application to a probate court of Missouri for restoration to his rights, notice to his family or guardian is not a prerequisite to jurisdiction, the want of it being at most an irregularity only, which cannot be taken advantage of in a collateral proceeding.

6. SAME.

One who has, upon his own application, been discharged by a probate court from guardianship as an insane person, cannot assail the judgment discharging him upon the ground that no notice of the application was given to his family or former guardian, even if such notice was required.

This was a suit in equity, brought by William F. Cockrill against defendants, Clinton Cockrill, Helen Woodson, and others, to set aside two deeds to land executed by the complainant, on the grounds of fraud, undue influence, and incompetency of the grantor to transact business.

Merryman & Merryman, for complainant.

Hall & Woodson and E. H. Norton, for defendants.

ADAMS, District Judge. This suit was instituted by complainant, William F. Cockrill, against defendants, Clinton Cockrill, Helen Woodson, and others, to set aside a deed to 251 acres of land sold by him to Clinton Cockrill on May 19, 1881, on the grounds of fraud, undue influence, and especially on account of the alleged incompetency of complainant at that time to transact his business, and for the further purpose of setting aside a deed made by complainant to Clinton Cockrill for the 160 acres known as the Fielding Cockrill homestead. This deed was made November 2, 1887. The same reasons are assigned for setting aside this deed as the former. The defendant Clinton Cockrill is the father-in-law of complainant, and the father of defendant Helen Woodson, who was formerly the wife of complainant. Two of the other defendants are complainant's minor children by his wife Helen. The other two defendants are children of Helen by her second husband, the defendant Byron Woodson. By deed dated May 19, 1881, the complainant, for the consideration of \$6,000 paid to him, deeded a tract of 251 acres of land in Platte county, Mo., to his father-in-law, Clinton Cockrill. On the same day Clinton Cockrill and wife duly conveyed the same to Helen Cockrill and her bodily heirs, intending the same as an advancement to his daughter and her children. She then had two children by her husband, the complainant herein. The tract of land, according to the evidence before me, was not worth over \$6,000 at the time, and this sum was paid to the complainant by his father-in-law for it. The complainant was then without doubt capable of attending to business, and no fraud or undue influence was practiced upon him in the transaction. I find no warrant in

the evidence for the contention of complainant's counsel that Clinton Cockrill undertook or agreed to pay complainant any sum above the consideration mentioned in the deed, \$6,000; and therefore there is no ground for ordering an accounting in favor of the complainant for any unpaid purchase money. This disposes of the first ground of complaint alleged in the bill.

The second alleged ground of complaint relates to the homestead tract of 160 acres. The complainant inherited a fortune, in land, from his father, and indulged the reasonable expectation that his father-in-law would in a short time die, and leave another fortune for his own or his family's use and support. As is usual in such cases, he became inattentive to business, and convivial in his tastes and habits, and soon became addicted to the excessive use of alcoholic liquors. Under such circumstances, and with such habits, he became frequently short of money, and resorted to the common expedient of borrowing. Being still the owner of lands, inherited from his father, his credit was, to a limited extent, good. Prior to the year 1885 he had, from time to time, borrowed money from the bank of Wells & Co., of Platte City, till it amounted in April of that year to the sum of \$2,739.02. He then applied for more, and could have secured it from the bank at 10 per cent. interest; but it was finally determined, in order to avoid paying the high rate of interest demanded by the bank, that the father-in-law should loan him \$3,300 at 6 per cent. interest per annum. This was done, and with the money so borrowed he paid \$2,739.02 to the bank, and had \$560.98 for his own use. To secure the payment of this loan, the complainant executed a deed of trust bearing date April 29, 1885, whereby he conveyed to one C. C. Kemper, as trustee, a tract of 160 acres of land situate in Platte county, Mo., already referred to as the Fielding Cockrill homestead. As a part of this transaction, the complainant was required by Clinton Cockrill to make, and did make, a deed to another tract of 80 acres of land in Platte county to his wife, Helen. No consideration was paid by his wife to him for this grant, and only a nominal consideration of one dollar is mentioned in the conveyance. In passing it is proper to say that no relief is asked against this conveyance, but it is claimed that because the father-in-law persuaded the complainant to make this gift to his wife, at just this juncture, it amounts to exacting usurious interest for the loan of the \$3,300, and therefore is to be considered in determining the issue of fraud in relation to the execution of the deed of trust itself. The complainant at this time had a family consisting of his wife and two children, aged, respectively, five and seven years. He so mistreated his wife that she was compelled to, and did some time after the month of April, 1887, take her children, and leave him. She instituted a suit for divorce, and on April 2, 1889, secured a decree. This decree also awarded to her the care and custody of the two children. While the complainant, even before April, 1885, had been addicted to the use of alcoholic beverages, and had frequently been under the influence of liquor, the evidence shows that he was fully capable of managing his own affairs, and at the time of executing the Kemper deed of trust under-

stood what he was about. No coercion or undue influence was practiced upon him by his father-in-law in this transaction unless it be in requiring him to make the gift of the 80-acre tract of land to his wife, which will be considered later. After 1885 the drinking habit seems to have increased. His sprees became more frequent, and were longer continued. He became abusive and cruel to his wife and family, and in June, 1887, due and proper proceedings were taken, at the instance of his relatives, in the probate court of Platte county, to have him adjudged non compos mentis, and on June 3, 1887, on inquisition had, he was duly adjudged by said court incapable of attending to his own business, and an habitual drunkard, and one William C. Wells was thereupon appointed guardian of his person and estate. Wells, the guardian, entered upon the discharge of his duty, and at once committed his ward to the St. Vincent's Inebriate Hospital at St. Louis for treatment. He remained there for nearly three months, and on September 1, 1887, was discharged by the medical staff of the hospital, consisting of Drs. Bauduy and Herman, as apparently cured. After his discharge, he endeavored to secure employment at Kansas City and other places, and succeeded in doing so for a space of a month or six weeks. Between September and November he occasionally appeared to be under the influence of liquor, but, after a careful reading of all the evidence relating to his conduct and mental condition up to November 1st, I am of the opinion that he did not, up to that time, resume his intemperate habits as of old, but that his maudlin condition, as occasionally observed, was rather the effect of some stupifying drug. Many witnesses testify to seeing him, and observing his conduct during this period, and pronounced him to have been intelligent, sensible, and entirely capable of transacting his own business. On the whole, I believe the evidence fairly warrants this conclusion. In this state of facts, the complainant, on November 1, 1887, after personal interviews with the probate judge of Platte county, prepared and filed a petition in said probate court in words and figures as follows:

"To the Probate Court of Platte County, Missouri: The petition of W. F. Cockrill shows to the probate court that on the 2d day of June, 1887, he was found by a jury and adjudged by said probate court to be incapable of managing his own affairs, and Wm. C. Wells was duly appointed guardian, and gave bond as required by law. Petitioner states that he has undergone treatment for his disability, and has been cured, and is now in condition to take charge of his own affairs. He therefore asks that proper, legal steps be taken to restore to him his rights, that inquiry be had into his present condition in the manner required by law, and that upon proper finding of a jury that his property be restored to him subject to his own control and management.

"[Signed]

W. F. Cockrill."

—and duly sworn to. The evidence shows that the complainant wrote this petition himself, and presented it to the court for its action, and I am unable to find from a careful examination of the evidence that he was inspired or aided to do this by any of the defendants, or any persons acting for them. On the contrary, the evidence shows that this proceeding was entirely of his own motion; and, notwithstanding its suspiciously close proximity in time to the

transaction of the next day, I can find no satisfactory evidence of any connection with it by the defendants, and much less of any fraudulent connection. On the filing of this petition, on November 1, 1887, the court issued a venire for a jury to inquire into the mental condition of complainant, and thereupon a jury of 12 lawful men of Platte county came, and, after hearing the testimony, in the presence of complainant, returned the following verdict:

"We, the jury, find that the within-named, William F. Cockrill, is competent to attend to his own affairs.

"[Signed]

William Kimsey, Foreman."

And the court then and there made the following order:

"It is therefore considered by the court that said William F. Cockrill is a person of good mind, and competent to attend to his own affairs. Wherefore it is ordered that William C. Wells, guardian of the person and estate of said William F. Cockrill, do make final settlement of his accounts, and that he restore to the said William F. Cockrill all things remaining in his hands."

Prior to this time the complainant had made such default in the payment of the loan of \$3,300 due to Clinton Cockrill as entitled him, Cockrill, to foreclose his deed of trust by a sale of the mortgaged property, and the requisite advertisement had already been commenced in one of the newspapers of Platte county. The complainant had no money to make payment of the loan, and on the advice and with the aid of his friends William C. Wells, his former guardian, E. O. Waller, one of the most respected citizens of Platte county, and others, who acted as intermediaries between him and Clinton Cockrill, who were now not on speaking terms, a settlement was concluded, by the terms of which complainant agreed to convey his interest in this home place of 160 acres (conveyed by the deed of trust) to Clinton Cockrill for \$6,000. His title was subject to his wife's dower. Complainant made his deed to Clinton Cockrill and the grantee after taking out the \$3,300 and interest due him from complainant, paid the balance of the \$6,000 over to complainant, or to such persons as he directed; and subsequently, and prior to the institution of this suit, conveyed the land so acquired from complainant to his daughter, the former wife of the complainant, as a gift to or settlement upon her. The evidence shows no coercion, undue influence, or fraud of any kind exercised by Clinton Cockrill in this transaction, and further shows that the persons who advised the complainant in regard to it did it in good faith, believing at the time that they were rendering material, disinterested, and valuable aid to him. In my opinion, also, the transaction was in fact a reasonably fair one. Complainant's title was subject to the dower of his wife, and for that reason practicably not salable for even its value. Ordinarily, purchasers want a clear title, and usually, in their negotiations, exaggerate the importance of defects. The witnesses who testify as to the value of complainant's title and interest in the land in 1887 differ in their opinions somewhat, but no more than is usual in the expression of opinions in cases of this kind. From them all, taking into consideration the infirmity of complainant's title, I am satisfied that \$6,000 was a fair and reasonable price for it at the time. At any rate, it cannot be claimed by

any fair-minded person that it was so unreasonably low a price as to be in itself a badge of fraud.

Complainant also contends that he was in fact so incapable of managing his own affairs at the time this last-mentioned deed was made that his act and deed was and is void. I do not think so. The evidence satisfies me that on November 1 and 2, 1887, to which dates much evidence is directed, the complainant was sober, understood well what he was about, and made the deed in question as his own voluntary act and deed. I quite agree with defendants' counsel in the following summary of the real facts of this case:

"The complainant's case is one of the common kind of a young man inheriting a fortune from his father, and wasting it in idleness and riotous living. The complainant was idle, and he was dissipated, but he was not an imbecile, and neither was he a lunatic. He had inherited one fortune, and he had, he fancied, married another; and this he thought made it unnecessary for him to labor, and so he did nothing but dissipate and fritter away the opportunities for a successful, useful, and happy life."

When urged by his wife not to neglect his business, but to go to work, his response to her was "that he wouldn't work; that when her old daddy died he would have more money than he could spend." As a result of such conception of his rights and duty, and of such a course of life as he led, he soon began, as already stated, to abuse and illtreat his wife, and she was compelled to resort to the courts to be legally separated from him. The conduct of Clinton Cockrill, in all the transactions complained of in this case, seems to me to have been inspired by a knowledge of the disposition and propensities of his son-in-law, and by a laudable desire to make the provisions for the maintenance and care of complainant's wife and family which the complainant neglected to make. Even if he had not paid complainant the full value of the land acquired from him (which I cannot find to be the case), yet, considering the fact that all the lands so acquired have been vested in complainant's wife and children for their support and maintenance, and thereby, in spite of himself, a part of his legal and moral obligation to his wife and family has been discharged, I could not, as a chancellor administering rights in conscience and equity, hold his own benefactor to a very exact accounting. Besides the foregoing facts, which are directly incident to the transaction in question, it appears to me that complainant is guilty of gross laches in instituting proceedings to set aside the deeds in question. He deferred action for nearly eight years after the execution of the last deed complained of, and has not offered to return the consideration received by him for his conveyances. During this time the main defendant, of whom he principally complains, has, through advancing years, decrepitude, and failure of health and strength, become unable to give testimony in the case. During this time, also, complainant's former wife—now by the generosity of her father, the owner of the property in controversy—has expended much money in improving the property, and the condition of things generally has been substantially changed.

In these observations concerning laches I do not overlook the proposition advanced by complainant's counsel, namely, that, as

complainant was insane, no offer to restore or put defendants in statu quo was necessary. But this contention involves a finding of fact to the effect that complainant was insane at the time the conveyances were made by him, and has continued so. I do not find either of these facts to be true. Notwithstanding the fact that complainant was again in January, 1888, declared non compos mentis, and a guardian appointed for him, it is apparent that this was a spasmodic condition, occasioned by the excessive use of intoxicating liquors at the time. He was sent to an inebriate asylum at Ft. Hamilton, N. Y., when, on an examination by the medical staff, on entering, he was found in general good health, suffering only from excessive use of whisky and the associate habit of using tobacco. He remained there three months, when he was "paroled," as it is called in the report. He then went to South Dakota with a surveying party under Prof. Bannister, and remained there, keeping the notes of the surveyor for several weeks, and returned to Platte county, where, upon like petition, order, and proceedings as before, he was, on the 6th day of September, 1888, adjudged to be capable of managing his own affairs, and the guardian, Overbeck, was discharged. Certainly, since this last-mentioned date—September 6, 1888—there is no evidence of inability on his part to attend to his business. In fact, there is comparatively little in the record concerning his habits or condition after this date, and certainly nothing to overcome the presumption of continued sanity after the finding and judgment on the inquisition held September 6, 1888. The complainant must, therefore, be held to all the consequences of want of action by him since that date, at least. Taking this date as a starting point, he allowed over seven years to elapse before even complaining of any ill treatment, much less instituting any suit for redress of his supposed wrongs. He waited until the supposed wrongdoer was unable to speak in his defense. He permitted his injured and innocent wife to expend money in improving the property which she supposed was her own. He retains the consideration received by him for the property, and makes no offer to return the same. His suit is against his own wife and children to take from them what her father, in times of her distress, occasioned by complainant's wrongful and cruel conduct, had given her. Whatever conclusion may be reached on questions hereinafter discussed, I am satisfied there is no equity in this bill; and, if there was, complainant is estopped by his own failure to do equity, and by his gross laches (*Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873; *Kinne v. Webb*, 49 Fed. 515; *Id.*, 4 C. C. A. 170, 54 Fed. 34-40), from asserting the same.

But complainant's counsel contend that his equitable rights are aided by certain strict rules of law, which I will now consider. And first, they claim that the deed of trust executed by the complainant to secure the loan of \$3,300 made to him by Clinton Cockrill, of date April 27, 1885, is a usurious transaction. It is said that Clinton Cockrill demanded of complainant, not only a note bearing 6 per cent. interest per annum, but also demanded, as a condition of

making the loan, that complainant should simultaneously convey to his own wife the 80-acre tract of land already referred to, and it is contended that this conveyance was so made by the complainant at the time, without other consideration than securing the said loan of \$3,300. It is true that such requirement was made and conformed to, but this does not constitute usury in the particular case under consideration. The lender demanded nothing for himself but a low rate of interest. He did demand that complainant, who was then a spendthrift, and who was the husband of his daughter and the father of her children, should, while he was yet able, make some provision for his wife and family. The complainant obviously recognized the justice of this demand, and for the first and only time, as shown by this record, voluntarily devoted a small part of his inheritance to the discharge of his natural, equitable, and legal obligations. To hold that such a settlement, even though instigated by the father, is a badge of fraud, would, in my opinion, be a strange perversion of equity. But this is not all, even if such conveyances could be held to constitute usury to the extent of the value of the 80-acre tract, yet, under the statute of the state of Missouri, it would not avoid the obligation created by the loan to pay the principal debt as made. The lender could recover the same, and enforce all his legal remedies to that end; and even the legal rate of interest could be recovered from the debtor for the benefit of the school fund. *Ferguson v. Soden*, 111 Mo. 208, 19 S. W. 727. For the foregoing reasons, I cannot hold, either as a result of equitable considerations or legal rules, that the rights of the parties to this suit are at all affected by complainant's conveyance of the 80-acre tract of land to his wife. The most serious and strenuous contention of complainant's counsel in this case is: That on November 2, 1887, when complainant executed the deed to Clinton Cockrill conveying the 160-acre home place, he was, as a matter of law, conclusively presumed to be incompetent to make the deed, for the reason, as alleged, that he was then, under the judgment of the probate court of Platte county, incompetent to manage his own affairs, by reason of his being an habitual drunkard.

At the outset of the discussion of this question, it must be admitted that the deed of an insane person while under guardianship is absolutely void; that the existence of guardianship over him is conclusive respecting the disability of the ward; and that this rule applies to a person under guardianship by reason of his being incapable of managing his own affairs in consequence of habitual drunkenness. *Rannells v. Gerner*, 80 Mo. 474. The question remains whether the complainant was in fact under guardianship on November 2, 1887, when he made the deed to the 160 acres in question. He had confessedly been duly adjudged incompetent by the probate court of Platte county on June 3, 1887, and a guardian of his person and estate duly appointed; and he had been, by the same court, on November 1, 1887, duly adjudged relieved of his disability, and competent to attend to his own affairs, and his guardian had been duly discharged, provided, the last-mentioned judgment is not void for one of two reasons, namely: (1) Because complainant him-

self was the sole petitioner in the proceedings resulting in such judgment, or (2) because no notice was given of the proposed inquisition to his relatives or guardian.

Section 5549, Rev. St. Mo. 1889, provides as follows:

"If any person shall allege in writing, verified by oath or affirmation that any person, declared to be of unsound mind, has been restored to his right mind, the court, by which the proceedings were had, shall cause the facts to be inquired into by a jury."

Section 5550 provides, in substance, that if it be found that such person has been restored, he shall be discharged from care and custody, etc. The language of section 5549 is certainly broad enough to permit any one to inaugurate the inquiry as to the continued insanity of a ward, and I know of no one more interested in the commencement of such proceedings than the person who believes himself to have been restored, and entitled to be discharged from bondage. To deny him this privilege might be the means by which evil-disposed persons could permanently restrain him of his liberty, and deprive him of his rights. A construction of the statute which will permit the ward to petition for his own discharge is in harmony with the practice pursued in the chancery courts of England, in exercising their jurisdiction over insane persons (*Busw. Insan.* § 69); and, in the absence of statutes to the contrary, generally prevails in the states of this Union (*Id.* § 70; *In re Hanks*, 3 Johns. Ch. 567; *In re Christie*, 5 Paige, 242).

In the case of *McDonald v. Morton*, 1 Mass. 543, the supreme court of Massachusetts, in dealing with this subject, says "the law contemplates that there may be a time when a person in the situation of appellant [under guardianship as an insane person] may be restored to his reason. I do not think he is to be left to his friends. Their ignorance of the fact, carelessness, or inattention ought not to leave him in bondage forever,"—and accordingly held that he might, by his own petition, institute an inquiry concerning his restoration. Inasmuch as the statute of Missouri, in sufficiently comprehensive language, confers this right upon any person, I am not disposed, in the light of reason or authority, to deny the right to the person above all others most interested in it.

The complainant further assails the validity of the judgment of the probate court of Platte county rendered on November 1, 1887, because no notice of the hearing of complainant's petition for restoration was given to complainant's family or guardian. In considering this question, it is well at the outset to note that the statutes of Missouri do not, in terms, require any notice in such cases; that the probate court of this state is a court of record, possessed of plenary jurisdiction to appoint, control, and discharge guardians of insane persons; and judgments within its jurisdictional limits are not subject to collateral attack for any mere irregularities. Bearing these facts and principles in mind, the question is: Does the above-mentioned want of notice of complainant's application for restoration to his rights so affect the jurisdiction of the court as to render its judgment thereon void? I think not, for the following reasons: The probate court had jurisdiction over the subject-

matter. This subject-matter was the status of the complainant himself. The finding and judgment of the court as to such status affected him and his relation to his property only. The proceeding is, therefore, analogous to a proceeding in rem, where jurisdiction is acquired over the res. It was probably in view of considerations like these that the legislature made no provision requiring notice of the hearing of an application for restoration to be given to any persons. The omission of such legislation becomes significant when it is considered that a certain notice is expressly required to be given of the hearing of a petition for the original appointment of a guardian, and this significance may be, as suggested by counsel for the defendants, that the application for restoration is not a new proceeding, but a step in the progress of a pending cause, namely, that which was instituted by filing the original petition for the appointment of a guardian. This view finds support in the following cases: *Dutcher v. Hill*, 29 Mo. 271; *In re Marquis*, 85 Mo. 617. Under such circumstances it is my opinion that notice to the former guardian or relative of complainant's application for restoration to his rights is not a prerequisite to jurisdiction. The want of it, at the worst, is an irregularity only, which cannot be taken advantage of in this collateral proceeding. *Henry v. McKerlie*, 78 Mo. 416; *Rowden v. Brown*, 91 Mo. 429, 4 S. W. 129; *Dutcher v. Hill*, supra; *Kimball v. Fisk*, 39 N. H. 110; *Busw. Insan.* § 56; *Rogers v. Walker*, 6 Pa. St. 371; *Willis v. Willis' Adm'rs*, 12 Pa. St. 159; *Bethea v. McLennon*, 1 Ired. 523. I have proceeded so far in the consideration of this last question as if the former guardian, or members of the family of the complainant, were themselves assailing the judgment of the probate court of November 1, 1887. But such is not the case. They are not complaining, or seeking to set aside the judgment for want of notice to them. The only person assailing the judgment is the complainant, who, by a petition drawn and presented by himself, invoked the jurisdiction of the probate court which rendered the judgment, and whose duty it was to give necessary notice in the case. His solicitude for the rights of others is very commendable as an abstract ethical question; but I know of no principle of law or equity which will permit the complainant to take advantage of his own wrong, even in the exercise of such praiseworthy solicitude.

From the foregoing it appears that there are no unyielding rules of law which demand an unconscionable solution of this case, and complainant's bill must therefore be dismissed.

UNITED STATES et al. v. ALASKA PACKERS' ASS'N et al.

(Circuit Court, D. Washington, N. D. March 12, 1897.)

1. CONSTRUCTION OF INDIAN TREATY.

Article 5 of the treaty of January 22, 1855, with the several Indian tribes of Washington Territory (12 Stat. 928), which provides that "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory, and of erecting

temporary houses for the purpose of curing," was not intended to secure to the Indians exclusive rights at any particular places, but only such rights as might be enjoyed by all citizens in common, and valid state laws effective to abridge the fishing rights of citizens are equally effective as against the Indians.

2. RIGHT OF NATIONAL GOVERNMENT TO DISPOSE OF INDIAN RESERVATIONS.

The national government, as original proprietor, has the power to dispose of public lands even within an Indian reservation without the consent of the Indians; and even if the Indian treaty of January 22, 1855 (12 Stat. 928), be regarded as making a reservation of fishing grounds and lands adjacent necessary for use of the Indians, congress still had the power to make disposition of the same grounds, notwithstanding the treaty.

8. STATE CONTROL OF FISHERIES.

In the control of fisheries within a state, the state government is supreme.

W. H. Brinker and J. A. Kerr, for plaintiffs.

S. H. Piles and Dorr, Hadley & Hadley, for defendants.

HANFORD, District Judge. This is a suit by the United States and certain Indians of the Lummi tribe for an injunction against the Alaska Packers' Association, a corporation, and Kate Waller, to protect the Lummi Indians in the right to take salmon, by their ancient and primitive means of fishing, in the waters adjacent to Point Roberts, and to maintain summer houses for their habitation, and places for drying fish on the shore during each fishing season, which rights are alleged to be guarantied by article 5 of a treaty made and concluded at Point Elliott, Wash. T., January 22, 1855 (12 Stat. 928), which article reads as follows:

"Art. 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens."

Point Roberts is the extremity of a peninsula extending into the Gulf of Georgia, and stands as a headland of Semiahmoo Bay. The boundary line between the state of Washington and British Columbia crosses Semiahmoo Bay and the peninsula so that only the extreme outer end of the peninsula south of the boundary line belongs to the United States. This small area of land, projecting from British territory into deep water, was at one time, by an order of the president, reserved for governmental use; but the defendant Kate Waller has been permitted to acquire title to a part of the same, under the homestead law of the United States, and she is at present the owner of the particular land which the Indians wish to occupy. The defendant the Alaska Packers' Association owns a fishing establishment and cannery on land leased from Mrs. Waller, and has in connection therewith a wharf, and has constructed a number of leads and fish traps in adjacent waters. The traps consist of rows of piles supporting nets forming barriers in the way of salmon migrating towards the Fraser river, and operating so as to lead the salmon into traps. There is a reef over which the Sockeye salmon have been accustomed to run in great numbers in making their way towards the Fraser river. The Indians, taking ad-

vantage of the shoal water over this reef, have been accustomed to catch fish there by the use of nets made of willow bark.

The bill of complaint charges that, at and prior to the time of making the treaty above referred to, this reef, near Point Roberts, was one of the usual places for taking fish, or fishing stations, to which the Lummi Indians had been accustomed to resort for the purpose of obtaining fish for food; and that they were accustomed to erect and maintain temporary houses, in which to live during the fishing season, upon the shores adjacent to said reef; and that the fish traps above described, constructed and maintained by the Alaska Packers' Association, are so placed as to completely obstruct the run of the Sockeye salmon towards and over the said reef, so that while said traps continue to exist, without openings therein for the passage of fish, the Indians are prevented from catching fish upon or over said reef; and that they are unable, with their means of taking fish, to catch the Sockeye salmon at any other place. The Sockeye is a species of salmon especially valuable for canning, on account of the red color of the flesh. They run during a period of only from 20 to 40 days each year, commencing about the 1st of July. Other varieties, equally good for the use of the Indians, are obtained in the same waters in the spring and fall of each year. The Lummi Indians, in whose behalf this suit has been commenced, have had the lands upon their reservations allotted to them in severalty, and patented. They all have cultivated farms, and are an unusually thrifty and enterprising tribe of Indians.

It is a disputed point in the case whether or not the Lummi Indians were, at or previous to the time of the treaty, accustomed to resort to the Point Roberts fishing station to catch fish. I consider this an immaterial point, for, as I construe the treaty, the fifth article was not intended to create a reservation of any particular place for catching fish, in favor of any one of the different tribes or bands of Indians with whom the treaty was made. It is a general provision in favor of all the Indians represented by signers of the treaty, and applies generally to all fishing stations within the territory of Washington; and the words used, so far from creating an exclusive right, manifest clearly a purpose to secure equality of rights in favor of the Indians, at all usual places where citizens have the common right of fishing. Although I regard the point as immaterial, I will say that I find a decided preponderance of the evidence in favor of the contention on the part of the complainants, and the evidence satisfies me that for many generations the Lummi Indians have been accustomed to catch fish, by means of nets of their own manufacture, at the place referred to.

The legislature of the state of Washington has assumed to make laws regulating the construction of fish traps, and authorizing the issuance of licenses for the construction, maintenance, and operation of fish traps, and appliances for catching salmon. Laws Wash. 1893, p. 15; *State v. Crawford*, 13 Wash. 633, 43 Pac. 892. The Alaska Packers' Association claims the right to maintain its fish traps by virtue of licenses therefor, duly issued, pursuant to the laws of the state, and avers that the same have been constructed in conformity with the regulations prescribed by the state; and this defense is fully sus-

tained by the evidence. The case therefore presents a controversy between the Indians claiming rights guarantied by a treaty made with the national government, and a corporation claiming rights conferred by the laws of the state; and it becomes necessary to determine, in the first place, the validity of these conflicting claims, by an interpretation of the treaty, and, in the second place, whether the fish traps, as constructed and maintained, do infringe the lawful rights of the Indians, and, if so, which of the contending parties has the paramount right. The object of the government in making the treaty was to extinguish the Indians' title to lands in Washington Territory, so that the same might be opened for settlement and improvement by white people, to define the boundaries of the reservations for the exclusive use and occupancy of the different tribes respectively, and to agree with the Indians as to their compensation for the lands ceded, and to establish peace and friendly relations with the Indians. Having in view the general scope and object of the treaty, and the particular provisions contained in the different articles, I am unable to find any indication of an intent, in the fifth article, to create, in favor of the Indians, reservations of any particular places for fishing purposes, or sites for their habitations, or as places for drying fish. As I have already intimated, the words of this article indicate a purpose to secure to the Indians equality of rights, co-equal with the rights of citizens, and not exclusive rights at any particular places. Instead of reserving places for permanent use for curing fish, the article secures to the Indians only a right to erect temporary houses for the purpose of curing, and that right is coupled with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Now, as the government contemplated the settlement of Washington Territory, and the acquisition of titles to the public lands by individuals under the general laws providing for the conveyance by the United States of titles in fee simple, it is unreasonable to suppose that article 5 was intended to reserve, from sale and disposition by the government, any particular tracts not particularly described, and not included within the reservations which are described in the treaty; and it is equally unreasonable to suppose that all the public lands in Washington Territory adjacent to waters where fish may be taken are, by the fifth article of the treaty, permanently impressed with an easement in favor of the Indians. I conclude, therefore, that the rights guarantied by the fifth article are only such as might be, after the date of the treaty, enjoyed by all citizens in common, and valid laws effective to abridge the fishing rights of citizens are equally effective as against the Indians. In decisions heretofore rendered, both for and against the government, I have given the same interpretation to similar treaties with other tribes of Indians in Washington Territory. *U. S. v. The James G. Swan*, 50 Fed. 108; *U. S. v. Winans*, 73 Fed. 72. Up to the present time these decisions stand unreversed.

To construct permanent fish traps and fixed appliances in such a manner as to wholly deprive the Indians of any chance to take fish for their own use at any usual or accustomed fishing place, as the bill of complaint in this case charges that the Alaska Packers' Association has done, would certainly be an infringement of the rights

guarantied to the Indians by the treaty. But the answer raises an issue as to whether or not the fish traps in question do constitute such an interference as the bill charges. I find from the evidence bearing upon this disputed question that, since the fish traps now owned by the Alaska Packers' Association were put in place, the Indians have been successful as fishermen in the vicinity of Point Roberts during all seasons when the different varieties of salmon are running, and have obtained an abundance for their own use, and a surplus of thousands of fish, which they have been able to sell to the canneries at a good price. To interfere with the Alaska Packers' Association in such a way as to render its business unprofitable, and drive it away from Point Roberts, would be a serious injury, rather than benefit, to the Indians, for they would then be obliged to sell their fish elsewhere; and, by removal of this competitor, the market would be affected to the injury of those engaged in catching fish for sale, including these same Indians, who are joined as complainants with the United States in this case. The testimony fails to convince me that these Indians are unable to make use of appliances or means for taking fish other than nets of inferior quality, such as they were able to manufacture previous to the coming of white people to this country. On the contrary, it is shown that they are able to obtain and use better material for fish nets, and that they are able to operate in deep water, and that, notwithstanding the fish traps complained of, there is still ample room for them to engage in fishing, and that they can do so successfully in all seasons.

Conceding that the fish traps complained of do impede the fishing operations of the Indians, to the extent of restricting them in the choice of means for taking fish, or even to the extent of depriving them of the choice of locations upon the fishing grounds, by obstructing the fish from running to the places where they have formerly been accustomed to anchor their nets, still it must be considered that the fish traps as constructed are authorized and licensed by the state government, pursuant to laws enacted for the purpose of regulating fisheries within the state. The treaties made with the several Indian tribes are not to be regarded as conveyances of the title to lands within Washington Territory, from the Indians as proprietors, with limitations and reservations of easements. The government of the United States does not deraign title to its public lands from the Indians. The national government is the primary source of title, and, as original proprietor, it had the power to dispose of public lands, even within an Indian reservation, without the consent of the Indians. *Johnson v. McIntosh*, 8 Wheat. 543-604; *U. S. v. Cook*, 19 Wall. 591-597.

In the opinion of the supreme court, by Mr. Justice White, in the case of *Spalding v. Chandler*, 160 U. S. 394-407, 16 Sup. Ct. 360, the doctrine held by the supreme court is stated as follows:

"It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was, from the time of the formation of this government, vested in the United States. The Indian title, as against the United States, was merely a title and right

to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit, until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

Even if the treaty should be regarded as making a reservation of fishing grounds and lands adjacent, necessary for use of the Indians, congress still had the power to make other disposition of the same grounds, notwithstanding the treaty. The supreme court, in the same opinion, referring to the power of congress to control the use of lands within an Indian reservation, or dispose of the same, held that:

"The power existed in congress to invade the sanctity of the reservation, and disregard the guaranty contained in the treaty of 1820, even against the consent of the Indians, party to that treaty; and, as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the state for canal purposes."

Applying the same rules to the case in hand, we find that, pursuant to laws enacted by congress, an absolute title in fee simple has been conveyed by the United States government to the land whereon the Indians claim a right to erect temporary houses, for their use during the fishing seasons, to the defendant Kate Waller; and by the enabling act, pursuant to which the territory of Washington has been admitted into the union of states on an equality with the original states, and the constitution adopted by the state, all proprietary rights in the waters within the boundaries of the new state, and the power to regulate and control rights of fishery in those waters, have been transferred to, and assumed by, the state of Washington. By article 17 of its constitution, the people of this state have made the following claim of dominion over its public waters:

"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

It is settled by the decisions of the supreme court that, under the provisions of our federal constitution, the same rights and powers possessed by the original 13 states in all things relating to the public waters within their boundaries must be conceded to each new state admitted into the Union, because essential to make each of the states co-equal with the others. *Pollard v. Hagan*, 3 How. 212-235; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548. And it has also been determined by the supreme court that each state has the right and power of a proprietor and sovereign to control, regulate, restrict, and license the enjoyment by individuals of the privilege of taking fish from its public waters. *McCready v. Virginia*, 94 U. S. 391-397; *Manchester v. Massachusetts*, 139 U. S. 240-266, 11 Sup. Ct. 559. In the latter case the supreme court affirmed a judg-

ment imposing a fine for fishing in Buzzard Bay, contrary to the laws of Massachusetts, in a vessel licensed for the fishing trade, pursuant to the laws of the United States, placing the decision upon the ground that, in the control of fisheries within the state, the state government is supreme.

These considerations lead me to conclude: (1) That the rights of the Lummi Indians under the treaty referred to have not been invaded by the defendants in such manner as to call for legal redress. (2) That it is not competent for this court to interfere by an injunction with the fish traps of the Alaska Packers' Association, which are authorized and licensed by the laws of the state. Let there be a decree dismissing the suit, without costs.

CENTRAL RAILROAD & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. et al. FARMERS' LOAN & TRUST CO. v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA et al. BROWN et al. v. SAME.

(Circuit Court, S. D. Georgia. March 27, 1897.)

1. RAILROAD RECEIVERS—LIABILITY FOR RENT OF LEASED LINE.

Where receivers appointed to take charge of railroad property took possession of a leased line, and operated it for 18 months, keeping no separate account of its earnings and expenses, but applying them for the benefit of the entire system, of which it was treated as an integral part, and the rent which fell due a few days after the appointment of the receivers was paid by them with the sanction of all parties, and the several bills under which the receivers were appointed, and the orders of court made thereon, looked to the maintenance and full preservation of the entire system, including leased lines, and the lessor was not proceeded against as an insolvent corporation, these facts, in connection with the judicial admissions from time to time that the rent which became due more than a year after the appointment of the receivers was a debt which they were required to provide for, require that the rental for the entire period during which the receivers were in possession should be treated as a receivership obligation, contracted under the authority of the court.

2. LIABILITY OF PURCHASERS AT FORECLOSURE SALE FOR RECEIVERSHIP DEBTS.

When the reorganization scheme carried out by the foreclosure of a railroad mortgage contemplated and included all the benefits of a receivership which existed at the time the foreclosure bill was filed, as well as of the receivership instituted under the bill, the mortgage bondholders having the full benefit of all the earnings and advantages of the receivership, and the decree of foreclosure expressly stipulated that the purchasers should take the property subject to all receivership debts and the decree affirming the sale contained the same stipulations, the purchasers are liable for the rental of a leased line which was taken possession of by the receivers, that being a receivership obligation.

Intervention of the Eatonton Branch Railroad Company on exceptions to the master's report.

Charles Nephew West, for the Eatonton Branch Railroad Co.

Lawton & Cunningham, for the Central Railroad & Banking Co. of Georgia.

PARDEE, Circuit Judge. On the 1st day of April, 1893, the Central Railroad & Banking Company of Georgia, hereinafter called

the Central, leased the Eatonton Branch Railroad, a railroad line running from Milledgeville to Eatonton, both in the state of Georgia. The lease was made for the term of the charter of the said Eatonton Branch Railroad Company under certain terms not necessary to mention, except that the Central agreed to pay as rental to the Eatonton Branch Railroad Company the sum of \$14,000 per annum on the 1st day of April, 1854, and thereafter on each succeeding 1st day of April. Under this lease the Central took possession of the railroad, and there- after operated the same as a part of its own property, keeping no separate accounts of the same, and paying the stipulated rent regularly until the matters occurred hereinafter set forth. On March 4, 1892, Rowena Clark, a stockholder of the Central, filed her bill in this court assailing the validity of a certain lease made by the Central of its entire railroad and property to the Georgia Pacific Railroad Company, under which lease the Richmond & Danville Railroad Com- pany was then operating and controlling the same. She also assailed the legality of the control exercised over the Central by the Rich- mond & West Point Terminal Railway & Warehouse Company, by means of a majority of shares of Central stock owned by it. The bill prayed for the cancellation of the lease; injunction against the contin- ued use of the said majority of stock; for an injunction and a re- ceiver. As detailed in the bill, the object of the same was to protect the Central and to preserve its autonomy. On this bill the court is- sued a temporary injunction, and appointed E. P. Alexander a tempo- rary receiver, directing him to make no change in keeping the Cen- tral's books. On subsequent hearing, March 28, 1892, the court ap- pointed receivers with the usual powers granted to receivers of rail- roads, directing them to take and operate the property pending a reorganization of the board of directors of the Central, and generally providing for the maintenance of the Central system. Under the or- ders made in this case the Eatonton Branch Railroad, as an integral part of the Central system, was taken into possession by the receivers, and operated by them in the same manner as the Central had done since the lease was made. On the 1st day of April, 1892, default was made by the receivers in the payment of the rental which accrued on that day; whereupon the Eatonton Branch Railroad Company at once intervened, asking for payment of the rental, and the receivers paid it. Whether this payment was made by specific order of the court does not appear, but it was evidently with the approval and sanction of all parties. On July 4, 1892, the Central filed its bill against the Farmers' Loan & Trust Company of New York City, the Central Trust Company of New York, and a number of railroad corpo- rations, in which bill was set forth the proceedings in the Rowena Clark Case above mentioned, a description and list of all the railroads and assets and property of the Central, including its leasehold inter- ests in other railroads, stating therein that the Central controls and operates as a part of its system the Eatonton Branch Railroad, and declaring the terms of the lease, including the amount of rental agreed to be paid, but not making the Eatonton Branch Railroad party to the bill. This bill averred that the Central is now insolvent, in the sense that it is unable to meet its maturing obligations, but that if the in-

tegrity of its system is maintained, and its properties and interests preserved, until a proper plan of reorganization can be effected, it can be re-established upon a sound basis and restored to prosperous conditions. To accomplish which, however, the immediate interposition of a court of chancery is absolutely necessary for the purpose of protecting the integrity of the system, and saving it from disintegration, and preventing the serious and irreparable losses that the disruption would entail upon the stockholders, creditors, and other persons interested in the property. The bill prayed that all of the property and assets of the Central be taken in charge by a receiver to be appointed by the court, to be administered as a trust fund for the stockholders and all interested; that the receivers first pay current expenses of maintaining and operating the Central and steamship lines and other properties, and all labor, supplies, and rentals, and such other charges as are necessary to be made in order to prevent the forfeiture of the Central's rights and interests in the properties which constitute its said system, etc. Under this bill, on July 15, 1892, the court discharged the receivers under the Rowena Clark bill, and appointed H. M. Comer sole receiver, and, in and by this order, the court directed that the receiver assume and pay all the liabilities and expenses incurred under the Rowena Clark receivership, take possession and charge and control of said corporations named in the bill, and other property and assets of every kind, operate the same, and take possession, charge, and control of all the railroads and steamship lines and railroads and steamships owned, leased, or otherwise controlled and operated by said Central Railroad & Banking Company, and manage and operate the same, etc., under the order and protection of the court, having and exercising all the rights and franchises belonging or appertaining to said corporations, to the end that the integrity of the Central Railroad system may be preserved. The order authorized the receiver, after defraying operating expenses, to pay out of the net earnings the rentals and other fixed charges accruing to other companies, or resulting from the uses or operations of other lines and property as a part of said system, and all the corporations named in the bill were restrained and enjoined pendente lite from in any wise interfering with the receiver's possession. The order further provided that all liabilities and expenses incurred under the receivership under the bill of Rowena Clark should be assumed and paid by the receiver then appointed. That this order was not *ex parte* is shown by the following recital therefrom:

"The following defendant corporations appeared and submitted their answers, signifying their desire that said H. M. Comer, the receiver appointed in and by said order of July 4th, be continued as permanent receiver, viz. the Ocean Steamship Company of Savannah, the Montgomery and Eufaula Railway Company, the Savannah and Western Railroad Company, the Port Royal and Augusta Railway Company, the Port Royal and Western Carolina Railway Company, and the Savannah and Atlantic Railway Company. The defendant the Farmers' Loan and Trust Company of New York also appeared by their counsel, Turner, McClure & Rolston and George A. Mercer, Esq., and filed their answer assenting to the continuance of said receivership. The defendant the Central Trust Company of New York, which is also a party defendant in the original cause of Rowena M. Clark et al. v. the Central Railroad and Banking Company of Georgia et al., and which has duly appeared in said cause, and

which has also been duly served, in accordance with the order of this court, by the United States marshal for the Southern district of New York, with a notice of this hearing and with a copy of said order of July 4th, has failed to appear at this hearing and made no objection to the continuance of said receivership. The counsel for complainants in said original bill of Rowena M. Clark also appeared and participated in this hearing. It appears, further, to the court at a meeting of the board of directors of the Central Railroad and Banking Company of Georgia, held on said July 4, 1892, in the city of Savannah, a resolution was unanimously adopted approving and ratifying the filing of the bill of complaint in this case, and requesting the continuance of said H. M. Comer as permanent receiver. It further appears to the court that other holders of a large amount of the securities and obligations of the Central Railroad and Banking Company, and others largely interested therein, have likewise signified to the court their desire for the appointment of said H. M. Comer as permanent receiver."

Pursuant to above order, the receiver took possession of the Central system, including the Eatonton Branch Railroad, and operated the Branch Railroad as a part of the main line of said system, but, as had been theretofore the practice of the company and former receivers, kept no separate accounts of the earnings and operating expenses of said Eatonton Branch Railroad. After various pleadings not necessary to notice, on February 20, 1893, the Farmers' Loan & Trust company on leave of the court filed its bill for foreclosure and for the appointment of a receiver, particularly making a party thereto the Central Trust Company of New York as trustee of the second or consolidated mortgage bonds. This bill showed that the mortgage held by the Farmers' Loan & Trust Company covered all the railroad, and also all the property and assets, of the Central Railroad & Banking Company of Georgia. It averred that the Central's auxiliary lines held under leases were a part of the property mortgaged, and all should be sold together. It recited the receivership under the bills of Rowena Clark and of the Central Railroad & Banking Company, and an order of court directing the receiver to take charge of the leased lines, mentioning by name the Eatonton Branch Railroad, and describing it as extending from Milledgville, Ga., to Eatonton, Ga., averring that the Central controls and operates it as a part of its system under lease; and after specifying all of the property, including the leasehold interest of the Central, it avers that all the property described, and each and all and every of them, and the interest of the Central therein, are subject in all respects to the provisions of the mortgage held by the Farmers' Loan & Trust Company, and are part, and constitute part of, the subject-matter of said mortgages, and are and constitute part of the security pledged by the said mortgages and deeds of trust of the said bonds of the Central Company. It averred default of the Central, the inadequacy of the security, and, then, that the mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trusts. After other suitable allegations and prayers looking to a foreclosure and sale, the complainant prayed for a receiver, as follows:

"Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises, and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises, and property of the Central

Company, of whatever name, nature, and description, including all its money on hand, and the earnings of the same, and all the rights, franchises, and property of the Southwestern Railroad Company of Georgia, of every kind and description, be placed in the hands and under the control of a receiver to be appointed herein by this court, with such proper powers as are right and equitable to be conferred, such receiver to be the same person appointed in like manner by the other courts having jurisdiction of portions of the mortgaged property, respectively."

Upon this bill the court ordered that "Hugh M. Comer, the receiver of the court under the litigation now pending in said court, be, and he is hereby, appointed temporary receiver under the above bill. This appointment is cumulative and supplementary to the orders heretofore made, and is not intended to vacate or affect any previous order." On May 1, 1893, the Central Trust Company of New York answered the bill of the Farmers' Loan & Trust Company, and, among other things therein, admitted as true the proceedings and orders of court as alleged in the bill under which the leased property was taken possession of and operated by the receiver, but the Central Trust Company alleged that the court had no jurisdiction over the suits in which said orders were passed, but did not set out wherein the defective jurisdiction, if any, existed. The answer contained other matter not necessary to recite. Some other bills and answers were filed, and many interventions, and there was much litigation; but on January 4, 1894, a consolidation having been previously ordered, a decree of foreclosure was rendered in favor of the Farmers' Loan & Trust Company on its mortgage and deed of trust, and therein it was specifically recognized and decreed that included in the property owned by the Central Railroad & Banking Company, subject to the lien of the mortgage to the Farmers' Loan & Trust Company, was the leasehold interest of the Central in and to a certain lease of the Eatonton Branch Railroad, extending from Milledgeville, Ga., to Eatonton, Ga., the lease being dated April 1, 1853, all of which, with other property of the Central, was ordered sold to satisfy the mortgage held by the Farmers' Loan & Trust Company. At the same time the above decree was rendered, leave was given to the Central Trust Company of New York to file a cross bill to foreclose its claim and mortgage on the Central's properties. This cross bill, subsequently filed and prosecuted, was brought in the interest of and pursuant to a new reorganization scheme fully set out in the record. This reorganization scheme contemplated taking advantage of all the beneficial contracts made by the receiver, particularly in regard to the collateral, which included the issue of bonds secured by the mortgage to the Central Trust Company of New York, and of all the earnings and improvements made during the receivership; and therefore provided that the purchasers under said agreement at the sale to be procured by foreclosure of the Central Trust mortgage should pay all the expenses of the main-line receiverships and foreclosure, and allowed preferential claims after application of all funds in the hands of receivers available therefor, and in like manner the debts and preferential claims of the receiverships of any other lines embraced in the plan. On August 26, 1895, on the said cross bill and pleadings thereto, the court passed a final decree of foreclosure in favor of said Central Trust Company, which provided

that, in case of further default, the said Central Railroad be sold in one parcel, without valuation, appraisement, redemption, or extension, and that, of the price for which the property be sold, \$50,000 should be paid in cash, and upon the confirmation of same, and from time to time thereafter, such further portions of the purchase price should be paid in cash as the court should direct, in order to meet the expenses of foreclosure and sale and allowed preferential claims; and, further, that upon confirmation of the sale, the approved purchaser or purchasers should take the property purchased subject to the lien, if any, of all debts, obligations, and liabilities of the receivership heretofore or hereafter to be lawfully incurred by or under the authority of the court, or arising under the operations of said railroad, and subject also to the lien of any and all claims heretofore filed in this cause, or in the causes consolidated herein, which the court has allowed or adjudged, or shall hereafter adjudge, to be prior in lien or superior in equity to said consolidated mortgages hereby foreclosed and ordered to be paid.

Under this decree of foreclosure a sale was made to Samuel Thomas and Thomas F. Ryan, which sale was confirmed by the court, October 17, 1895; the said decree of confirmation reciting that the sale was subject, however, to all the decrees, mortgages, liens, receiver's debts, and preferential claims, and to all equities reserved, and to all and singular the conditions of purchase, as recited in the final decree aforesaid, and the continued right of the court to adjudge and declare what receiver's or corporate debts were prior in lien or in equity to the lien of the consolidated mortgage foreclosed, or ought to be paid out of such proceeds and sale in preference to the bonds secured thereby; and the court expressly reserved for future adjudication, with the power thereby to bind the property sold, all liens and claims and equities specified and reserved by the final decree of foreclosure of August 26, 1895. Prior, however, to the foreclosure proceedings aforesaid, and on April 24, 1893, the Eatonton Branch Railroad filed in the case of the Central against the Farmers' Loan & Trust Company an intervention *pro interesse suo*, asserting that the contract rental due April 1, 1893, on the lease of the Eatonton Branch Railroad Company, was unpaid, and praying an order of the court that the receiver should pay the same. This intervention was permitted by the court, and the Farmers' Loan & Trust Company and other parties defendant to said cause ordered to show cause, on the 1st day of May, 1893, why the prayer in the intervention set forth should not be granted, and directing service upon the several parties.

On May 1, 1893, on leave of the court, Alexander Brown & Sons and others, claiming to be owners and holders of bonds of the Macon & Northern Railroad Company,—which, both as to principal and interest, were guarantied by the Central,—filed their alleged dependent bill, making parties defendant thereto all of the parties to the previous litigation, and, in addition, the several leased and operated lines, including the Eatonton Branch Railroad Company. This bill attacked a certain reorganization scheme as prejudicial to the creditors of the company, and particularly attacked the conduct and management of the receiver in the litigation and the oper-

ation of the property, substantially charging that the earnings of the properties had not been applied to the payment of the proper obligations of the company permitting defaults to be made in certain interest charges guarantied by the Central, and in rentals, particularly averring as follows:

"Your orators show that in addition to certain defaults said Central Company has defaulted in the payment of the rental due * * * to the Eatonton Branch Railroad, * * * and that, by reason of said several defaults, said Central Company is in danger of forfeiting its control of said properties, which are valuable as adjuncts and part of its said system, while remaining bound to pay the debts and obligations for which it has become liable either as principal or guarantor under said several leases."

The bill, among other things, prayed for removal of the receiver, and the appointment of a new receiver of the Central, and of all the leases and operated railroads connected with the Central system, to operate the same as an entirety, to prevent the disintegration of the said Central system of railroads. To this bill the receiver made answer, admitting the default in the rental due to the Eatonton Branch Railroad Company, but averring the same not intentional or premeditated, or made for any other reason than that the money required for the payment of the coupons and rentals had not been earned. No action appears to have been taken upon the intervention of the Eatonton Branch Railroad Company, but on June 30, 1893, the court passed an order directing the receiver to report to certain corporations whose properties were under lease to the Central, to wit, the Southwestern Railroad Company, the Augusta & Savannah Railroad Company, the Mobile & Girard Railroad Company, and the Eatonton Branch Railroad Company, the amount of earnings which had come into the hands of the receiver from the operation of the said leased lines from March 4, 1892, to date, or as near thereto as practicable, and showing the amount of expenses incurred by him in the operation of the same, and the amount of disbursements for their account during the same period. The order further provided that, within 30 days from the receipt of the report by the respective corporations, the said corporations should make known to the receiver and to the court whether they desired to permit said properties to remain in the hands of said receiver as representing the lessee company, with the right on the part of said corporations, or either of them, to claim the net results of the operation of their respective properties up to the rental contract, but not beyond, or whether the said corporations shall receive from the receiver the surrender of the leasehold interests held by him as receiver of the Central Railroad & Banking Company of Georgia; further, that, if any of said companies should make known their option to receive the surrender of the leasehold interests as aforesaid, the receiver should immediately apply to the court for an order authorizing and directing him to surrender the same; and, further, provided that, should any of the said companies elect to permit the leasehold interest to remain in the hands of the receiver, said companies shall have the right to claim from the court the net result of the operations of their properties by the receiver up to the

rental contract price, and no more, unless the receiver should, under order of the court, elect to retain the said leasehold interest, and pay therefor the rental contract price.

Under this order, and on August 14, 1893, the receiver made his report to the Eatonton Branch Railroad Company, showing an estimate of earnings and expenses of the said railroad from March 4, 1892, to June 30, 1893, to wit: Earnings, \$16,599.04; expenses, \$17,037.15; net loss from operation of property, \$438.11. In his report the receiver says that the statement is only an estimate; that the earnings and expenses of the Eatonton Branch Railroad—the road being leased for a fixed sum, and being very short—have never been kept separate from the earnings and expenses of the main stem of the Central Railroad & Banking Company of Georgia, and therefore an exact statement of all receipts and disbursements for account of this piece of road cannot be given. The estimate, however, has been carefully made by the auditor for the receiver, and is believed to be as nearly correct as practicable. In relation to this report the receiver testifies that no separate account of earnings and expenses had been kept up to the date of the order of June 30, 1893; that he has no positive recollection of the matter, but his impression is that the estimate was made by prorating on the basis of the business that came from and went to that road. He thinks he discussed the matter with the comptroller at the time of the order of June 30th, as to how to arrive at a satisfactory division of the earnings of that road, and his impression is that it was done on a basis of prorating according to the mileage. He further testified that he was a director of the Central Railroad Company from 1883 to 1887, and again in 1889, and he does not think that any report was ever made as to the earnings of the Eatonton Branch Railroad. He did not remember ever seeing one or hearing it discussed, or seeing a statement of its earnings, or hearing that it had not earned its rental. On this report the Eatonton Branch Railroad Company elected to retake possession of its road on September 25, 1893. The receiver applied to the court, and obtained an order to surrender the road to the company. Under this order the receiver moved off the leased road all the property of the Central Railroad Company, including tools and cross-ties not in the track, and gave up possession of it October 1, 1893.. On February 6, 1894, the Eatonton Branch Railroad Company presented an amendment to their original intervention, setting forth all the facts in the case with regard to their claim for rental from the 1st day of April, 1892, up to the 1st day of October, 1893, with certain exhibits and documents, to the Honorable Howell E. Jackson, circuit justice, then presiding in the circuit court, who entered thereon the following: "This application is denied. The funds and assets being administered are not liable for the rental claimed, and it would be idle and useless to direct a reference about the matter." The application being thereafter renewed, the court on November 24, 1894, granted leave to file the intervening petition, and for the Eatonton Branch Railroad to amend its original intervention as prayed. This intervention, as amended, was subsequently referred to a special master, who, after

taking evidence covering the whole record of the Central litigation and much additional, reported, among other things, "that the intervenor is entitled to a judgment for the amount due for rent and interest on the same, and I find in its favor for the sum of fourteen thousand dollars and interest from April 1, 1893, and the further sum of seven thousand dollars and interest on the same from October, 1893"; and, further, that "the claim is not one which is entitled to any priority in the distribution of the assets of the Central Railroad & Banking Company of Georgia."

Many exceptions have been filed to this report, and I have heard argument on the same, but the view I take of the case renders it unnecessary to consider them in detail. On the facts as above recited, in connection with the many cumulative circumstances and admissions found in the record not necessary to specifically point out, I find that the rent due the Eatonton Branch Railroad under the lease to the Central, for the time the Eatonton Branch Railroad was held and operated by the receivers, to wit, from April 1, 1892, to October 1, 1893, was, and is, a debt of the receivers, as an expense necessary to the administration and operation of the railroad properties taken into the possession of the court under the several and respective bills of Rowena Clark against the Central Railroad & Banking Company et al., the Central Railroad & Banking Company et al. against the Farmers' Loan & Trust Company et al., and the Farmers' Loan & Trust Company against the Central Railroad & Banking Company et al., all of which bills, and the orders of court made thereon and thereunder during the period for which the rent is claimed, look to the maintenance and full preservation of the entire Central system; in fact, the first two named bills appear to have not much, if any, other equitable foundation. Considering the declared objects of the several bills, and the orders of court made thereunder; the fact that the receivers kept no separate accounts of the earnings and expenses, the receipts and disbursements, of the Eatonton Branch Railroad, applying the earnings of said branch for the benefit of the entire system, treating the said Branch Railroad as an integral part of the Central; the manner in which the receivers otherwise dealt with the property; the payment of the rent due April 1, 1892; the judicial admissions from time to time that the rent due April 1, 1893, was a debt and obligation which the receivers were required to provide for,—it seems clear that, in equity and good conscience, the rental due must be declared to be a receivership obligation contracted under the authority of the court. From an examination of *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. 263; *Park v. Railroad Co.*, 57 Fed. 799; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 280; *Ames v. Railway Co.*, 60 Fed. 971; *Central Trust Co. of New York v. Charlotte, C. & A. R. Co.*, 65 Fed. 264; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; *Railroad Co. v. Humphreys*, 145 U. S. 105, 12 Sup. Ct. 795; *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86,—I conclude that the present case is not controlled by any of them, but is within a clear equity recognized in most of them.

In Quincy, M. & P. R. Co. v. Humphreys, supra, it is said:

"Where a receiver appointed to take charge of railroad property takes possession of a leased line, and operates it for a reasonable time, keeping separate accounts, diverting none of its earnings to the benefit of the general system or its creditors, and with an express recognition on the part of the court appointing him of the right of the lessor to resume possession on making proper application therefor, he does not become the assignee of the lease, or adopt it so as to render the agreed rental a lien on the earnings of the general system superior to that of the mortgages thereof. Nor was the rental an expense originating in the course of the receiver's administration, and entitled, as such, to priority over the mortgage lien."

In Railroad Co. v. Humphreys, supra, it is said:

"The receiver of an insolvent railroad corporation, originally formed by the consolidation of two separate companies, does not, by virtue of his appointment, become the assignee of a branch-line lease executed to one of the companies before the consolidation; and where the income of the leased line is insufficient to pay the operating expense, and it is also unprofitable as a feeder or connection, the property of the consolidated corporation should not be taken without the consent of its creditors, for the purpose of paying the rental of the leased line. Where the accounts of an insolvent railroad corporation had been so kept as to render it impossible to ascertain the net profits or loss incident to the operation of a leased line, and from the nature of the case the receiver could not begin to ascertain its unprofitable character inside of three months from his appointment, he cannot be held to have adopted the lease, because he failed for nine months after his appointment to formally notify the lessor that the rent would not be paid, especially when the order of court appointing the receiver directed the payment of rental on leased lines 'out of the income' of such lines."

The subject was again considered in United States Trust Co. v. Wabash W. Ry., 150 U. S. 287, 14 Sup. Ct. 86, and the conclusions summarized were:

"A railroad receiver, even though appointed on the petition of the railroad company itself, and for the express purpose of preventing the disintegration of the system, does not become liable for rentals upon leased lines, eo instanti, by the mere act of taking possession, but he is entitled to a reasonable time to ascertain the situation of affairs. An order directing railroad receivers to keep divisional accounts, and to pay rentals on leased lines only to the extent of any surplus earned by such lines, respectively, over their operating expenses, is notice to such lines and their mortgagees that they must not expect payment of rentals unless there is such a surplus; and, if they do not then intervene to regain possession of the property, they have no claim on the receivers in the event that there is no surplus."

The present case is sharply distinguished by two salient facts: That the receivers did not keep separate accounts of the earnings and expenses of the Eatonton Branch Railroad, but applied its earnings to the benefit of the system, therein acting under authority of the court; and the further fact that at no time during the possession by the receivers of the Eatonton Branch Railroad, under any of the three bills in which the receivers were appointed, was the Central proceeded against as an insolvent corporation, although in the bill of the Farmers' Loan & Trust Company, filed January 23, 1893, and perhaps in other pleadings, there is an allegation, on information and belief, that the Central was insolvent. At no time during the receivership, nor until the order of June 30, 1893, was there, in my opinion, any action taken which authorized or required the Eatonton Branch Railroad Company to conclude otherwise than that the receiver, under the au-

thority of the court, adopted the lease and would be responsible for the rent. The default in the payment of the rent due April 1, 1893, came nearest to a warning to the Eatonton Branch Railroad to be vigilant in asserting its rights; but that warning should have very little effect, because, when an intervention was filed asking that the receivers be ordered to pay the rent, the obligation was apparently admitted, and other excuses than want of obligation given for the failure to pay.

Having thus determined that the rental due the Eatonton Branch Railroad Company, April 1, 1892, to October 1, 1893, is an obligation of the receivers growing out of their administration, the next question is whether purchasers of the Central property, under the decree of foreclosure and sale rendered in favor of the Central Trust Company of New York, are liable therefor. It is contended, and apparently with justice, under the principles declared in the cases above cited, that mortgaged bondholders not provoking the appointment of receivers, nor benefiting by their administration, cannot be held liable for the expenses of such receivers, nor can such expenses be made a lien on the property administered to the prejudice of prior mortgages. I do not wish to be considered as now holding anything to the contrary, but I do not find that the facts in the present case require the application of the principles contended for. As early as July 4, 1892, the Farmers' Loan & Trust Company, trustee in the tripartite and prior mortgage, and the Central Trust Company of New York, the trustee in the subsequent mortgage under which the Central property was finally sold, were called upon by the court to oppose or consent to the appointment of receivers of the Central property for the purpose of preserving the system as an entirety. The Farmers' Loan & Trust Company appeared and consented to the appointment of a receiver. The Central Trust Company of New York, as recited by the court in the order made July 15, 1892, though duly notified, failed to appear, and made no objection to the continuance of said receivership. The bill of the Farmers' Loan & Trust Company praying for a foreclosure, filed January 23, 1893, claimed that the lease of the Eatonton Branch Railroad was included in their mortgage, and that bill distinctly prayed for a receiver for all the franchises, property, and premises and appurtenances included in the mortgage, and all the rights, franchises, and property of the Central of whatever name, nature, and description, including all its money on hand and the earnings of the same; and on this prayer the court did appoint a receiver, making the same cumulative and supplementary to the orders theretofore made, without opposition or objection by the Farmers' Loan & Trust Company.

From these facts, if the case required, I might, and with reason and some authority, say that the receivership of the Central, from July 4, 1892, was at the instance, and in the interest, of the mortgage bondholders, and that in equity the said bondholders, having thereafter taken full advantage of all the benefits of the receivership, were charged with its expenses (see *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 58 Fed. 264); but I do not find it necessary to put my decision solely upon this ground. The record shows that the reorgan-

ization scheme which was carried out by a foreclosure of the mortgage of the Central to the Central Trust Company of New York, which covered all the rights and franchises and property in the Central system, contemplated and included all the earnings and benefits of the receivership from the incipency of the litigation; and that, in fact, in the decree of foreclosure subsequently rendered in favor of the Central Trust Company of New York, under which the entire property of the Central covered by the mortgage was foreclosed, it was expressly stipulated that the purchasers at the sale should take the property purchased subject to the lien of any and all debts, obligations, and liabilities of the receivership theretofore and thereafter lawfully incurred by and under the authority of the court or arising under the operation of said railroad; and in the decree confirming the sale, in which Thomas and Ryan were purchasers, and conveyance ordered to be made to them of the purchased property, it was expressly stipulated that the same was subject, however, to all the decrees, mortgages, liens, receivers' debts, and preferential claims, and all equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of the court to adjudge and declare what receiver's or corporate debts are prior in equity to the lien of the consolidated mortgage herein foreclosed, or ought to be paid out of such proceeds and sale in preference to the bonds secured thereby. Under this decree, and the subsequent decree of confirmation of sale, it cannot be questioned that the purchasers of the property assumed and agreed to pay all the debts and obligations of the receivership prior or subsequent to said decree. Nothing less than this could have been contemplated, because, under the decree and the reorganization scheme, the mortgage bondholders had the full benefit of all the earnings and advantages of the receivership, benefiting particularly by the several contracts and arrangements made by the receivers in relation to the large loan on collaterals made by the Central prior to any receivership, which collaterals were by such contracts preserved to the use of the bondholders.

Other questions have been made and argued on both sides, but I do not find it necessary to consider them further than to say that the alleged plea in bar to the effect that the order of Mr. Justice Jackson on February 6, 1894, refusing leave to the Eatonton Branch Railroad Company to file an amended and supplemental intervention,—which leave to file was subsequently granted,—was a final decree of dismissal upon the merits, and is an absolute bar against the further prosecution of the claim, if the same is seriously pleaded, is not well taken. Neither *Gumbel v. Pitkin*, 113 U. S. 545, 5 Sup. Ct. 616, nor *Savannah v. Jesup*, 106 U. S. 563, 1 Sup. Ct. 512, the only cases cited, support such contention. In each case an intervention was filed by leave of the court, and afterwards heard on its merits.

A decree will be entered sustaining the exceptions to the special master's report, so far as the master finds that the Eatonton Branch Railroad Company, for the amount of rental found due, is not entitled to any priority in the distribution of the assets of the Central Railroad & Banking Company of Georgia; and thereupon, no recom-

mittal being necessary to advise the court, the decree will further provide that the amount due the Eatonton Branch Railroad Company as rental aforesaid shall be paid by Thomas and Ryan, the purchasers of the property of the Central Railroad & Banking Company of Georgia at the foreclosure sale under the decree of this court in favor of the Central Trust Company of New York.

FOSTER v. LINCOLN'S EX'R.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

INSOLVENT NATIONAL BANKS—ASSESSMENTS AGAINST SHAREHOLDERS—TRANSFER OF SHARES.

L., a stockholder in the D. national bank, transferred his stock, shortly before its failure, to his married daughter and other minor children. It appeared from the circumstances surrounding the transaction that L., though perhaps not supposing the D. bank to be actually insolvent, was advised of facts, not generally known, which indicated such uncertainty as to its ability to stand a run, which had apparently begun, as to make it safer for him to dispose of his stock forthwith, and that the transfer was made with the intent that, if all came out well, his children should have the stock, while, if the bank met with disaster, he would not be obliged to throw good money after bad. *Held*, that the transfer so made could not stand against the creditors of the bank, and L. was liable, at the suit of its receiver, for an assessment on the stock.

Appeal from the Circuit Court of the United States for the District of Vermont.

This is an appeal from a decree of the circuit court, district of Vermont. The suit was brought by the receiver of the First National Bank of Deming, N. M., to enforce an assessment made by the comptroller upon the stock of that bank against Benjamin F. Lincoln, of Lyndon, Vt., as one of the actual stockholders of the bank, and seeking to set aside a transfer made by him, shortly before the failure of the bank, to his children, who were made defendants. Lincoln died pending the litigation, and the action was revived and continued against his executor. The circuit court decreed in conformity to the prayer of the bill. 74 Fed. 382.

C. A. Prouty, for appellant.

W. L. Burnap, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The appellant was himself president of the National Bank of Lyndon, and held 25 shares in the Deming bank. The Lyndon bank held 50 shares, and other individuals and banks in this vicinity held shares. As found by the circuit court, "on September 21, 1891, he transferred his stock in the Deming bank, in equal parts, to his five children, one of whom was a married woman, two of whom were minors, and all of whom were irresponsible for assessments on it." The transfer was without consideration. It was completed by issuing new certificates of stock in exchange for the old one before the bank failed, on February 3, 1892. Mr. Lincoln was also a stockholder in the First National Bank of Silver

City, N. M., of which stock similar transfers were made at the same time. Both banks were practically under the same management, having the same president, and both failed at the same time, and are in charge of the same receiver.

The only question in the case is whether the transfer was so far fraudulent that, as between the creditors of the bank (represented by the receiver) and the defendants, it should be set aside. The defendant B. F. Lincoln testified that some time in June, 1891, he proposed to his wife to transfer property to the children; that the matter drifted along until about the 1st of September, when the children began to ask that he give them property; that he said to them he would give each of them \$1,000 in New Mexico bank stock, and on September 21st he made the transfer in question; that he attended a meeting at the Merchants' Bank of St. Johnsbury, Vt., in September, 1891,—concededly, it was two or three days prior to September 21st. The meeting was held to consider what action to take in reference to telegrams sent to C. M. Chase, a director in the Lyndon bank, by C. H. Dane, the president of the First Deming, and by E. B. Chase, the cashier of the Silver City. C. M. Chase being absent at the time, his brother Henry Chase opened them, and it was on account of those telegrams that Lincoln attended the meeting at St. Johnsbury. He saw the telegrams, as he says, either at the meeting, or on the cars coming down. He further testified that he thought this was not the first time that telegrams had come from these Western banks for funds; that he did "not think the question of solvency of the Deming bank was discussed" at the meeting; that he did not transfer the stock in consequence of the receipt of the telegrams, or of anything that was said at the meeting; that at the time of transfer he valued the stock above par, and believed the bank to be solvent; that he expected dividends would be received, and that previous to the transfer no rumor or information had come to his knowledge touching the solvency of the Deming bank; and that he first had reason to suppose that the institution was insolvent about February 4, 1892. This testimony is that of an interested party, and should be weighed with the caution usually required when such testimony is under consideration, and it may be noted that his statement as to what took place at the meeting is somewhat indefinite. The telegrams referred to are as follows:

"September 15, 1891.

"To C. M. Chase, Lyndon, Vermont: Please remit, and notify by wire as soon as possible, \$5,000 to First New York, account First Deming, and \$3,000 to Western National, New York, our use. I don't need the sixty-six hundred for personal use. I forward by express to-day over \$16,000 bills receivable as collateral. Everything quiet, but we need rediscounts for thirty or sixty days. Important. Answer.

C. H. Dane."

"Silver City, N. M., Sept. 15, 1891.

"To C. M. Chase, Lyndon, Vt.: Remit as requested by Dane quick as possible.

E. B. Chase."

From the other evidence in the case it appears that the meeting at St. Johnsbury was attended by the president and cashier of the Merchants' National Bank of St. Johnsbury, by two of the directors

of the Citizens' Savings Bank of the same place, and by Lincoln and Henry Chase, representing the Lyndon bank. All three banks were interested in the Deming bank, and, although none of them cared to send the money, it was finally agreed that they would do so, contributing equally, since it was going to be a help. One of the persons present at the interview testifies that an explanation was made by Henry Chase, who was the uncle of the cashier of the Silver City bank, and brother-in-law of the president of the Deming bank, regarding the condition which led to the call for the loan; that the explanation was to the effect that C. H. Dane had been involved in a lawsuit with M. M. Chase, and report of foreclosure proceedings had caused some mistrust on the part of depositors, which had led to a withdrawal of deposits; that there ensued some discussion as to the probable length of time that the bank would be able to stand a continuing run. None of the other persons present at the interview explicitly contradicts this account.

It is well settled that when the holder of shares of stock in a national bank transfers them to a person known to him to be irresponsible, with the intent of escaping liability as a shareholder, such transfer will be held void as to the creditors of the bank. *Bank v. Case*, 99 U. S. 628; *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246. Intent in such cases need not be separately proved by direct evidence; it may be found as an inference from all the facts in proof. Upon the evidence in this case, we have little doubt that defendants' testator, while he may not have supposed the Deming bank was actually insolvent, was advised of facts, not generally known, which indicated to him that there was such uncertainty as to its ability to stand a run, which had apparently begun, that it would be safer for him to dispose of his stock forthwith, and that the transfer was made to his irresponsible children with intent that, if all came out well, they might have it, while, if the bank should meet with disaster, he would not have to throw good money after bad. If made with such intent, it cannot stand against the creditors of the bank, whom the receiver represents. The decree of the circuit court is affirmed, with costs.

BAUSMAN v. KINNEAR.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1897.)

INSOLVENT CORPORATIONS—UNPAID SUBSCRIPTIONS—SET-OFF.

A stockholder who is also a creditor of a corporation has no right to set off the debt of the corporation to him as against his unpaid subscription, after the corporation has become insolvent, and a suit in equity has been brought to wind up its affairs and distribute its assets, even though such debt arises upon an accommodation note given by him to the corporation because of his subscription, and to avoid an assessment on his stock. *Bausman v. Denny*, 73 Fed. 69, reversed.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Frederick Bausman, in pro. per.
John R. Kinneare, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The receiver of the Ranier Power & Railway Company appeals from a decree of the circuit court (73 Fed. 69) dismissing his bill as against the defendant, George Kinnear, in a suit brought against certain stockholders of the Ranier Power & Railway Company to require them to pay their subscriptions to the stock of said corporation. Kinnear held stock of the par value of \$5,000. In his answer to the bill he alleged that he had paid the full amount of his subscription. The undisputed facts are as follows: On the 17th of October, 1891, Kinnear had paid three assessments of 5 per cent. each upon his capital stock, amounting in all to \$750. On that date, a promissory note, due 90 days after date, payable to the corporation, for the sum of \$3,197.29, was presented by an officer of the corporation to Kinnear for his signature, with the statement that Mr. Denny, the president, wanted to raise money for the company. Kinnear signed the note without question. The note was indorsed by David T. Denny, who was the president, and the largest stockholder. It was discounted at the bank, and the proceeds were used by the corporation in constructing its street railway. Subsequently to that date another assessment of 5 per cent. was made on the capital stock, and Kinnear paid his proportion thereof in the sum of \$250. When the note fell due, it was renewed, and was regularly thereafter renewed until December 10, 1892. At each renewal other shareholders indorsed the note, and the interest was paid by the president or by the company. On February 15, 1893, when the last note fell due, the amount was increased to \$5,000, and the increased amount thereof was obtained from the bank, and was used by the corporation as before. When the \$5,000 note fell due, on May 16, 1893, it was renewed for one year; but it was made payable, not to the company, but to David T. Denny. In June of that year the receiver was appointed, and eight months later Kinnear paid the note in full. It was found in the opinion of the court below as follows:

"These notes were not given by Mr. Kinnear in payment for his stock, but were intended as a loan of credit, to assist the company at a time when it was incurring debts in the construction of its line of street railway, so as to enable the company to obtain funds without resorting to assessments upon its capital stock, which at that time would have been burdensome to its stockholders, and specially so to Mr. Kinnear. These notes were given, however, in consideration of Mr. Kinnear's liability for his unpaid subscription. He was not indebted to the company on any other account, and would not have loaned his credit to the company for any other purpose than to avoid being required to pay for his stock."

The court held, upon this state of the facts, that the defendant, Kinnear, had the right to have the money received by the corporation upon his note set off against his liability upon his stock subscription. The question presented for our consideration is whether, upon the facts so found, and the further facts as disclosed in the record, such offset was permissible.

The only evidence concerning the purpose for which the notes were given is found in the testimony of the defendant, Kinnear, and in

that of Mr. Denny, the president, and in the books and records of the corporation. The books show assessments against the stock of Kinnear in the amount of \$1,000, and a payment of the same, and a balance of \$4,000 unpaid. No other assessments were ever made. Mr. Kinnear testifies that he signed the note for the purpose of paying his subscription, and that, while nothing was said on the subject, he believed at the time that the company understood that the note was given for the purpose of raising money on the subscription. Mr. Denny, in his testimony, denied that there was any such understanding. When the \$5,000 note was given, it will be seen that the amount thereof was \$1,000 in excess of the sum remaining unpaid upon the stock of Kinnear. It appears in the evidence that in June, 1893, Kinnear, hearing of the approaching insolvency of the corporation, applied to Denny for security. He testifies that the amount for which he sought security was the \$1,000 by which the note exceeded his liability on his stock subscription. Nothing was said upon that subject, however. The property which was intended as security was conveyed by Denny to Kinnear, and consisted of lots belonging to Denny, of the value, at the time of the conveyance, of about \$10,000, but subject to a prior mortgage of \$3,000. The consideration recited in the deed was \$10,000. At the time of the trial the value of the property had so far decreased that it was worth little, if any, more than the amount of the prior mortgage. Mr. Denny testified that he understood that it was the purpose of this conveyance to secure Kinnear against liability upon the whole amount of the note. He also testified—and it is not disputed by Kinnear—that it was not until sued in this action on his stock that the latter claimed that his stock had been already paid for by the note, and that the land was intended as security only for the \$1,000 in excess of the stock liability.

The facts as found by the trial court and as disclosed by the evidence amount to this: That the appellee, by lending his credit to the corporation, became a creditor thereof in an amount exceeding the amount of his liability for unpaid stock, and that the inducement for such loan of his credit was the fact that he was a subscriber to the unpaid stock of the corporation. A stockholder, who is also a creditor of a corporation, has no right to set-off as against his unpaid subscription, after the corporation has become insolvent, and a suit in equity has been brought to wind up its affairs and distribute its assets. The unpaid stock is held to be a trust fund for the purpose of paying the debts of the corporation, and as such it must be distributed among the creditors pro rata. The debt due to a stockholder is entitled to no preference over other debts, and he cannot require its payment by way of set-off, to the exclusion or postponement of other claims. The reason usually assigned for this rule is that the debt owing by the stockholder to the corporation after insolvency and that owing from the corporation to him are not in the same right, the former being a debt payable to a trust fund. The decisions upon this proposition appear to be unanimous. *Sawyer v. Hoag*, 17 Wall. 610; *Scovill v. Thayer*, 105 U. S. 143; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Thompson v. Bank*, 19 Nev. 103, 7 Pac. 68; *Carbon Co. v. Mills*, 78 Iowa, 460, 43 N. W. 290; *McAvity v. Paper Co.*, 82

Me. 504, 20 Atl. 82; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274. In some jurisdictions the rule has been extended, not only to the distribution of the trust fund arising from unpaid subscriptions, but to the distribution of the fund obtained under proceedings to enforce the statutory liability of stockholders. *Matthews v. Albert*, 24 Md. 527; *In re Empire City Bank*, 18 N. Y. 199; *Buchanan v. Meisser*, 105 Ill. 638; *Liquidators v. Troop*, 31 Am. & Eng. Corp. Cas. 410. The reason of the rule applies to all cases of simple indebtedness from the corporation to a stockholder, and upon principle no distinction can be made on account of the purpose for which the debt was incurred, or the motives that prompted the stockholder to become a creditor. One who lends money to a corporation on account of the fact that he owes unpaid stock in the company is in no better attitude than one who lends money for other reasons. The court will not inquire into the reasons that actuated him. It is unimportant whether the appellee in this case loaned his credit to the corporation only because he was a subscriber to unpaid capital stock, or whether he loaned it on account of his desire for the success of its business, and his pecuniary interest therein as a holder of its stock. A stockholder who has advanced money to his corporation is no more entitled to the right of set-off than is the stockholder who has any other kind of claim against the company. *Matthews v. Alberts*, supra. The set-off, if made at all, must be made while the corporation is a going concern. It cannot be made after the insolvency has intervened, and a court of equity has been called upon to administer its affairs.

It is urged by the appellee that his defense to the suit does not rest alone upon the right of set-off, but that the evidence supports the allegation of his answer that his stock has been paid in full, and that the moneys realized on the notes which he signed for the corporation extinguished his stock liability. This view of the evidence is not only opposed to the findings of the circuit court, which, on appeal to this court, are controlling unless shown to be contrary to the weight of the evidence (*Tate v. Holmes*, 22 C. C. A. 466, 76 Fed. 664, and cases cited), but, in our view, it is not at all sustained by the evidence. When the first note was given, it was for an amount considerably less than the amount of the appellee's liability on his stock subscription. At that time but three assessments of 5 per cent. each had been made. Subsequently another assessment of 5 per cent. was made, and was paid by the appellee. No call was ever made upon the stock for which the money realized on the notes could have been applied in payment. Nothing was ever said to indicate that it was the intention so to apply it. At no time did the amount of the note correspond with the unpaid subscription. The last note made was \$1,000 in excess of that liability. When it was known that the company was in failing circumstances, the stockholder, instead of causing the money realized on his note to be applied in payment of his stock, sought security against his liability on the note, and received a deed which recited a consideration of \$10,000, and which conveyed to him property the value of which was then much greater than the amount of his liability, if the measure of his liability was only \$1,000 of the note. The whole transaction would appear to be one in which Kinnear, as a stockholder, had

consented to help the corporation by the loan of his credit, with the expectation that the corporation would eventually be able to meet the note, and relieve him from liability thereupon, and with the expectation that he would probably never be called upon to pay the balance of his unpaid subscription to the stock. The decree dismissing the bill as to the defendant, Kinnear, is reversed, at the appellee's costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

BROWN et al. v. OHIO VAL. RY. CO.

(Circuit Court, D. Indiana. March 15, 1897.)

1. CONSTITUTIONAL LAW—RAILROADS—PREFERRED DEBTS.

A state statute providing that citizens of the state shall have a lien on the personal property of railroad companies thereafter organized, to the amount of \$100, for all debts originally contracted in the state, superior to all other liens or mortgages (2 Burns' Rev. St. Ind. 1894, § 5179; Rev. St. Ind. 1881, § 3919), is valid both as against the railroad company and other lien holders.

2. SAME — ONLY THOSE INJURIOUSLY AFFECTED CAN QUESTION CONSTITUTIONALITY OF STATUTE.

Only those who are injuriously affected by an unconstitutional act will be heard to complain of it. Therefore neither a railroad corporation nor its receiver will be heard to question the right of a claimant to have his claim paid as a preferred one, upon the ground that the statute upon which he bases his right discriminates against citizens of other states, as only a citizen of another state will be heard to make that complaint.

In Equity.

Hamilton A. Madison, Francis B. Posey, and Andrew J. Clark, for petitioners.

Gilchrist & De Bruler, for receiver.

BAKER, District Judge. Hamilton A. Madison, Francis B. Posey, and Andrew J. Clark have filed an intervening petition in the above-entitled cause for the recovery of a decree against the defendant, the Ohio Valley Railway Company, and John MacLeod, its receiver, for the sum of \$100, for services rendered by them as attorneys for said railway company prior to the appointment of the above-named receiver. The right of recovery is predicated on the provision of the statute of Indiana relating to the organization of railroad corporations, which took effect on May 6, 1853, and which is as follows:

"And the citizens of this state shall have a lien upon all the personal property of said corporations, to the amount of one hundred dollars, for all debts originally contracted within this state; which, after said lien of the state, shall take precedence of all other debts, demands, judgments or decrees, liens or mortgages against such corporations." 2 Burns' Rev. St. 1894, § 5179 (Rev. St. 1881, § 3919).

The receiver, answering the petition, admits that the intervening petitioners are, and have been for many years, citizens of the state of Indiana, and that, at the time of his appointment as receiver for the Ohio Valley Railway Company, it was indebted to them in the sum of \$100 for a liability originally contracted within this

state, for services rendered to and for said company. He also admits that at the time of his appointment the Ohio Valley Railway Company had cars and other personal property, to a large amount, in the state of Indiana. It is admitted that the petitioners are entitled to have their demand allowed and paid as a preferential claim, unless, as the receiver insists, the above-quoted statutory provision is invalid by reason of its repugnancy to the following provision of the constitution of the United States, viz.: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Article 4, § 2. Counsel who make the objection for the receiver have not argued the constitutional question, but have contented themselves with the single statement that "we do not find any authority which would throw any light on the subject, and do not think we can make any argument which would be of any assistance to the court." The provision in question has stood upon the statute book for nearly half a century, and, so far as the court is advised, its constitutionality has never been heretofore drawn in question. A court will not, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While the court cannot shun the discussion of a constitutional question, when fairly presented and its decision is essential, yet it will not go out of its way to find such a question. It will not seek to draw such a weighty matter into judgment collaterally, nor on a trivial occasion. A proper respect for a co-ordinate department should restrain the court from discussing the constitutionality of a statute, unless that question is the very *lis mota*, and its decision unavoidable. In the view which the court takes of the present case, the consideration of the constitutional question suggested is not necessary, and therefore the court will enter upon no such extrajudicial discussion as is invited.

The power to create corporations resides exclusively in the legislative department of the state. With the exercise of this power, within constitutional limits, the courts have no concern. The legislature is possessed of the unquestionable power to provide that the debts of such corporations, to a limited amount, shall take priority over liens or mortgages. The corporation having been granted corporate existence on that express condition, it cannot repudiate the provision in question. It has taken the benefit of the statute, and it must bear the burden which has been made an essential condition of its right to become a railway corporation. Nor can a lienor or mortgagee complain because their rights have been acquired since the statute has been enacted, and with a knowledge of it. They will be presumed to have given their assent to the statute by entering into contractual relations with a corporation which has voluntarily accepted its provisions. The precise constitutional objection is not, and cannot be, that the legislature is not possessed of the power to provide for the payment of all small debts of the corporation by giving them a preference and priority over liens and mortgages subsequently originating, for such power is undoubted. The objection must be that the statute in question is unconstitu-

tional because it limits the right to citizens of this state, and to debts originally contracted therein, and thus discriminates injuriously against the citizens of other states. If it should be granted that nonresidents of this state have equal constitutional rights in respect to enforcing the collection of small debts with the citizens of this state, it might follow that as to those who were injuriously affected, or as to those against whom the statute discriminates, it would be invalid, while as to those to whom it assumes to grant a special privilege it would be valid. When a nonresident of the state assails the constitutionality of the statute on the ground that it injuriously affects him, or on the ground that it denies him a privilege granted to the citizens of this state, it will be time to consider the constitutional question suggested. Courts will not listen to those who are not aggrieved by an invalid law. The railway company and its receiver are not aggrieved by the statute. The only ground of complaint open to them is that the statute limits their liability within too narrow bounds. If it granted the right to sue for debts amounting to \$100 to every one, it would confessedly be a valid enactment. Can the receiver object that the statute is unconstitutional because it is less burdensome to railway corporations than it might and ought to have been? It has been held that a state law which excluded colored persons from service on grand and trial juries deprived them of the equal protection of the law, but that a white person could not complain of the statutory exclusion. *Com. v. Wright*, 79 Ky. 22. So it has been held that a white person could not raise the question whether the exclusion of colored persons from participation in the benefits of the common-school system was a violation of the constitution of the state. *Marshall v. Donovan*, 10 Bush, 681. A male inhabitant of the state cannot assail the constitutionality of a statute regulating the granting of licenses to vendors of intoxicating liquors on the ground that the exclusion of women and nonresidents from participation in its benefits is an unjust discrimination. *Wagner v. Town of Garrett*, 118 Ind. 114, 20 N. E. 706. These cases are agreeable to the principle that only those who are injuriously affected by an unconstitutional act will be heard to complain of it. *Cooley*, Const. Lim. (5th Ed.) 163, 164; *Smith v. McCarthy*, 56 Pa. St. 359. The receiver, having admitted the rights of the complainants unless the statute in question should be held unconstitutional, is in no situation to object to the allowance of the demand of the intervening petitioners as a preferential claim. An order may be entered directing the receiver to pay the intervening petitioners the sum of \$100, as a preferential claim, with costs to be taxed.

SEATTLE, L. S. & E. RY. CO. v. UNION TRUST CO.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

1. FORECLOSURE OF MORTGAGE—PLEADING—DEFAULT IN INTEREST—PRINCIPAL DECLARED DUE.

When a suit for the foreclosure of a mortgage has been commenced, based upon a default in interest alone, and, while the suit is pending, the trustee of the mortgage, under the provisions thereof, elects to declare the principal of the bonds secured by it due because of the nonpayment of interest, such election is properly the subject of a supplemental bill, but, if introduced into the suit by amendment to the original bill, objection must be made by demurrer, plea, or answer; otherwise it is waived.

2. SUBPOENA—AMENDED BILL—STIPULATION TO ANSWER.

The sole office of the writ of subpoena is to bring a defendant into court, in order that the court may acquire jurisdiction of his person; and, when a defendant has appeared generally in a cause, and subsequently, upon the filing of an amended bill containing a new cause of action, stipulates by his solicitor to file an answer to the merits of such amended bill, no subpoena thereon is required.

3. MORTGAGE FORECLOSURES—PLEADING—DEFICIENCY DECREE.

A decree for a deficiency upon the foreclosure of a mortgage, may be rendered, under the ninety-second equity rule, without a special prayer therefor in the bill, though it is the better practice to insert such a prayer.

4. SAME—STIPULATION AS TO PROPERTY COVERED.

When, in a suit for the foreclosure of a mortgage, the parties have stipulated that certain property is covered by the mortgage, no objection can afterwards be made to its inclusion in the decree of foreclosure which could have been obviated by the introduction of any proof.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Crowley & Grosscup, for appellant.

E. C. Hughes, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was a suit for the foreclosure of a mortgage, executed August 10, 1886, by the appellant, Seattle, Lake Shore & Eastern Railway Company, to the appellee, Union Trust Company of New York, in trust, to secure the payment of 5,675 bonds, of the denomination of \$1,000 each, payable to the holder or holders thereof on the 1st day of August, 1931, with interest thereon at the rate of 6 per cent. per annum, payable semiannually. The bonds had annexed thereto interest coupons for the respective semiannual installments of interest. After the delivery of the bonds, and before the institution of the suit, 117 of the bonds were redeemed and canceled by the railway company, leaving 5,558 outstanding at the time of the commencement of the suit, in the hands of the various parties to whom they had been sold for a valuable consideration. Each of the bonds contains this provision:

"The payment of the principal and interest of this bond, with others of like tenor and same date, not exceeding, in all, twenty-five thousand dollars per mile of railroad and branches authorized by the articles of incorporation or charter of the company, is secured by a mortgage or deed of trust duly made by the said railway company to the Union Trust Company of New York, trus-

tee for the holders of all said bonds, which shall be the first mortgage and paramount lien upon the entire of said lines of railroad and branches, constructed or to be constructed, with the appurtenances, rights, and branches, and upon all the property and rights of property of the said railroad company now held and which may be acquired."

To secure the payment of the bonds, all of which were duly authorized and executed by the railway company, the company at the same time duly executed to the trust company a mortgage upon its property, in which the property mortgaged is thus described:

"All and singular the said lines of railroads and branches of the said party of the first part now being and to be constructed in the territory of Washington, and hereafter to be constructed in the territories of Idaho, Montana, and Dakota, and extending from a point on Puget Sound at the city of Seattle, King county, Washington territory, to a point on the eastern boundary line of said last-named territory in the vicinity of Lewiston, in Idaho territory, and thence in a general easterly direction, through the territories of Idaho, Montana, and Dakota, to a point at or near Deadwood, in said Dakota territory; and also a line of railroad from a point on said above-described line east of the Cascade Mountains to the city of Spokane Falls, and thence to some point on the eastern boundary line of said Washington territory; and also such branch railroads, from such convenient points on said above-described lines of railroad, to such points, either north or south of said lines of railroad, as said railway company may hereafter determine; and all the lands, tenements, and hereditaments acquired or appropriated, or which may or shall hereafter be acquired or appropriated, for the purpose of a right of way for said lines of railroad and branches; and all the easements, rights, liberties, franchises, privileges, immunities, and exemptions of the said party of the first part appertaining to the construction, maintaining, operating, owning, and enjoying of said lines of railroad and branches, and every part thereof; and all railroad tracks, railways, ways, and rights of way, depot grounds, bridges, viaducts, culverts, fences, and other structures, depots, station grounds, station houses, engine houses, car houses, fuel houses, ware houses, shops, machine houses, water tanks, turntables, superstructure, erections, fixtures, rolling stock, furniture, tools, implements, appendages, and appurtenances, used or intended to be used in connection with said lines of railroad and branches in any manner whatsoever; and all and singular the tenements, hereditaments, appendages, and appurtenances thereunto belonging, whether now owned or acquired, or hereafter at any time to be owned or acquired, by the said party of the first part, together with all and singular the rents, tolls, income, issues, and profits of the said lines of railroad and branches, premises and property; and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, and present and prospective, of the said party of the first part in and to the same and every part thereof."

The mortgage also provided that the railway company should pay into a sinking fund, created by the terms of the mortgage, annually, after August 1, 1891, an amount equal to 1 per cent. upon the aggregate of the principal of all of the company's outstanding bonds. It also contained a covenant to the effect that the railway company, whenever requested by the trust company, should execute to the trust company such further deed and assurance for the better assuring to the trustee the said lines of railroad and branches, premises, property, appurtenances, rights, privileges, immunities, and franchises mentioned, and thereby "conveyed, or meant or intended so to be, whether now owned, acquired, or held, or hereafter to be acquired or possessed by it," as the trustee or its counsel should reasonably advise or require. The mortgage also contained this covenant:

"In case default shall be made at any time in the payment of any installment of interest on any of the bonds hereby secured, the payment thereof having

been duly demanded, and the coupons therefor having been duly presented at the time and place named therefor, and if any such default shall continue for the period of six months, then and in such case the principal of all said bonds shall, at the election of the trustee, become and be immediately due or payable, anything in the said bond or herein contained to the contrary notwithstanding; but a majority in interest of the holders of all said bonds then outstanding, unpaid or unredeemed, may in writing instruct the trustee in any such case to declare the said principal to be due, or to waive the right so to declare, on such terms and conditions as such majority shall deem proper, and may annul or reverse the election of the trustee; provided, that no waiver by the trustee or the bondholders shall extend to or be taken to affect any case of subsequent default, or to impair the rights resulting therefrom."

The record shows that in July, 1893, in anticipation of default in the payment of the interest upon the bonds maturing August 1, 1893, an agreement was prepared providing for the appointment of a committee of the bondholders, to consist of James D. Smith, H. O. Armour, Edward D. Christian, Morton S. Paton, and a fifth person to be chosen by them, authorizing such committee to institute and conduct such suits and actions and take such proceedings as to it should seem advisable and proper for the protection and enforcement of the rights of the bondholders, of which committee Morton S. Paton was selected chairman. Subsequently that agreement was signed by the owners and holders of 4,672 of the bonds, being more than five-sixths of the entire issue. On the 16th day of November, 1893, Paton, as such chairman, addressed to the trustee this letter:

"Seattle, Lake Shore & Eastern Railway Company, 80 Broadway, Room 145.

"New York, November 16, 1894.

"Union Trust Company of New York, Trustee, 80 Broadway, New York, N. Y.—Gentlemen: A committee of the first mortgage bond holders of the Seattle, Lake Shore & Eastern Railway Company, composed of Messrs. H. O. Armour, E. D. Christian, J. D. Smith, and M. S. Paton, has been organized, and the undersigned has been elected chairman of said committee. The said committee have deposited, subject to their order under the terms of a certain agreement, with the Manhattan Trust Company of New York \$4,410,000 of said first mortgage bonds of said railway company, being over four-fifths of the total outstanding bonds. The committee hereby, under a resolution passed the 9th day of November, 1893, requests you to proceed forthwith to the foreclosure of said mortgage for the interest past due and unpaid. The committee does not desire at the present time to declare the principal of said mortgage due, but request that the papers may be drawn on the lines as above indicated, namely unpaid interest. We further request you to demand in the bill of foreclosure above referred to the appointment of receiver to represent the interests of the bond holders and yourself as trustee.

"Very truly yours,

Morton S. Paton, Chairman."

As printed in the record, the date of this letter is November 16, 1894, which date, as asserted by counsel for the appellee, and which is evident from other parts of the record, particularly the findings and decree, is incorrect; the true date of the letter being November 16, 1893. It was pursuant to that request that the original bill, after notice to the defendant railway company, was allowed by the court below to be filed, and was filed December 23, 1893. In the bill as so filed it was alleged, among other things, that the railway company made default in the payment of the semiannual interest due and payable upon the bonds secured by the mortgage, and each of them, on August 1, 1893, after demand therefor duly made. The original bill

also contained the allegation "that it is essential to the preservation of the rights of your orator, and of all said bondholders, that the income yielded by said mortgaged premises be at once sequestered and applied towards the reduction of the amounts due and to become due on said bonds." The prayer of the bill was for an accounting and ascertaining of the amount due and unpaid for interest on the outstanding bonds, and that the payment thereof be decreed; and for the ascertaining of what amount is due and payable to the sinking fund, and that payment thereof be decreed; and for the ascertaining of the amount due for taxes and other prior liens, and for allowances for costs of suit and attorney's fees, and that the payment thereof be decreed; and that, in default of such payments within a reasonable time, to be fixed by the court, the mortgaged premises be decreed to be sold, and the proceeds, after the discharge of the prior liens and costs and attorney's fees, be applied to the payment of interest due on the outstanding bonds and to the payment of the amount due to the sinking fund. The prayer also asked for the appointment of a receiver of the property, which appointment the court subsequently made.

To the original bill the defendant railway company entered its general appearance July 2, 1894. On the 28th day of July, 1894, the trust company addressed and sent to the railway company this letter:

"New York, July 28, 1894.

"Seattle, Lake Shore & Eastern Railway Co., Mills Building, New York City—Gentlemen: Default having been made by you in the payment of certain coupons annexed to the bonds secured by mortgage dated August 10th, 1886, and executed by you to us as trustee, which coupons matured August 1st, 1893, and default having been made by you in the payment of the amount required to be paid on August 1st, 1893, into the sinking fund to be created pursuant to the provisions of said mortgage, we hereby elect to declare, and do now declare, the principal of all of said bonds now outstanding as due and payable.

"Yours, respectfully,

"Union Trust Company of New York, by Jas. H. Ogilvie, V. Pr."

On the 2d day of August, 1894, the complainant made a motion in the court below for leave to file an amended bill, a copy of which was on the same day served upon the solicitors for the defendant railway company. The motion was granted by the court, and an amended bill filed, which alleged, among other things, that in and by the mortgage—

"It was further provided that, in case default should be made at any time in the payment of any installment of interest on any of the bonds thereby secured, the payment thereof having been duly demanded, the coupons therefor having been duly presented at the said time and place named therefor, and if any such default should continue for a period of six months, then and in such case the principal of all of said bonds secured by said mortgage should, at the election of the said trustee, become and be immediately due and payable, anything in the said bonds or in the said mortgage contained to the contrary notwithstanding."

The amended bill also alleged that the defendant railway company had made default in the payment of the semiannual interest due and payable on the bonds, and each of them, on the 1st day of August, 1893, and on the 1st day of February, 1894, respectively, due demand therefor having been made, and the coupons therefor having been duly presented, and had also made other defaults in failing to comply with

the conditions of the mortgage, by reason of which the complainant had, on or about July 20, 1894, elected to declare, and did declare, the principal of all of the bonds secured by the mortgage to be immediately due and payable. Subsequent amendments to the bill were by leave of the court filed by the complainant, and on October 2, 1894, this stipulation was entered into and filed by the respective parties, through their solicitors:

"It is hereby stipulated by and between the parties hereto that the above-named respondent shall have until Monday, the 15th day of October, 1894, to file its answer to the complainant's bill of complaint and amendments thereto filed herein, and that, in the case of a default by said respondent to file its answer on the merits on or before the time above designated, the said complainant shall take and enter the default of the said respondent herein as for want of an answer, and proceed immediately to apply to the court for the relief demanded in its bill of complaint and amendments thereto; the right to file any plea or demurrer, except an answer to the merits, being hereby expressly waived by the respondent, in consideration of the extension for leave to file such pleading."

The defendant railway company, on the 15th day of October, 1894, answered to the merits, to which answer exceptions were filed by the complainant and sustained by the court. On the 25th day of January, 1895, the defendant railway company filed an amended answer and plea, duly verified by its vice president, which plea was, on the 11th day of February, 1895, set down for argument upon the ground of its insufficiency, and which plea, after argument, was by the court overruled February 18, 1895. On the 24th day of May, 1895, leave was given the defendant railway company to file a second amended answer, which it did on the same day, and which was duly verified by the vice president of the company. To that second amended answer the complainant filed exceptions on the 24th of May, 1895, for impertinence, and the matters so excepted to were subsequently expunged by order of the court. No other amendment to the answer being made, and the cause being at issue, the same was referred, on the 14th day of June, 1895, to the master. Among the issues raised by the pleadings, and so referred to the master, was one as to the amount due upon the outstanding bonds secured by the mortgage; and the master was also directed, among other things, to ascertain and report all of the property upon which the mortgage was a lien, and to ascertain and report whether the mortgaged property could be advantageously sold in separate parcels, or whether the same should be sold as an entirety. Upon the taking of the proof before the master both parties to the suit were represented by their solicitors, and there this stipulation in writing was entered into by the respective parties:

"First. That Exhibit No. 4, hereto attached, together with schedules, marked 'A,' 'B,' 'C,' 'D,' 'E,' and 'F,' annexed to said exhibit, contains a correct description of the mortgaged premises, with the appurtenances, rights, and franchises thereunto belonging, as set forth in the bill of complaint and mortgage therein set forth; and that all the property, of every kind and description, mentioned, set forth, described, or referred to in said Exhibit No. —, and in any of the said schedules, are embraced within and covered by the lien of said mortgage above referred to.

"Second. That none of the property embraced within and covered by the lien of said mortgage, and hereinbefore referred to, can be advantageously sold in

separate parcels under any decree of foreclosure that may be rendered in said cause by said court, but that the same should be sold as an entirety.

"Third. That the expenses of said complainant, trustee, in and about the execution of its said trust, aggregate the sum of sixty-seven and $\frac{17}{100}$ (\$67.17) dollars, as per detailed statement this day filed with Eben Smith, Esq., master in chancery of said court, to whom this cause has been referred.

"Fourth. That the reasonable fees and compensation of Struve, Allen, Hughes & McMicken, solicitors and of counsel for said complainant and trustee, may be fixed and determined by this court upon the coming in of the report in this cause by said master, and upon the hearing of the same, and that either party, with the consent of said court, may introduce proof as to the value of such reasonable fees and compensation, and proof as to any additional services rendered after the date hereof.

"Dated at Seattle this 25th day of September, 1895."

In Schedule E, referred to in this stipulation, is embraced 2,500 shares of the capital stock of the Union Depot Company of Spokane Falls. The Union Depot Company of Spokane Falls is a corporation organized and existing under the laws of the territory (now state) of Washington, having its office and principal place of business at the city of Spokane Falls, in that state, and was organized for the purpose, among other purposes, of acquiring, by purchase, donation, lease, or otherwise, lands in Spokane county, and to contract for the construction of, and to construct, railway passenger depots, freight depots, warehouses, roundhouses, machine shops, cattle yards, grain elevators, side tracks, and storage tracks, and any and all buildings or structures useful, necessary, or convenient for railway terminals, and to carry on and conduct the business of a railway terminal company, and to provide railway terminal facilities at or near the city of Spokane Falls, in the territory (now state) of Washington, and to charge reasonable compensation therefor, and to acquire, by purchase, lease, or otherwise, warehouses, storehouses, elevators, and other structures, and to sell, lease, or otherwise dispose of any structures or buildings owned or controlled by it. With the Seattle, Lake Shore & Eastern Railway Company and the Washington & Idaho Railroad Company, the Union Depot Company of Spokane Falls entered into, on the 14th day of October, 1889, a lease, by which the Union Depot Company undertook to construct and maintain, on lands which it had acquired and then owned, and which are specifically described in the lease, for the use in common by the two railway companies mentioned, and their successors and assigns, all necessary depots and other terminal facilities at the city of Spokane Falls, for certain considerations and upon certain terms and conditions in the lease mentioned.

On the 3d day of October, 1895, the master filed his report, to which no objections or exceptions were filed by the defendant railway company, and on the 22d day of November, 1895, the report coming on to be heard, both parties being represented by their solicitors, it was by the court in all things confirmed. The report showed, among other things, the number of outstanding bonds to be 5,558, and the amount of principal and interest due and unpaid thereon to be \$6,446,980. A decree and order of sale followed for that sum, together with costs and attorney's fees, to procure the reversal of which the present appeal was brought.

In support of the appeal the counsel for the appellant make four points: (1) That the court below erred in finding and decreeing that the principal of all of the outstanding bonds became due and payable in July, 1894, by virtue of the declaration of the complainant; (2) that it erred in decreeing that the defendant railway company pay, within a certain time stated, the principal of all the outstanding bonds, as well as the interest due thereon, as a condition by which to avoid a sale of the mortgaged property; (3) that the court below erred in providing in the decree for a deficiency judgment in favor of the complainant and against the defendant railway company; (4) that it erred by including in the property decreed to be sold 2,500 shares of the capital stock of the Union Depot Company of Spokane Falls.

The assignments of error by which the appellant seeks to present these points are as follows:

"(8) The court erred in holding that complainant herein did, on the 30th day of July, 1894, elect to declare, and did declare and elect, the principal of all outstanding bonds secured by said mortgage to become immediately due and payable, pursuant to the provisions of said mortgage.

"(9) The court erred in finding, in and by said decree, that \$5,558,000 was the total principal due on said outstanding bonds at the date of the rendition of the decree."

"(12) The court erred in ordering, adjudging, and decreeing herein that this defendant pay or cause to be paid to the complainant, on or before the 3d day of February, 1896, the sum of \$5,558,000, together with the interest found to be due by the terms of said decree, as hereinbefore stated."

"(17) The court erred in ordering, adjudging, and decreeing herein that this defendant is personally liable for, and shall pay to the complainant, the amount of any deficiency, with interest thereon, which may remain due after the sale of the properties of this defendant under the terms of said mortgage, and the application of the proceeds thereof, pursuant to the terms of said decree."

"(23) The court particularly erred in ordering, adjudging, and decreeing that 2,500 shares of the capital stock of the Union Depot Company of Spokane Falls, Washington, and a certain leasehold estate for the period of 99 years in and to said property leased by said depot company to this defendant, in and near the city of Spokane, in the state of Washington, were covered by the terms of and included within the said mortgage, and in directing said property to be sold, along with the other properties mentioned in said decree, to satisfy the amounts by said decree found to be due upon said mortgage.

"(24) The court erred in ordering, adjudging, and decreeing that the mortgage mentioned and set forth in the bill of complaint herein should be foreclosed, and the properties described therein and covered thereby sold to satisfy the amounts of principal and interest found to be due upon the bonds secured by said mortgage according to the terms of said decree."

Passing the question of the sufficiency of these assignments, we think it clear that the appellant's points 1, 2, and 3 are not well taken. Points 1 and 2 may be considered and disposed of together. They relate to the inclusion by the court below in its decree of the principal sums of the outstanding bonds. Undoubtedly, if the principal sums were not due at the time of the trial and judgment, their inclusion would constitute such error as would make it necessary to reverse the entire decree; for, as said by the supreme court in *Railroad Co. v. Fosdick*, 106 U. S. 47, 71, 1 Sup. Ct. 10:

"It is obvious that the finding of the amount due, for nonpayment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceed-

ings. Unlike a calculable error in the amount of a personal judgment, which may be cured by a remittitur, it is otherwise incurable; for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause."

It is true, as stated by counsel for the appellant, that by the terms of the mortgage a majority in interest of the bondholders had control of the action of the trustee respecting its election to declare the principal of the bonds due by reason of default on the part of the mortgagor; for the mortgage in terms authorized the majority in interest of the bondholders to waive the right of election, and to annul or reverse the election of the trustee when exercised. But, in saying that the committee of the bondholders, through its chairman, after the action of the trustee in declaring the principal sums of the outstanding bonds due, and before the case was at issue in the court below, annulled that action of the trustee, the counsel for the appellant make a mistake of fact. The basis of that statement by the appellant's counsel is the letter from the chairman of the committee of bondholders to the complainant, appearing in the record as of date November 16, 1894, by which the trustee was requested "to proceed forthwith to the foreclosure of said mortgage for the interest past due and unpaid," and in which the trustee was informed that "the committee does not desire, at the present time, to declare the principal of said mortgage due, but request that the papers may be drawn on the lines as above indicated, namely, unpaid interest." The findings of the master, to which no objections or exceptions were taken by the appellant, as well as the findings and decree of the court, show that the original bill, which was filed December 23, 1893, was filed pursuant to that request of the committee of the bondholders. That letter, therefore, must have been written prior to December 23, 1893. Its date appearing in the record—November 16, 1894—was, therefore, evidently a mistake, the year 1894 being, as stated by counsel for the appellee, erroneously given instead of 1893. Besides, there is in that letter nothing whatever to indicate any reversal or annulment by the majority in interest of the bondholders of any action of the trustee in declaring the principal sums of the bonds due, and nothing to indicate that any such election had been made by the trustee; but, on the contrary, it plainly shows upon its face, as do the findings of the master, and the findings and decree of the court below, that that letter was the first step taken looking to the foreclosure of the mortgage in question. Nearly one year thereafter, and after the defendant railway company had entered its general appearance to the original bill, to wit, on the 28th day of July, 1894, the complainant did exercise its election, and did declare the principal sums of all the outstanding bonds due and payable because of the default on the part of the defendant railway company in the payment of the coupons annexed to the bonds maturing August 1, 1893, and of its default in the payment of the amount required to be paid August 1, 1893, into the sinking fund to be created pursuant to the provisions of the mortgage. So far as the record shows, that was the only election ever made by the trustee, and with it there was no interference on the part of the majority in interest of the

bondholders at any time, so far as appears; nor does it appear that the majority in interest of the bondholders ever waived such election on the part of the trustee.

It is, however, further insisted on the part of the appellant that the election made by the complainant, after the commencement of the suit and during its pendency, declaring the principal sums of the outstanding bonds due, constituted subject-matter for a new suit, and made a new case which could not be properly brought into the original suit by amended bill, and, furthermore, that if it could, such amended bill required the issuance of another subpoena, without the issuance of which the appearance of counsel thereto for the defendant was without effect. The sole office of the writ of subpoena is to bring the defendant into court in order that the court may acquire jurisdiction over his person. "A general appearance," said the supreme court in *Creighton v. Kerr*, 20 Wall. 8, 12, "waives all question of the service of process. It is equivalent to a personal service." The record shows that in this cause the defendant stipulated by its solicitor to file an answer to the amended bill upon the merits, in consideration of an extension of time given it for that purpose, and in pursuance of that stipulation did afterwards file such an answer to the amended bill, duly verified by its vice president. It thus voluntarily submitted itself to the jurisdiction of the court, which was a waiver of the service of process having for its object the bringing of the defendant into court. The new matter brought into the suit by the amended bill was the election exercised by the complainant declaring the principal sums of the outstanding bonds immediately due and payable. This was properly the subject of a supplemental bill; but, where such matter is introduced into the suit by amendment to the original bill, objection must be made by demurrer, plea, or answer; otherwise, it is waived. *Fost. Fed. Prac.* (2d Ed.) § 165; *Brown v. Higden*, 1 Atk. 291; *Archbishop of York v. Stapleton*, 2 Atk. 136; *Wray v. Hutchinson*, 2 Mylne & K. 235. In this case no such objection was taken. On the contrary, the parties stipulated in writing, whereby, in consideration of an extension of time within which to plead, the defendant railway company expressly waived the right to file any plea or demurrer, but agreed to file an answer to the merits, which it afterwards did, duly verified by its vice president.

The third point made on behalf of the appellant is answered by the ninety-second equity rule prescribed by the supreme court for the government of the courts of equity of the United States. It is as follows:

"In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money." *Insurance Co. v. Keith*, 23 O. C. A. 196, 77 Fed. 374.

By the terms of the decree appealed from, the deficiency judgment provided for is not for the benefit of the complainant, but is in favor of the complainant as trustee. The amount of such deficiency, like the amount realized by the sale of the mortgaged property, after de-

ducting costs et cetera, is to be paid to the bondholders according to their respective interests. A special prayer for a judgment for such deficiency as may be found to exist, while proper and the better practice, is not absolutely essential. Under the prayer for general relief, which the amended bill contained, such judgment may be given. Story, Eq. Pl., §§ 40, 41; 1 Pom. Eq. Jur. 161; Tayloe v. Insurance Co., 9 How. 406; Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685.

Nor did the court below err in including in its decree of sale the 2,500 shares of the capital stock of the Union Depot Company of Spokane Falls. It is true that that company was an independent corporation, organized and existing under and by virtue of the laws of the state of Washington; and that the ownership of a portion of its stock by the defendant railway company did not and could not confer upon the latter any power to mortgage the property of the depot company. *Humphreys v. McKissock*, 140 U. S. 304, 312, 11 Sup. Ct. 779. But, while the agreement of lease entered into between the Union Depot Company and the Seattle, Lake Shore & Eastern Railway Company and the Washington & Idaho Railroad Company, embodied in the report of the master, shows that the Union Depot was erected upon property belonging to the Union Depot Company, the complainant, but for the stipulation entered into by counsel for the respective parties, might have been able to show by proof that the Union Depot Company acquired the land upon which the Union Depot was erected from the defendant railway company, in consideration of the 2,500 shares of the capital stock of the depot company, and that at the time of such acquisition the land was subject to the complainant's mortgage. Under such circumstances, the stock representing the interest of the defendant railway company in the depot used in connection with its road might be covered by the complainant's mortgage, and, since it is possible that such proof might have been made by the complainant, the stipulation of counsel, entered into before the master, to the effect that the 2,500 shares of the capital stock of the depot company were covered by the mortgage to the complainant, must be held conclusive of the fact upon the parties.

In speaking of the binding character upon parties of stipulations between their counsel, in regard to proof, Chief Justice Shaw, in the case of *Lewis v. Sumner*, 13 Metc. (Mass.) 269, said:

"The importance of upholding agreements and concessions, like the present, between attorneys and counsel of litigating parties, is greater than it might seem at first blush, and is enhanced by our present practice. In most cases of controverted facts, many facts are embraced in the issue which are not really in dispute between the parties; but each must be prepared to prove all the facts necessary to his own case unless he can previously obtain a concession from the adverse party in a form which he can rely upon at the trial. It is, therefore, a wise, useful, and beneficial practice, resorted to by those who are most careful in preparing causes for trial, and a practice well deserving to be encouraged by the courts, for the parties, by their attorneys, to obtain and give mutual concessions, in writing, of all the material facts not intended to be controverted, and so narrow the litigation to the precise matters in controversy. It saves expense, avoids surprise and delay, and often prevents the loss of a good cause, by an unexpected call for proof, which could easily have been obtained if it had been anticipated that such fact would be called in question. This practice of admitting facts is the more necessary, since the disuse of special pleadings, which was designed, and to some extent had the ef-

fect, to narrow the issue on record to some one or a few questions of fact. This consideration renders it important to hold that a litigant party shall not be permitted to deny the authority of his attorney of record while he stands as such on the docket. He may revoke his attorney's authority, and give notice of it to the court and to the adverse party; but, while he so stands, the party must be bound by the acts of the attorney."

The shares of stock in the Union Depot Company being thus stipulated to be covered by the mortgage were, like all the other property covered by it, embraced by the complainant's bill. Besides, no objection was at any time made in the court below to the bill upon the ground that the allegations were not broad enough to embrace the shares of stock in question; nor was that objection made in any assignment of error. The judgment is affirmed, with costs.

DENTON v. BAKER.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 316.

1. INSOLVENT NATIONAL BANKS—JUDGMENTS—RECEIVERS.

While the receiver of an insolvent national bank may interpose and become a party to a suit to enforce a claim against the bank, he is not a necessary party to such a suit, and a judgment rendered against the bank by a court of competent jurisdiction, in a suit to which he is not a party, is binding upon the receiver, in the absence of fraud or collusion.

2. SAME—EQUITY JURISDICTION—REMEDY AT LAW.

The holder of a judgment against an insolvent national bank, recovered upon a claim rejected by its receiver, has an adequate remedy by an action at law against the receiver, by the judgment in which the latter may be directed to recognize the claim, and he cannot resort to equity to compel the allowance of the claim by the receiver, or enjoin its rejection.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Frederick Bausman, for appellant.

L. C. Gilman, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was a suit in equity, to the bill of complaint in which the court below sustained a demurrer, interposed by the defendant, and, the complainant declining to amend, the court dismissed the bill. The appeal brings up the question of the sufficiency of the bill. The court below held that it did "not state facts sufficient to entitle complainant to relief in equity, and that complainant had an adequate remedy, if any at all, at law." Passing the allegations of the bill in respect to the citizenship of the respective parties, and in respect to the insolvency of the Merchants' National Bank of Seattle, and the appointment and qualification of the defendant, Baker, as receiver of that bank, it alleges that in the month of July, 1893, the bank was pressed for money with which to meet the demands of its creditors, and found itself under the necessity of ob-

taining a loan from the National Park Bank of New York; that, in order to get the collateral for such a loan, it borrowed from one Angus Mackintosh certain bonds and coupons, and in consideration thereof did, in writing, under date of July 26, 1893, acknowledge itself indebted to Mackintosh in the sum of \$25,000, which sum it agreed and bound itself to pay Mackintosh with 8 per cent. interest thereon from July 1, 1893, in the event that it should not return the bonds and coupons to him on or before January 1, 1894, which agreement was, by a resolution of the board of trustees of the bank, duly authorized; that on the faith of that agreement the bank obtained the bonds and coupons from Mackintosh, and used them as collateral security from which to borrow money from the National Park Bank of New York, but has ever since failed, neglected, and refused to return the bonds and coupons to Mackintosh, or to pay him the consideration upon which they were obtained, and that neither the bonds nor coupons have ever been offered or tendered or restored by the receiver of the Merchants' National Bank of Seattle to Mackintosh or to the complainant; that about two years after the agreement between Mackintosh and the Merchants' National Bank of Seattle,—that is to say, on or about May 26, 1895,—the Merchants' National Bank became insolvent, and, the comptroller of the United States having appointed the defendant, Baker, receiver of its assets, the comptroller, on June 19, 1895, caused notice to the creditors of the bank to be published, requiring all persons having claims against the bank to present the same to the receiver, with the legal proof thereof, within three months from that date, and instructed the receiver to pass upon the claims presented to him, and to report to him (the comptroller) such claims as he might allow, which instructions were followed; that on August 15, 1895, Mackintosh filed his claim in the sum of \$29,250 upon forms of proof furnished by the receiver, and in the manner prescribed by his office, annexed to which was a copy of the written agreement between Mackintosh and the bank, and a copy of the resolution of the board of trustees of the bank authorizing the same, which claim the receiver thereupon rejected; that Mackintosh thereafter, in writing, and for and in consideration of the sum of \$16,000, assigned, transferred, and set over to the complainant the whole of his interest in the claim; that thereafter, and within the time prescribed by the comptroller, the complainant, upon forms supplied by the receiver, and in accordance with the manner prescribed by his office, presented to the receiver a verified claim in the sum of \$29,450, with proofs of the assignment of the claim from Mackintosh to himself, which claim of the complainant the receiver, on September 27, 1895, rejected, stating that the claim was the same already presented by Mackintosh; that thereafter, and on the 7th day of November, 1895, the complainant, as assignee of Mackintosh, did, in the superior court of King county, state of Washington, a court of competent jurisdiction, bring suit against the Merchants' National Bank of Seattle, and did cause the bank to be personally served in the county of King, in which it is located and did business; that on the 30th day of November, 1895, judgment was rendered and entered in the complainant's favor by that court in the sum of \$29,716; that

thereafter, and on January 15, 1896, on forms supplied from the receiver's office, and in the prescribed manner, the complainant presented his claim for the amount so adjudged to be due him from the bank, annexed to which was a duly-certified copy of the judgment, which claim the receiver rejected in these words: "I am in receipt of your favor of the 13th instant, inclosing the claim of D. B. Denton against this trust for \$29,716. That claim I have to-day rejected." The bill further alleged that the receiver never at any time assigned any reason for rejecting the claim; that from August 15, 1895, to the time of the bringing of this suit the receiver had actual knowledge of the written agreement of the bank with Mackintosh, and that from some time in September, 1895, he had actual knowledge of its being assigned to the complainant, and that the judgment has been of public record since November 30, 1895, and that the receiver has had actual knowledge of it since January 15, 1896; that at no time has either the comptroller or the receiver brought against Mackintosh or the complainant any action on behalf of the bank or its creditors, or at all sought to set aside, cancel, annul, or in any wise rescind the agreement between the bank and Mackintosh, or to effect its assignment to the complainant, or to impeach, attack, vacate, modify, or in any wise alter the complainant's judgment against the bank, which still stands wholly unpaid, unreversed, unmodified, and not appealed from. The bill further alleged that the comptroller is preparing to levy assessments on the capital stock of the insolvent bank to create funds for the payment of its liabilities; that in such levy he is taking no account of the judgment recovered by the complainant against the bank, and that unless defendant, Baker, be restrained from rejecting the complainant's claim, the whole of it will be disregarded by the comptroller, and the latter will not have evidence before him on which to include this claim, and on which to make a levy sufficient to pay it; that the complainant at all the times mentioned in the bill was, and still is, one of the stockholders of the insolvent bank to the extent of 4 shares, and that his assignor, Mackintosh, was at all those times, and still is, one of its stockholders to the extent of 600 shares, and that each of them will be included in such assessment, and be called upon to pay a proportion of the indebtedness of the bank, and that it is equitable that the assessment include the claim of the complainant, to the end that the other shareholders may be assessed their due proportion of it, and that Mackintosh be compelled, as a shareholder, with the others, to be assessed his proportion also; and that, if the claim of the complainant continue to be rejected by the receiver, irreparable damage and injury will be done the complainant, for which he has no plain, speedy, and adequate remedy at law. The prayer was that the defendant receiver be restrained from any further rejection of the complainant's claim, and that he be compelled to file and allow the same, with interest up to the date at which the Merchants' National Bank of Seattle became insolvent, and that he be compelled, as such receiver, to approve and forward to the comptroller of the currency of the United States the claim of the complainant; and for such other and further relief as the equity of the case may require.

In the case of *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 397, the supreme court said:

"Whenever a receiver [of a national bank] is appointed, the comptroller is required to give notice of the fact, requesting all persons having claims against the association to present the same, and to make legal proof thereof. Provision is first to be made by the comptroller for refunding to the United States any such deficiency in redeeming the notes of the association as is mentioned in the act, and, having refunded that amount, the comptroller is required, in the next place, to make a ratable dividend of the money paid over to him by the receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction. Claims proved to the satisfaction of the comptroller are to be included in the list, and he is also to include in the list all claims adjudicated in a court of competent jurisdiction, which shows conclusively that claims disallowed by the comptroller may be prosecuted in a court having jurisdiction in such cases."

In that case the supreme court also held that, notwithstanding the insolvency of a national bank, and the appointment by the comptroller of a receiver of its assets, the corporate franchise of the association continues, and the association, as a legal entity, continues to exist, and is capable of suing and liable to be sued in all matters in which the corporation is interested. It is not denied that the state court of King county, Wash., where the corporation was located, and where the contract relied on by the complainant was made, was a court of competent jurisdiction for the adjudication of the rights of the parties to the contract which forms the basis of the complainant's suit, had there been no insolvency proceedings. It follows that it was a court of competent jurisdiction for the adjudication of the complainant's claim, the bank having become insolvent, and the receiver of its assets having rejected the claim. Undoubtedly, the receiver would have been entitled to have defended that suit in the name of the bank or in his own, and would have been permitted by the court, upon a seasonable application, to have contested the validity of that judgment.

In *Bank v. Colby*, 21 Wall. 609, one of the questions was whether the property of a national bank organized under the act of congress of June 3, 1864, attached at the suit of an individual creditor, after the bank has become insolvent, can be subjected to sale for the payment of his demand against the claim for the property by a receiver of the bank subsequently appointed; and the court said, among other things:

"It is too late for counsel to question in this court the right of the receiver to appear in the state court, and move the discharge of the attachment and the abatement of the suit, or to contest the case at the trial. Whatever informality may have existed in the proceeding, it was waived by the silence of the parties. Objections in matters of form to modes of procedure in the court below cannot be urged here for the first time. But, independently of this consideration, we are of opinion that it was a proper proceeding on the part of the receiver to apply to the court below to discharge the attachment on proof of the facts presented by him, and the production of his appointment, and the decree dissolving the association. Invested with the rights of the bank to the possession of the property by his appointment, it was his duty to take the necessary steps to remove the levy."

In *Bank v. Kennedy*, 17 Wall. 19, it was held that the receiver may sue in his own name or in that of the bank; and, if he may so sue,

he may so defend. In the *Bank of Bethel Case*, above cited, while the receiver was not a party to the suit, and does not appear to have taken any part in it in the supreme court, it appears from the report of the case in the supreme court of Connecticut, from which court the case was taken to the supreme court of the United States, that the suit was there defended by the receiver, by direction of the comptroller of the currency, in the name of the defendant to the suit, for the benefit of the stockholders and creditors of the bank. *National Bank of Pahquioque v. Bank of Bethel*, 36 Conn. 325. But, while the receiver of an insolvent national bank may, in the interest of its creditors and stockholders, and for the protection of its assets, interpose, and become a party to a suit to enforce a claim against the bank, it does not follow that he is a necessary party to such a suit. The statute creating such banking institutions, and providing for their conduct, and for their management, and for winding them up in the event of insolvency, does not require that the suit to establish a claim before a court of competent jurisdiction shall be brought against the receiver. The provision of the statute is that:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." Rev. St. § 5236.

Under this language the supreme court, in the case of *National Bank of Pahquioque v. Bank of Bethel*, supra, sustained a suit against the insolvent bank, to which the receiver did not appear as a party; and in *National Bank of the Commonwealth v. Mechanics' National Bank*, 94 U. S. 437, 440, it was expressly held that claims against an insolvent bank, whose validity is established by a judgment in a court of competent jurisdiction, and claims that are proved to the satisfaction of the comptroller, stand upon the same footing. In that case a suit against the insolvent bank for interest accruing after the allowance of the principal sum by the receiver was sustained, although the receiver was not a party thereto. In the cases of *Turner v. Bank*, 26 Iowa, 562, and *Green v. Bank*, 7 Hun, 63, cited and relied on by the appellee, it was held that the receiver was a proper party to a suit brought in a court of competent jurisdiction to establish a claim against the insolvent bank; but in neither of those cases was it held that he is a necessary party to such a suit. *Case v. Bank*, 100 U. S. 446, was an action by the *Citizens' Bank of Louisiana* against the receiver of the *Crescent City National Bank* to recover damages for a refusal on the part of the latter bank, prior to its insolvency, to permit a transfer of certain shares of its capital stock. The proof showing, and the jury having found, that the *Citizens' Bank* was damaged by that refusal on the part of the insolvent bank in a certain sum of money, the supreme court sustained the action against the receiver of the insolvent bank, and affirmed the judgment of the lower court, directing the receiver to recognize the *Citizens' Bank* as a creditor for the amount in which it had been damaged, and requiring him to provide for its payment along with the other creditors of the insolvent bank.

It results, we think, from the decisions of the supreme court to which we have referred, that an action to establish the validity of a claim against an insolvent bank may be brought in a court of competent jurisdiction against both the insolvent bank and the receiver, or against the insolvent bank or the receiver; and if against the receiver either jointly with the insolvent bank or against him only, he may be directed by the judgment in the action to recognize the claim, and to provide for its payment along with the other claims against the bank; and if against the insolvent bank only, it is binding upon the receiver, unless void by reason of fraud or collusion. The case is analogous to that of a suit brought against a debtor for the recovery of a debt, after a general assignment of his property made to a trustee for the benefit of creditors. The contract between the debtor and creditor would still subsist, and could be enforced by suit against the debtor, and a judgment between the original parties on the contract would necessarily establish the existence and extent of the obligation between them, as well as against a trustee of his estate for the benefit of creditors. *Pringle v. Woolworth*, 90 N. Y. 502, 511. That was evidently the view taken by the supreme court of the national banking act in the case of *Bank of Bethel v. Pahquioque Bank*, supra, where it said: "Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction as a means of establishing their validity." 14 Wall. 401.

The validity of the complainant's claim being thus established against the bank, and the receiver continuing to reject it, the claimant is clearly entitled to some remedy to enforce his right. That he cannot resort to mandamus is conceded by the appellee. The United States courts have no jurisdiction in mandamus except where the right sought is ancillary to their other powers, or to enforce their own judgments. *McIntire v. Wood*, 7 Cranch, 504; *Bath Co. v. Amy*, 13 Wall. 244; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633; *Gares v. Association*, 55 Fed. 209. But there is no difficulty in the way of the complainant maintaining an action at law against the receiver upon the judgment recovered by him in the state court. *Hickman v. Macon Co.*, 42 Fed. 759; *Freem. Judgm.* § 432; 2 Black, *Judgm.* § 958, and cases there cited. The judgment in such action at law may direct the receiver to recognize the claim of the complainant, and to provide for its payment along with all other claims against the insolvent bank. *Case v. Bank*, 100 U. S. supra. This affords complainant a plain, speedy, and adequate remedy, and therefore he cannot resort to equity. The judgment is affirmed.

CENTRAL TRUST CO. v. VALLEY RY. CO. et al.

(Circuit Court, N. D. Ohio, E. D. January 2, 1897.)

RAILROAD COMPANIES—EMINENT DOMAIN—JUDGMENT FOR LAND APPROPRIATED—LIEN.

A judgment under Rev. St. Ohio, § 6448, for the value of land appropriated by a railroad company, in favor of a landowner who has failed to take proceedings to prevent the construction of the road over his land, or to obtain compensation, is not a lien on the land.

Doyle & Bryan, for Apolonia Orth.

Kline, Carr, Tolles & Goff, for defendants.

SEVERENS, District Judge. In this matter the petitioner prays that she may be declared entitled to a lien upon the property of the said Valley Railway Company for the amount of the judgment recovered by her against the above-named defendant, the Valley Railway Company, on the 12th day of April, 1890, in the probate court of Summit county. It appears that this judgment was recovered for certain real property appropriated by the said railway company, belonging to the petitioner, which had been appropriated and used for some time by the railway company, prior to the date of the recovery of the above-mentioned judgment. The proceedings for the condemnation of property for railway purposes, where such condemnation takes place before the appropriation of the property, and also where the property has been appropriated before condemnation, are regulated by the statutes of Ohio relating to that subject. The effect of the statute has been construed by the supreme court of the state, and such construction is binding upon, and must be followed by, this court. By the decisions of the said supreme court in the cases of *Goodin v. Canal Co.*, 18 Ohio St. 169, and *Railroad Co. v. Robbins*, 35 Ohio St. 531, it would seem that the petitioner, by failing to take proceedings for the purpose of obtaining compensation or preventing the construction of the railroad over her land, is estopped from asserting any other remedy than that provided by the twenty-first section of the act of 1872 (69 Ohio Laws, 95; Rev. St. § 6448), whereby she might have the value of her land ascertained by a jury, and obtain a judgment for the value thereof, to be collected by execution. By this proceeding the judgment is not made a lien or a charge upon the land, and there remains to the owner only the right of compensation. It is only necessary here to decide that under the twenty-first section of the act, upon which judgment was recovered, she still retains her title, and it would be incongruous that one should have a lien upon his own land. Doubtless the title remains in her, but she may be precluded from asserting that title upon the grounds stated in the first of the above-mentioned cases. I think, therefore, that this petition must fail, and that judgment must be entered disallowing the same.

THIRD STREET & SUBURBAN RY. CO. v. LEWIS.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

MORTGAGES—PURCHASE OF MORTGAGED PREMISES BY RAILROAD COMPANY—RECEIVER'S CERTIFICATES—PRIORITIES—FORECLOSURE.

In 1884 the W. Co. mortgaged to L. certain city lots. In 1891 it sold them, subject to the mortgage, to a railway company, which proceeded to erect a power house upon them, and put them to railroad uses. Subsequently, in a suit brought against the railway company, a receiver was appointed, who operated the railroad under the orders of the court, and, to pay operating expenses, issued receiver's certificates, also under an order of the court, which made such certificates a first lien on the company's property. Upon the request of the certificate holders, the railway company's property, including the lots, was sold, and the proceeds applied to the payment of the certificates. L. was not a party to this suit, but had actual knowledge of the proceedings. During his operation of the railroad, the receiver paid taxes on the property and interest on L.'s mortgage. Before the order for the sale of the railway company's property, L. commenced a suit for the foreclosure of his mortgage. *Held*, that the lien of L.'s mortgage was not extinguished by the proceedings in the suit against the railway company, nor subordinated to the lien of the receiver's certificates, but that his right to foreclosure of his mortgage was unimpaired. *Union Trust Co. v. Illinois Midland R. Co.*, 6 Sup. Ct. 809, 117 U. S. 434, distinguished.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Frederick Bausman, for appellant.

Morris B. Sachs, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellee was the complainant in a suit brought to foreclose a mortgage on certain real property in the city of Seattle. His supplemental bill alleged, in substance, that on May 14, 1884, the Western Mill Company, a corporation, executed its promissory note to the complainant in the sum of \$20,000, payable three years after date, with interest at 9 per cent. per annum, and to secure the same executed its mortgage on certain lots in the city of Seattle; that the interest on said note and mortgage has been paid to December 14, 1893, but not thereafter; that on October 14, 1891, the mortgagor sold and conveyed the said mortgaged premises to the Ranier Power & Railway Company, a corporation, and that on or about February 13, 1895, in a cause pending in the circuit court of the United States for the district of Washington, in which A. P. Fuller was complainant and the Ranier Power & Railway Company was defendant, the master in chancery of said court executed and delivered to A. M. Brookes, Angus McIntosh, and Frederick Bausman, who were the purchasers of said lots at a sale had to satisfy the decree rendered in said cause, a deed of sale to said mortgaged premises, and that on February 12, 1895, the said McIntosh, Brookes, and Bausman conveyed the same unto the Third Street & Suburban Railway Company; that the interest of said

last-named corporation is subject to the lien of the mortgage. To this bill the Third Street & Suburban Railway Company, the appellant, made answer, alleging that the Ranier Power & Railway Company, immediately after receiving its conveyance of said lots from the mortgagor, applied the said property to railway uses, and erected thereon a power house for its railway; that on June 13, 1893, the assets of said Ranier Power & Railway Company passed into the hands of Manson F. Bacchus, receiver in the suit of Fuller against said company, mentioned in the bill; that said receiver, under the order of the court, operated the railway properties and power house, and on August 8, 1894, under the order of the court, issued receiver's certificates upon all the property of said railway company, including the lands described in the bill; that the certificates were by the court adjudged to be necessary, and essential to the continued existence of the railway company, and were made upon the petition of the receiver, showing that the operating expenses of the company exceeded its gross receipts, and that, unless money were raised by means of these certificates, the property would have to be abandoned; and that the order of court made the certificates a first lien upon all property in the receiver's hands, including the mortgaged premises; that subsequently the certificate holders petitioned the court to enforce the lien, and that thereupon, under the order of the court, all the property in the receiver's hands was sold on January 28, 1895, as alleged in the bill; that the sale was thereafter confirmed, and on February 12, 1895, the purchasers conveyed the same to the Third Street & Suburban Railway Company. The answer further alleges that the Ranier Power & Railway Company was a corporation, organized with railway powers, and owned public franchises for railway purposes; that the complainant did not seek to foreclose his mortgage at the time of the transfer of the land to said corporation, but forbore to do so for more than two years following, during which period the mortgage was overdue, but that he accepted interest on the loan from said railway company, and thereafter accepted interest from the receiver; that the receiver, before the foreclosure suit was begun, paid taxes and insurance upon the lands to the amount of \$3,000; that, while the complainant was not a party to the suit in which the receiver's certificates were issued, he had knowledge of that suit and of the receivership, and accepted interest from the receiver, with knowledge of the litigation, and of all the facts alleged in the answer, and during the space of eleven months forbore to foreclose his mortgage, and permitted the receiver, with the trust funds, to protect the mortgaged property; that about three months before the issuance of the receiver's certificates he caused his appearance to be entered in said cause, for the purpose of obtaining leave to sue the receiver, but did not ask to be made a party to the cause, nor did he serve notice of his appearance upon any of the parties; that the sale under the receiver's certificates was known to the complainant both before and after its date, but he has not sought to disturb it, or filed objection thereto. A demurrer to the amended answer was sustained by the circuit court, and, the defendant answering no further, a decree of

foreclosure was thereupon entered. The order sustaining the demurrer is assigned as error on the appeal to this court.

It is contended by the appellant that by virtue of the facts set forth in its amended answer the complainant's mortgage lien has been extinguished, and that the appellant holds its property under the title acquired at the judicial sale, which was made to satisfy the receiver's certificates, free from all prior incumbrances. It is not contended that the lien of the complainant's mortgage has been adjudged to be second to that of the receiver's certificates upon a hearing had to determine the respective rights and priorities of those incumbrances, nor that the complainant has had his day in court, but it is urged that the actual knowledge which the complainant had of the proceedings of the court, the issuance of the certificates, the adjudication of their necessity and of their priority, is tantamount to legal notice or service of process upon him. To sustain this view of the law, we are referred to the decision of the supreme court in *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, in which it is said: "A full opportunity, as in this case, to be heard on evidence as to the propriety of the expenditures and of making them a first-class lien, is judicially equivalent to prior notice. The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans. The court always retains control of the matter. Its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments." This expression of opinion was uttered in the case of a foreclosure of railroad mortgages, in which the court had had occasion to advert to the nature of that class of liens, and the necessity for preserving the road as a going concern, together with its franchises, not only for the benefit of the corporators, but as a public highway, and had said that its creditors, or the holders of its obligations, must necessarily be held to have received the same in view of these peculiar facts, and with the understanding that, if the company fall into insolvency, and its affairs come into a court of equity for adjustment, it may become necessary to make repairs, or pay the costs of operation, and for that purpose to borrow money upon the credit, not only of its earnings, but of its corpus. The court held, it is true, that the certificates of receivers might, in case of urgency, where legal notice was not practicable, be issued under the order of the court for the preservation of the property and the protection of the bondholders, and that in such a case prior notice to incumbrancers or to all the parties interested was not absolutely necessary, but that the question of the priority of such receivers' certificates over the liens of persons to whom notice was not given, or who did not consent, might be subsequently adjudicated, and that the takers of such receivers' certificates must be expected to receive the same subject to such contingency. But the facts upon which the decision was rendered in that case differ in substantial features from the present case. The complainant here did not lend his money upon railroad security. He loaned it upon lots in a city, which were subsequently sold to a

street-railway company subject to his lien, and by the latter were used as the site of a power house. The fact that he failed to foreclose his mortgage immediately on such transfer, or that he received from the railway corporation, or from the receiver appointed subsequently in a suit against said corporation, the interest which came due upon his mortgage, does not in any way change his rights, or estop him to enforce his lien as an ordinary mortgage upon real estate. Assuming it to be true that he had actual notice of all the steps taken in the suit in which the receiver's certificates were issued, and that he made no appearance in said court, and no opposition to said proceedings, he is not thereby precluded from proceeding to foreclose his mortgage upon default of the interest on the same. The foreclosure suit was begun some two months before the hearing on the petition for the order to sell the real estate to satisfy the receiver's certificates. The holders of those certificates and the parties to that suit had the opportunity to cause the complainant to intervene in said proceedings, and submit to the court the question of the priority of his lien. They declined to do so. They were chargeable with the record notice of his lien from the first, and the complainant, in view of their conduct, might justly assume that it was not their intention to dispute his prior lien, or to attempt to create a lien in advance thereof, and that in selling the property as the same was sold, in a proceeding to which he was not made a defendant, it was the intention to recognize his mortgage and to sell the property subject thereto. In making the expense of operating a railroad a charge upon it in preference to the mortgage liens, courts of equity have acted with extreme caution, and have exercised the extraordinary power only upon the theory that the holder of such a mortgage lien takes the same subject to the implied condition that, in case of the insolvency of the railroad company, it may become necessary, under a receivership, to borrow money for the purpose of preserving its value and protecting its franchises for the benefit of all interested therein. The power has generally been exercised only after notice to all parties to the litigation; and if, without such notice, or if before the time when the prior lien holders become parties to the suit, receivers' certificates are issued by authority of the court, such prior lien holders, when they are subsequently brought before the court, will always be given the opportunity to contest the priority of the receivers' certificates over their liens. In *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 7 C. C. A. 3, 58 Fed. 6, it was held that the holder of a receiver's certificate is put upon inquiry as to all that has been done in the litigation in which the certificate was authorized, and that he is charged with notice of all subsequent proceedings therein, and of the fact that by the final action of the court the validity of the certificate may be prejudicially affected; and that a final decree in a foreclosure suit against a railway company, vesting the purchasers at the foreclosure sale with a title free from all liens for receiver's debts, operates to set aside so much of a previous order as has made the receiver's certificates a paramount lien on the road. But the mortgagee in this case does not stand in the attitude of the ordinary

lender of money upon railroad security. His loan was made upon real estate only, and not in contemplation of its subsequent application to railroad uses. Upon what principle of equity can it be said that his mortgage has become subordinated to the uses for which the property was thereafter devoted, so that it has lost its character of a mortgage upon real estate, and has now, by virtue of the insolvency of the railway company, become extinguished by a lien created by a receiver for the purpose of maintaining other property of the company? At the time when the mortgage loan was made, the security presumably was, and still is, of sufficient value to satisfy the complainant's lien. For the protection of that lien, he has not, so far as the facts are disclosed in the pleadings, required the intervention of a court of equity, nor is it shown that any expense has been incurred by the receiver which was necessary or advantageous to the protection of his security.

The appellant insists that there is ground for the equitable preferment of the receiver's certificates over the complainant's lien, in the fact that the receiver, before the commencement of this foreclosure suit, paid out of the assets of said railway company, for insurance and taxes on the mortgaged property, the sum of \$3,000, thereby reducing the assets of the company, and in part creating the necessity for the issuance of the certificates. We are unable to see how this contention can be sustained. If the receiver paid taxes and insurance, it was in the discharge of his duty, and in the course of business, and for the purpose of protecting the property as it was, and possibly for the purpose of averting a suit by the complainant to foreclose his mortgage. The greater portion of the sum so paid is evidently on account of the improvements placed upon the property by the railway company, and not for taxes upon the lots which were the subject of the complainant's mortgage. If the taxes had remained unpaid, they would now be an additional charge upon the real estate, and the complainant, in his decree of foreclosure, would be entitled to have that amount also paid out of the security. The mortgage contemplated this, and it is not shown that the value of the property is inadequate to meet such increased charge upon it. In any view of the facts alleged in the amended answer, they constitute no defense to the bill, and the demurrer was properly sustained. The decree will be confirmed, with costs to the appellee.

SULLIVAN v. BECK et al.

(Circuit Court, D. Indiana. March 22, 1897.)

1. VALIDITY OF CONTRACT MADE BY FOREIGN CORPORATION — FAILURE OF AGENT TO COMPLY WITH STATUTE.

A contract made by the agent of a foreign corporation in the state of Indiana is valid, although the agent may not have complied with sections 3453, 3454, 2 Burns' Rev. St. Ind. 1894 (sections 3022, 3023, Rev. St. Ind. 1881), requiring the agents of foreign corporations to do certain things before entering upon the duties of their agency in the state, as the only inhibition of the statute is that the contract shall not be enforced in the courts of the state before compliance with these sections.

2. CONTRACT ENFORCED BY FEDERAL COURT ALTHOUGH NOT ENFORCEABLE IN STATE COURT.

Where a state statute provides that contracts made by foreign corporations shall not be enforced in the courts of the state before compliance with certain requirements of the statute, the prohibition will not be extended to suits brought in the federal courts, the contracts not being void.

Floyd A. Woods, Lorin C. Collins, Jr., and William Meade Fletcher, for complainant.

F. Winter and John L. Lewis, for defendants.

BAKER, District Judge. Bill by receiver of the American Building, Loan & Investment Society of Chicago, a corporation organized under the laws of Illinois, to foreclose a mortgage on real estate situated in this state executed by defendants to said society. The loan was made, and the note and mortgage in suit therefor were executed by and through an agent of said society with the defendants in this state on September 29, 1890. To this bill the defendants have filed a plea in abatement, grounded on sections 3453, 3454, 3456, 4464, 4483, 2 Burns' Rev. St. Ind. 1894 (sections 3022, 3023, 3025, Rev. St. Ind. 1881), which it is claimed preclude the maintenance of this suit, because the provisions of said sections have not been complied with. Section 3453, Rev. St. 1894 (section 3022, Rev. St. 1881), provides that:

"Agents of corporations not incorporated or organized in this state, before entering upon the duties of their agency in this state, shall deposit in the clerk's office of the county where they propose doing business therefor the power of attorney, commission, appointment, or other authority under or by virtue of which they act as agents."

Section 3454, Rev. St. 1894 (section 3023, Rev. St. 1881), provides that:

"Said agents shall procure from such corporations, and file with the clerk of the circuit court of the county where they propose doing business, before commencing the duties thereof, a duly authenticated order, resolution, or other sufficient authority of the board of directors or managers of such corporations, authorizing citizens or residents of this state having a claim or demand against such corporation arising out of any transaction in this state with such agents, to sue for and maintain an action in respect to the same in any court of this state of competent jurisdiction, and further authorizing service of process in such action on such agent to be valid service on such corporation, and that such service shall authorize judgment and all other proceedings against such corporation."

Section 3456, Rev. St. 1894 (section 3025, Rev. St. 1881), provides that:

"Such foreign corporations shall not enforce, in any court of this state, any contracts made by their agents or by persons assuming to act as their agents, before a compliance by such agents or persons acting as such with the provisions of sections 3453 and 3454 [sections 3022, 3023] of this act."

In the view which the court takes of this case, it does not become important to set out sections 4464, 4483, Rev. St. 1894. Plaintiff has set down the plea for hearing, and insists that the same is not sufficient to abate the maintenance of the present suit.

Section 3456, Rev. St. 1894 (section 3025, Rev. St. 1881), does not purport to invalidate any contract entered into before compliance with sections 3453, 3454, Rev. St. 1894 (sections 3022, 3023, Rev. St. 1881).

A contract so made is valid. The only inhibition is that it shall not be enforced in the courts of the state before compliance with those sections. Such has been the uniform construction placed upon these sections of the statute by the supreme court of this state. *Machine Co. v. Caldwell*, 54 Ind. 270; *Domestic Co. v. Hatfield*, 58 Ind. 187; *Daly v. Insurance Co.*, 64 Ind. 1; *Manufacturing Co. v. Brown*, Id. 548; *Insurance Co. v. Wellman*, 69 Ind. 413; *Elston v. Piggott*, 94 Ind. 14; *Guarantee Co. v. Cox* (Ind. Sup.) 42 N. E. 915; *Wiestling v. Warthin*, 1 Ind. App. 217, 27 N. E. 576. Can the national courts be called upon to enforce the provisions of section 3456, Rev. St. 1894 (section 3025, Rev. St. 1881)? In terms, the prohibition of this section only applies to courts of the state, and I am of opinion that it is not the duty of this court to extend its application to suits brought here. This view finds support in *Hervey v. Railway Co.*, 28 Fed. 169, and in *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 68 Fed. 412. The note and mortgage in suit having been executed in 1890, and being valid and enforceable at the time of their execution, sections 4464, 4483, Rev. St. 1894, which were enacted three years after their date, cannot affect their validity, or defeat the right of the receiver to enforce them. The plea is therefore insufficient, and is overruled, with leave to the defendants to answer.

LACKAWANNA IRON & COAL CO. et al. v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1897.)

No. 503.

RAILROADS—APPOINTMENT OF RECEIVER—DEBTS ENTITLED TO PREFERENCE.

The purchase by a railroad company, under contracts made from about sixteen months to over two years before the appointment of a receiver, of some 20,000 tons of steel rails, to replace the old and deteriorated rails with which its tracks were laid, to be paid for by its notes, due in six months, renewable for six months longer at the railroad company's option, is not a purchase of supplies in the ordinary operation of the road to keep it a going concern, so as to authorize the court appointing the receiver to give the debt a preference over the mortgage debt.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

On February 16, 1885, the Southern Development Company filed its bill of complaint in the United States circuit court for the Eastern district of Texas against the Houston & Texas Central Railway Company, in a cause known as "Cause No. 185" of the equity docket of that court. The complainant alleged that the railway company was indebted to it in the sum of about \$600,000 for money loaned at various times, and prayed for the appointment of a receiver. On February 21, 1885, receivers were appointed, and they took possession of all the property of the railway company. On April 18, 1885, the Southern Development Company filed its supplemental and amended bill in cause No. 185, whereby it made N. S. Easton and James Rintoul and the Farmers' Loan & Trust Company defendants in their capacity of trustees of the various mortgages on the property of the railway company. The Southern Development Company further prayed by said supplemental and amended bill that an account be taken of the several amounts due it by said railway company, as also of all sums due to all the other creditors of said railway company who

might intervene for the protection of their claims. An accounting was also asked of all amounts paid by the railway company to any of its mortgagees or bondholders, of all amounts paid for interest on bonds and of other items specified in the pleadings. The Southern Development Company prayed that the amounts which the accounting would show it to be entitled to, be declared liens on the net earnings of the railway company and upon all its property, superior in rank to the claims of the trustees and to the mortgage bonds and coupons issued under various deeds of trust executed by said railway company. On September 12, 1885, the Lackawanna Company intervened in cause No. 185, and prayed that an account be had of the sum which the railway company owed it on certain contracts to be hereinafter mentioned more fully, and that its claim be decreed to be paid out of the net revenues of the railway company, and declared to be a lien thereon superior in rank to the claim of the trustees and mortgage bonds and coupons. The bill of complaint of the Southern Development Company in cause No. 185 was, upon the demurrer of the trustees, dismissed on May 27, 1886, without prejudice to the rights of complainants to assert their rights, if any they had. The decree discharged the receivers in cause No. 185. They were ordered to turn over all the property of the railway company to other receivers, who had theretofore, in causes known as equity causes Nos. 198, 199, and 201 of the docket of said court, been appointed joint receivers of the property of the railway company, on the application of the trustees under various deeds of trust bearing on the property. The receivers in cause No. 185 delivered possession of the property to the receivers in causes Nos. 198, 199, and 201 on July 10, 1886. The three causes Nos. 198, 199, and 201 were consolidated as "Consolidated Cause No. 198." In this cause, the Lackawanna Company, on November 26, 1886, filed its intervention, praying substantially for the same relief it had prayed for in cause No. 185. A final decree of foreclosure was rendered in cause No. 198 on May 4, 1888, and, on September 8, 1888, all the property of the railway company was sold and one George E. Downs became the purchaser of the Waco & Northwestern Division of the railway company. But his purchase was made subject to the mortgage which was subsequently foreclosed in equity cause No. 227 of the docket of said court, and subject also to the right which the court reserved to charge upon the property the payment of any amount that might be found due by reason of intervening petitions pending in cause No. 198, and which might be found to be entitled to priority over the mortgage in that cause. The mortgage foreclosed in cause No. 227 is known as the "Waco and Northwestern Division First Mortgage," and is a different mortgage from the mortgages upon which the other causes were based. It bore only on the Waco & Northwestern Division of the railway company. On November 3, 1891, the Lackawanna Company, in cause No. 227, filed its intervention, which is now before this court. It is substantially the same as the interventions it filed in causes Nos. 185 and 198. Subsequently to the final decree of May 4, 1888, to wit, on April 20, 1889, the Lackawanna Company filed its petition in cause No. 198, praying that the receivership therein should continue over the property then in the possession of the court, until its claims should have been finally decreed and paid. On this petition an order was made ordering the receiver to retain possession of the property until the further order of the court. It was also ordered that the receivership which had theretofore been ordered in cause No. 227 should be concurrent with the receivership in cause No. 198, and that the receiver should keep separate accounts of the earnings and expenses of the Waco & Northwestern Division. On October 21, 1895, Moran Bros. and Henry K. McHarg, holders of bonds secured by the mortgage or deed of trust which is the subject of cause No. 227, intervened in that cause pro interesse suo.

The intervention of the Lackawanna Company in cause No. 227, which is now before this court, alleges that on December 28, 1882, on April 26, 1883, and on October 30, 1883, under three contracts respectively bearing said dates, it agreed to furnish to the Houston & Texas Central Railway Company about 20,000 tons of steel rails at prices stated in the contracts, and that upon the delivery of each 560 tons of rails payments were to be made in cash or in notes of the railway company, payable in six months from the average date of delivery of the rails, with interest at 6 per cent., with the privilege of renewing the notes before maturity for a further term of six months, by giving new

notes and paying interest for the additional six months at 6 per cent. The intervenor alleges that it delivered 5,009 tons of rails under the second contract, of date April 26, 1883, for which it received the promissory notes of the railway company; and that, under the third contract, of date October 30, 1883, it delivered about 8,552 tons of rails, for which it also received promissory notes of the railway company. The balances now claimed are \$6,426.51 for rails claimed to have been used on the Waco & Northwestern Division under the second contract, and \$99,300.64 for rails claimed to have been used on the same division under the third contract. Intervener alleges that the rails which it furnished were employed for the useful improvements and necessary repairs of the main line of the railway company and of its Western Division; that the rails were so absolutely necessary to the railway company to replace the old iron with which its tracks were laid that it is doubtful whether the railway company could have maintained its existence without them, and that prior to the improvement of the railway by means of the rails accidents to life and limb and damage to property were so great, owing to the condition of the tracks of said company, that the name of the Houston & Texas Central Railway Company became a terror to the traveling and shipping public, and a by-word and a reproach. The intervenor further alleges that by means of the rails furnished by it the railway has been kept in safe running order, the business increased, and the railway rendered more valuable to the bondholders. It is also alleged that the indebtedness was contracted in consideration of the promise of the railway company to pay the same out of its earnings, and that intervenor made the contracts under the expectation and belief that its claim would be paid out of the earnings, by preference over the bondholders. The intervenor further alleges: "That it is provided by the various deeds of trust securing the mortgage bonds upon the various portions of the railway of the railway company that the trustees of such mortgages, if they acquire possession of said railway under said mortgages, shall pay any floating debt or debts of said company out of the gross earnings of the said railway; and that under and by virtue of said provision your petitioner's claims aforesaid are specially made preferred claims upon the gross earnings of said railway, and enjoy priority over all mortgages bearing upon the same, and are entitled to be paid out of the gross earnings of said railway before said earnings are applied to the payment of any incumbrances whatsoever upon the same; and that your petitioner made the loans hereinabove described relying upon the said clause in the said mortgages, and in the expectation that the said company would comply with the obligation therein recognized by itself and by its mortgage bondholders, and that it would pay your petitioner's said claim before applying any part of its gross earnings to the payment of coupons or other bonded indebtedness. That said company and its bondholders are thus not only by law, but by contract, obligated to apply current earnings to payment of current expenses, and that such claims for current expenses are specially made preferred claims upon the gross earnings of said railway over all claims of bondholders." It is also alleged that the railway company has not only failed to pay, but has used a large amount of the earnings for the payment of coupons on the bonds secured by the mortgage upon which a bill of foreclosure was filed in the cause. Intervener alleges and claims that the revenues of the railway company should be applied to the payment of the claim for rails by preference over all bondholders and coupon holders.

By proper pleadings the Farmers' Loan & Trust Company, complainant in cause No. 227, on December 7, 1891, and Moran Bros. and Henry K. McHarg, intervenors, on January 13, 1896, objected to and opposed the allowance of the demand of the Lackawanna Coal & Iron Company as a preferential claim. Moran Bros. and Henry K. McHarg specially pleaded the statute of limitation of two and four years. The matter of the intervention of the Lackawanna Company was referred to a master, who reported adversely to the demand. The master's report was not excepted to. *Inter alia*, the master reports the following findings: On December 28, 1882, intervenor entered into a written contract with the railway company to deliver to it 5,000 tons of steel rails in March, April, and May, 1883, payment to be made in cash on delivery of the rails, or in notes of the purchaser, payable at six months, with 6 per cent. annual interest. Under this contract, 5,020 tons of rails were delivered, in

payment of which the railway company executed its 10 promissory notes to the intervener, payable at six months, amounting, with interest, to \$206,932.16; all of which notes were either paid at maturity or at the maturity of other notes given in renewal. On April 26, 1883, another written contract was entered into by the same parties for the delivery of 5,000 tons of rails during August, 1883, or earlier, if called for; payment to be made in cash or in notes of the purchaser payable at six months with 6 per cent. annual interest. This contract provided that the railway company should have the privilege to renew the notes before their maturity for a further term of six months, by paying the interest, 6 per cent., or adding the interest to the new notes. Under this contract, 5,009 tons of rails were delivered during June, August, and September, 1883, and 10 promissory notes, payable at six months from their dates, dated on divers days in June, August, and September, 1883, and aggregating, with interest, \$201,346.64, were delivered to intervener. As these notes matured, payment of so much of the debt as was not satisfied at maturity was extended, until in process of such settlement and extension the railway company, in settlement of the balance due under the contract of April 26, 1883, delivered to intervener eight promissory notes, payable at four months from their dates, dated on divers days in September, October, and December, 1884, and aggregating \$118,000. During the negotiations between intervener and the railway company, which resulted in the execution of these renewal notes, intervener demanded that the railway company should secure the renewal notes by the hypothecation of collaterals, and in response to such demand the railway company hypothecated with the intervener 170 first mortgage bonds of the Galveston, Harrisburg & San Antonio Railway Company, which, by agreement of counsel, are admitted to be worth \$157,250. On October 30, 1883, the same parties entered into another written contract, similar in general terms to the other contracts, and containing the clause securing to the railway company the privilege of renewing the notes and providing for the delivery of 10,000 tons of steel rails between February 1, and August 1, 1884. Under this contract, intervener delivered 8,552 tons of rails during February, March, April, and May, 1884. Through error, eight notes, in payment of rails supplied under this contract, dated on divers days in February and March, 1884, were made payable at 12, instead of 6, months. They were, however, accepted by intervener. Afterwards, in April and May, 1884, the railway company, in settlement of the balance due on the 8,552 tons of rails delivered under the contract of October 30, 1883, delivered to intervener nine promissory notes, payable at six months from their dates, and renewable for a like term, at the maker's option. Each of these notes was renewed for six months. The 17 notes given under this contract were dated on divers days in February, March, October, and November, 1884, and aggregate \$327,175.50.

The master's report also contains the following findings: "I find that negotiable promissory notes were given petitioner by the defendant company for all rails sold under the three contracts; that all of said sales were made on a stated credit for a fixed period of time, viz. six months after the average date of each delivery, and that said defendant company had the right, under said contracts, to extend the time six months longer from the maturity of said notes; that such extensions were made for the accommodation and to suit the convenience of said defendant company, and that said extended negotiable notes remaining unpaid matured, as shown above in clauses 2 and 3, during the months of February, March, April, and May, 1885. I find that all the rails delivered under the first contract, and about one-half of the rails delivered under the second contract, were paid for by the railway company prior to the appointment of any receiver of said property; but that the remaining half under the second contract, and all rails furnished under the third contract, are not paid for. I find that the rails furnished under the second contract were furnished under a contract made a year and ten months prior to the appointment of the receiver in cause No. 185, and about three years and three months prior to the appointment of the receiver in consolidated cause No. 198, and about six years prior to the appointment of the receiver in this cause. I find that the rails furnished under the third contract were furnished under a contract made about sixteen months prior to the receivership in cause No. 185, and about two years and nine months prior to the receivership in consolidated

cause No. 198, and about five years and six months prior to the appointment of the receiver in this cause. * * * I find that the debt for which the Lackawanna Company claims payment in its petition herein cannot be classed as a current debt made in the ordinary course of business, as those terms seem generally to be understood, yet it appears that at the time when the contracts hereinbefore mentioned were entered into between said Lackawanna Company and the defendant railway company the condition of the track of the defendant railway company was such that the demand for new rails upon the most worn portion of the roadway was practically imperative. For a number of years prior to December, 1882, only about 5,000 tons of new rails had been purchased. The road north from Houston for 90 miles was built in 1857, 1861, and thence northward to Denison, 1867-1872. The Western Division, leading to Austin, was constructed in part prior to 1861, and completed in 1873, and the Waco Division was completed about 1875. The condition of these roads was bad, except such portions as had been relaid with 5,000 tons of rails purchased prior to December 28, 1882. There was continual breakage of rails and wrecking of trains; the track was unsafe, and was generally so regarded, not only by 'railroad men,' but by the traveling public; the damage to merchandise, rolling stock, etc., was continuous, and the need for new rails appears to have been 'absolutely necessary as a preservation of human life, the loss of which was liable to occur at any moment.' I find that when the aforesaid contracts were made with the said Lackawanna Company both seller and buyer expected the debts to be paid from the net income of the railway; that the credit extended under said contracts was at the request of and for the accommodation of the defendant railway company, and upon its general credit. That said sales were made without any stipulation that security should be given by the defendant company for said rails, or that payment therefor should be made out of any particular fund, or in any particular way; that said sales were for an unusually large amount of rails, and the defendant was unable to pay cash therefor, and there was no other way of obtaining said rails except upon credit; and petitioner herein, at the time of said contracts and sales, had knowledge of the mortgage of June 16, 1873, given by the defendant railway company upon the properties of its Waco & Northwestern Division to secure the first mortgage bonds, which said mortgage has been herein foreclosed. * * * I find in the mortgage given by the Houston & Texas Central Railway Company to the Farmers' Loan & Trust Company, trustee, dated June 16, 1873, being the same mortgage declared on herein, the following provisions: 'And in case the said Houston & Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any installment of the interest, or any part thereof, or any of the said bonds at any time when the same shall become due and payable according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway, and the premises and property herein conveyed, by its attorneys and agents, and take possession of the same without let or hindrance of the said first party, and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same and receive the revenue and income thereof, applying the said funds, after deducting taxes, necessary expenses, and counsel fees, to keep the same in good order and repair, and the surplus to pay the principal and interest of all the bonds which may be due and outstanding and secured hereby, pro rata, and thereafter to the payment of any contributions due to the sinking fund herein established. And upon the request of the holders of one-fifth in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of said second party, by its president or agent duly appointed in its behalf, to enter upon and take actual possession with or without entry or foreclosure of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management, until the arrears of both principal and interest be paid, or the property sold as herein prescribed, receiving the rents, revenues, and income thereof, and applying them in the same manner as above stated. * * * It is, however, expressly agreed that the said party of the first part may dispose of the current net revenues and income of all the said property and railway hereby conveyed in such manner as it shall deem best, until default shall be made in the

payment of the interest or principal of said bonds, or of any one or more of them, and shall have the right to sell and dispose of any of such real estate or other property as it may own or acquire, which may not be needed or required for the purposes and business of the said Waco & Northwestern Division, except in the case of the six thousand acres per mile of completed road, and which sale and conveyance of such outside property shall transfer the said property and title free from incumbrance of this mortgage or deed of trust, and to change its tracks, and make any and all alterations necessary for the benefit of the same.' I find that there is no provision in said mortgage that the trustee may, if it acquired possession of said railway under said mortgage, pay any floating debt or debts of said company out of the gross earnings of said railway."

The lower court confirmed the master's report, and dismissed the intervention. The Lackawanna Company has appealed.

E. B. Kruttschnitt, for appellant.

L. W. Campbell, for appellees Moran Bros. and Henry K. McHarg.

Before TOULMIN, MAXEY, and PARLANGE, District Judges.

PARLANGE, District Judge (after stating the facts as above). It is contended on behalf of the Lackawanna Iron & Coal Company that its claim is a preferential one, within the doctrine of *Fosdick v. Schall*, 99 U. S. 235, and other cases in which certain claims were accorded preference over the holders of railroad mortgage bonds. The intervenor's counsel urge that the case of *Burnham v. Bowen*, 111 U. S. 777, 4 Sup. Ct. 675, is analogous in principle to the present case. The urgent need of the railway company for the rails supplied by the intervenor; the dilapidated condition of the road prior to the supplying of the rails; the danger to life, limb, and property which resulted from such condition; the increased business of the road and the augmented value of the bondholders' security,—are asserted and are pressed upon the court's attention, as considerations for declaring the intervenor's claim preferential. Even if all these assertions were sustained by the findings,—and some of them do not appear to be so sustained,—the intervenor's claim to a preference would, in our judgment, have to be rejected. We do not understand that the doctrine enunciated in *Fosdick v. Schall*, supra, was based merely or mainly upon the urgency of the need of the railway for the labor, supplies, or equipment to which a preference is accorded. Nor do we apprehend that the mere fact that the supplies, labor, or equipment furnished, may have augmented the value of the bondholders' security, gives rise to a preference. In the light of *Fosdick v. Schall*, supra, and the other cases in which the supreme court and other courts have followed the main case, our understanding of the doctrine is that within narrow limits, a court of equity, having in its custody a railroad which is being foreclosed by its mortgage creditors, may make preferential payments of such claims as debts due to operatives, limited amounts due to connecting roads for unpaid freight and ticket balances, and limited amounts due for supplies needed from day to day, or from month to month, in the ordinary course of the railroad's operations. The controlling principle appears to be that a railroad, having public duties to discharge, must be kept a going concern while in the hands of the court, and that to that end debts due its employes and other current debts incurred for its ordinary operations, which it is not usually practicable to pay in cash,

and which are therefore payable on short terms, should be paid as they would have been paid if the court had not taken away from the corporation the control of the railroad. A cessation of the railroad's operations by failure to pay promptly the operatives or such other debts as railroads must necessarily incur for their ordinary, current operations, must be prevented. The preferential payment of debts, restricted to the narrow limits indicated, operates no impairment of the bondholders' rights, for it is made both in the interest of the property and of the public. One purpose is to preserve the property in such condition that it may be sold as a going concern, and thus may suffer no diminution of value while in the hands of the court. This is to the direct benefit of all creditors. The other purpose is to enable the railroad to continue the performance of its public duties. Of this the creditors will not be heard to complain, because they are charged with knowledge of the public obligations of their debtor.

In *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 10 C. C. A. 323, 62 Fed. 205, the circuit court of appeals for the Fourth circuit, through Mr. Chief Justice Fuller, after stating certain debts which may be paid by preference, says: "Of course, the discretion to enter such orders should be exercised with great care." The chief justice then refers to the case of *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, as indicating the narrow limits within which a court of equity should confine itself in making preferential payments over railroad mortgages.

In *Thomas v. Car Co.*, just cited, the supreme court quoted approvingly from *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, where it was said:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness, in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company when property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced."

In *Thomas v. Car Co.*, *supra*, the supreme court proceeded to say:

"The case of a corporation for the manufacture and sale of cars dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds is very different from that of workmen and employes, or of those who

furnish, from day to day, supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."

In *Kneeland v. Trust Co.*, *supra*, it is said:

"It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In *Bound v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 473, the circuit court of appeals for the Fourth circuit, Mr. Chief Justice Fuller sitting as a member of the court, in a case almost identical with the present case, said:

"The supreme court has recently in *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, indicated the narrow limits to which an equity court should confine itself in allowing any unsecured claim to displace vested contract liens. Wages due employes, current operating expenses, current balances of ticket and freight money arising from indispensable business relations, and similar current debts accruing within 90 days, are recognized as among the limited class of claims which, in its discretion, the court may allow to have priority. In the case cited, the supreme court held it error to allow a claim for the rental of cars necessary to operate the road for the six months prior to the receivership."

Bound v. Railway Co., *supra*, has been cited by the circuit court of appeals for the Fourth circuit in *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 10 C. C. A. 326, 62 Fed. 208; by Circuit Judge Simonton in *Central Trust Co. of New York v. Charlotte, C. & A. R. Co.*, 65 Fed. 269; and by Circuit Judge Colt in *Wood v. Railroad Co.*, 70 Fed. 743.

It would subserve no useful purpose to cite more extensively from the numerous authorities which show the narrow and restricted limits within which, in cases such as the matter in hand, preferential payments can be made. No case has been cited, nor has any come under our observation, in which such a claim as that of the Lackawanna Company has been, on final adjudication, allowed a preference.

The case of *Burnham v. Bowen*, *supra*, relied on by the intervenor's counsel, and claimed to be analogous in principle to the instant case, was based on a demand for coal used in running the locomotives. The coal was supplied to the railroad company a few months before the appointment of the receiver, and the claim was found by the supreme court to be "one of the current debts for operating expenses, made in the ordinary course of continuing business." We discover no similarity of principle between that case and the case at bar. Coal is an article of constant and uninterrupted consumption on a railroad, and its purchase at short intervals, for the purpose of running the locomotives, in quantities not exceeding the operating requirements of the road, is clearly a current expense of the road. But it is difficult to see how the purchase of 20,000 tons of rails, made under the circumstances stated in the intervenor's own pleadings, can be a current debt "for operating expenses made in the ordinary course of continuing business." If the road was in the condition of dilapida-

tion which is inferable from the intervenor's averments, it might be sufficient to say, in denying the demand, that the rails were supplied, not as a matter arising in the ordinary course of the railroad's operations, but for the virtual reconstruction of the road. No authorities need be cited to establish the proposition that works of reconstruction are not entitled to preferential payment. That the necessity for the supplies does not entitle to preferential payment, unless the supplies are for current expenses in the ordinary course of operation, is forcibly shown by the case of *Morgan's L. & T. R. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, in which it was substantially held that the mere fact that money was loaned to a railroad company to pay the interest on its first mortgage bonds does not entitle the lender to preference; and that, although advances of money may have enabled a railway company to maintain itself, that fact alone does not entitle the lender to priority.

The contention that the intervenor is entitled to preference because the rails supplied by it must have enhanced the value of the bondholders' security is clearly untenable. In *Railway Co. v. Cowdrey*, 11 Wall. 482, Mr. Justice Bradley, as the organ of the court, said:

"As to the point of giving priority to the last creditor for aiding to conserve the thing, all that is necessary to say is that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason."

Also, see *Thompson v. Railroad Co.*, 132 U. S. 68, 10 Sup. Ct. 29; *Jones, Corp. Bonds*, § 584; *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338; *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546.

The unusually large purchase of rails; the time within which they were to be delivered; the condition of the road; the contracts providing for notes at six months, renewable for a like term, at the maker's option; the hypothecation of securities for the payment of the claim; the knowledge which the intervenor had of the mortgage; the fact that the contracts contained no promise to pay out of any particular fund; the time which elapsed between the date of the contracts and the appointment of a receiver in cause No. 185,—are circumstances which, taken together, cannot fail to convince us that the intervenor relied upon the general credit of the railway company.

We see no error in the action of the circuit court in dismissing the petition of intervenor, and the decree appealed from is therefore affirmed.

MORGAN'S LOUISIANA & T. R. & S. S. CO. v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1897.)

No. 504.

RAILROAD RECEIVERSHIPS—PREFERRED CLAIMS—MONEY LOANED.

Money loaned to a railroad company on its notes at various times, ranging from about nine months to over four years before the appointment of a receiver, with the purpose and result of keeping its road in safe running order, increasing its property and business, and rendering the same more valuable to the bondholders, and maintaining its credit, is nevertheless not a

debt which is entitled to a preference over the mortgage bonds, upon the appointment of a receiver. *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 79 Fed. 202, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The statement in the case of *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.* (No. 503 of the docket of this court) 79 Fed. 202, shows the nature of cause No. 185, consolidated cause No. 198, and cause No. 227 of the docket of the United States circuit court for the Eastern district of Texas.

On September 12, 1885, the Morgan's Louisiana & Texas Railroad & Steamship Company, the intervener in the present cause, filed its intervention in cause No. 185, making substantially the same claim as it makes in the present cause. On March 31, 1887, the present intervener filed its intervention in cause No. 198, claiming substantially as it prays in this cause. On April 30, 1889, the intervener filed its suit on its claim against the Houston & Texas Central Railway Company in the district court of Dallas, Tex., and obtained judgment against said railway company for \$1,795,570.81, with interest at 8 per cent. from May 17, 1889, the date of the judgment. On December 16, 1891, the intervener filed its intervention in cause No. 227, which intervention is now before this court. The intervener alleges that the railway company owes it 15 promissory notes, payable on demand, amounting to \$1,343,538.53, all bearing 6 per cent. interest from date, except the first note which bears 7 per cent. from date,—which notes are alleged to have been given for loans of money. The intervener alleges:

"That the loans so made by your petitioner to the said defendant company were made at the lowest market rates of interest, and were so made to said defendant company to enable it to retire its floating debt, and to provide for the improvement, equipment, and betterment of its road, to purchase supplies, pay for labor, repairs, operating and managing expenses, and for the proper equipment and useful improvement of its railway, and for other necessary expenses, outlays, and expenditures; by reason whereof the railway of the said defendant company was kept in safe running order, its business and importance increased, and its credit kept up; and that said loans were actually used by the said defendant company for the purposes aforesaid, and that the business and importance of the defendant's railway was thereby increased, and the said railway thereby rendered more valuable to the bondholders under the various mortgages described in the bills of complaint filed in this cause, as well as to all the other creditors of said company. Petitioner further avers that said credit was extended by petitioner to said defendant, and said advances so made to it, in consideration of its promise to pay the same out of the earnings of its railway; and that said indebtedness was and is, in equity and good conscience, a charge superior in rank to the mortgage bonds and coupons issued by defendant, upon the income and property of said railway company; but that said defendant, instead of paying said indebtedness so due to your petitioner out of the earnings of its railway, has entirely failed to pay the same, or any part thereof; and the truth is, and your petitioner so charges, that said defendant has used a large amount of earnings for the payment of coupons upon its bonds based upon the several mortgages described in the bills of complaint herein, although the holders of said coupons are and were entitled to receive payment therefor, only after defendant has paid your petitioner the amounts expended in the manner and for the purposes hereinabove set forth; and that upon a just accounting between your petitioner, the defendant company, and the bondholders, it will be found, as the fact is, that the bondholders have already received large amounts of money from the railway company beyond the amounts to which such bondholders were in any wise entitled, and to the loss, detriment, damage, and injury of your petitioner, which amounts, to the extent of the indebtedness of said railway company to this petitioner, should be made good to your petitioner out of the earnings of the property now in the possession of this court, and out of the proceeds of such property, if the same should be sold by any decree thereof."

The intervener admits receiving certain bonds and other collaterals as security for its claim. The intervener also claims that the mortgage pro-

vided that, if the trustee should acquire possession of the railway under the mortgage, he should pay all floating debts out of the gross earnings. In point of fact, the mortgage contains no such provision. On February 1, 1892, the Farmers' Loan & Trust Company answered the intervention. Moran Bros. and H. K. McHarg, bondholders, who had previously intervened pro interesse suo, pleaded on January 13, 1896, the statute of limitation of two and four years, and answered. The intervention was referred to a master. The report shows that the notes range in date from December 10, 1880, the date of the first note, to May 25, 1884, the date of the last note. The notes are all payable on demand. The intervener received as security for his claim collaterals, from which it realized \$842,811.73. The master further reports: "I find that during the year 1884, and for several years prior thereto, the finances of the defendant company were in an embarrassed condition. Its expenses, including fixed charges, interest, etc., exceeded its income for the year 1881, \$670,839.42; 1882, \$430,177.16; 1883, \$570,979.25; 1884, \$991,481.44; and it reasonably appears that without the advances made by petitioner, as herein recited (constituting nearly one-third of its floating debt as it existed in 1884), it would not have been able to maintain its credit, and meet its obligations. I find that by the advances so made by petitioner to said defendant railway company, the railways of said defendant company were kept in safer running order, and its property and business increased, and rendered more valuable to the bondholders under the mortgage described in the bill of complaint filed in this cause, as also to all other creditors of the defendant railway company; that said advances were so made to said defendant railway company for the purposes aforesaid, and that without them said company would not have been able to maintain its credit, and meet its obligations, and that said advances were made in consideration of the promise of the defendant railway company to pay the same." The master's report was not excepted to. The circuit court confirmed the report, and dismissed the intervention. The intervener, the Morgan's Louisiana & Texas Railroad & Steamship Company, has appealed.

E. B. Kruttschnitt for appellant.

L. W. Campbell, for appellees Moran Bros. and Henry K. McHarg.

Before TOULMIN, MAXEY, and PARLANGE, District Judges.

PARLANGE, District Judge (after stating the facts as above). This case is fully covered by the views we have expressed in the case of Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co. (No. 503 of the docket of this court) 79 Fed. 202. We find no error in the action of the circuit court, and the decree appealed from is affirmed.

SOUTHERN DEVELOPMENT CO. et al. v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1897.)

No. 505.

RAILROAD RECEIVERSHIPS—PREFERRED DEBTS—ADVANCES TO PAY FLOATING DEBT. ETC.

Money advanced to a railroad company at various times to pay floating debts and interest coupons, and bonds loaned it to be pledged for the price of necessary rails to be purchased, and which bonds it is unable to return, do not constitute a debt which is entitled to a preference over the mortgage bonds upon the appointment of a receiver in foreclosure proceedings. *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 79 Fed. 202, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The statement in the case of *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.* (No. 503 of the docket of this court) 79 Fed. 202, shows the nature of cause No. 185, consolidated cause No. 198, and cause No. 227 of the docket of the United States circuit court for the Eastern district of Texas. The Southern Development Company, the intervener in the present cause, was the complainant in cause No. 185, which suit was instituted on February 16, 1885. After the dismissal of that cause, without prejudice to the right of the Southern Development Company to assert its claims, if any it had, in such manner as it might be advised, the Southern Development Company, on March 31, 1887, filed its intervention in cause No. 198, substantially praying for the same relief against all the railways, moneys, revenues, and other assets of the Houston & Texas Central Railway Company as it prayed for the petition of intervention now before this court, and filed in cause No. 227, on December 16, 1891. On April 30, 1889, the Southern Development Company filed suit upon its claim against the railway company in the district court of Dallas county, Tex., and obtained judgment against said railway company for \$858,113.15, with interest at 8 per cent. from the date of the judgment, May 17, 1889.

By its intervention, filed as aforesaid, in cause No. 227, the Southern Development Company claims:

"That the Houston & Texas Central Railway Company, defendant in this cause, is justly and legally indebted unto your petitioner in the full sum of \$745,861.07, with interest at the rate of six per cent. per annum from November 15, 1886, until paid, for this, to wit: For moneys advanced by petitioner to said defendant company, at its request, at various times, to enable it to pay for supplies, labor, repairs, operating and managing expenses, proper equipment and useful improvement, and other necessary expenses of its railway, by which defendant's railway has been kept in safe running order, and its property and business increased, and rendered more valuable to the bondholders under the various mortgages described in the bills of complaint filed in this cause, as well as to all other creditors of said company. Petitioner further avers that said indebtedness was contracted under the circumstances following, to wit: That said advances were so made to defendant for the purposes aforesaid, and in consideration of its promise to pay the same out of the earnings of its railway; and that the said indebtedness was and is, in equity and good conscience, a charge superior in rank to all mortgage bonds and coupons issued by defendant upon the income and property of said railway company; but that said defendant, instead of paying said indebtedness so due to your petitioner out of the earnings of its railway, has entirely failed to pay the same, or any part thereof, and that the truth is, and your petitioner so charges, that said defendant has used a large amount of its earnings for the payment of coupons upon its bonds issued under the several mortgages described in the bills of complaint herein, although the holders of said coupons were only entitled to receive payment thereof after defendant had paid your petitioner the amount advanced and expended in the manner and for the purposes hereinabove set forth; and that upon a just accounting between your petitioner, the defendant company, and the bondholders, it will be found, as the fact is, that the bondholders have already received large amounts of money from the railway company beyond the amounts to which such bondholders were in any way entitled, and to the loss, detriment, damage, and injury of your petitioner, which amounts, to the extent of the indebtedness of said railway company to this petitioner, should be made good to your petitioner out of the earnings of the property now in the possession of this court, and out of the proceeds of such property, if the same should be sold by any decree thereof. Petitioner further avers that for about one-half of its said indebtedness it has received and holds as collateral security, jointly with the Morgan's Louisiana & Texas Railroad & Steamship Company, eight hundred and eighty certain bonds of the issue commonly known as the 'General Mortgage Bonds' of said defendant company, and the said indebtedness aforesaid will be entitled to a credit for such a proportionate part of the proceeds of sale of said general mortgage bonds, whenever a sale thereof is

made, as will inure to your petitioner under said pledge, but that such proportionate part of said proceeds of sale will fall far short of the amount of the part of such indebtedness for which said bonds are so pledged. Petitioner further shows: That, in addition to the indebtedness hereinabove set forth, said defendant company is also indebted to your petitioner in the full sum of one hundred and seventy thousand dollars (\$170,000), with interest at the rate of six per cent. per annum from November 1st, 1884, until paid, for this, viz.: That your petitioner, at the request of the defendant company, did lend to it, returnable on demand, one hundred and seventy first mortgage bonds of the Galveston, Harrisburg & San Antonio Railway Company, Western Division, to be by the defendant railway company pledged as security for a certain indebtedness due by said defendant company to the Lackawanna Iron & Coal Company, said indebtedness being for steel rails by defendant company purchased from said Lackawanna Company for the betterment and improvement of its railway aforesaid, and which were by said defendant company actually used for the purpose of such betterment and improvement of the railway of said defendant company, and not for purposes of independent construction. That said indebtedness is now past due, with interest as aforesaid, and that, unless such indebtedness is paid, the said security therefor is liable to be sold in liquidation thereof. That although your petitioner has demanded from said railway company the return of the Galveston, Harrisburg & San Antonio Railway Company's bonds so loaned to it for the purpose above stated, the said railway company has failed to return such bonds, and, as your petitioner is informed and believes, in its embarrassed condition, and on account of the fact that its property is in the hands of this honorable court, is wholly unable to return the same to your petitioner. Petitioner avers that said steel rails were used, not for the purpose of independent construction, but for the purpose of betterment and repair of the railways described in the mortgages of the various issues described in the bills of complaint herein, and that said rails have been an increment to the value of the property described in said mortgages; and that your petitioner has the right to claim, and does claim, that the revenue of said railway company should be applied to the payment of said indebtedness, with interest as aforesaid, and with priority over the claims of any bondholders or coupon holders whomsoever."

The Southern Development Company also claims in its intervention that the mortgage provided that, if the trustee should acquire possession of the railway under the mortgage, he should pay all floating indebtedness of the company out of the gross earnings. In point of fact, the mortgage contains no such provision. By proper pleadings, the Farmers' Loan & Trust Company, on February 1, 1896, and Moran Bros. and Henry K. McHarg, interveners pro interesse suo, on January 13, 1896, objected to and opposed the allowance of the demand of the Southern Development Company as a preferential claim. Moran Bros. and Henry K. McHarg specially pleaded the statute of limitation of two and four years. The intervention of the Southern Development Company was referred to a master. Inter alia, he found that the advances were made on open accounts ranging from July 15, 1884, to March 23, 1885, and aggregating \$754,571.59. All of the items are for money loaned. Some of the items specify the purpose for which the loan was made, such as "for the payment of interest coupons on first mortgage bonds." A number of items are stated as being for money advanced, or for paying debts, or to take up notes of the company, without further explanation. In addition to the open account, the master found that the Southern Development Company loaned to the railway company 170 bonds of the Galveston, Harrisburg & San Antonio Railroad Company, in order that the railway company might pledge the same to the Lackawanna Iron & Coal Company to obtain steel rails. By agreement of counsel these 170 bonds were valued at \$157,250. The master found that the railway company gave 310 of its general mortgage bonds as security for the indebtedness and for the return of the other 170 bonds just mentioned. The master found that the 310 bonds were subsequently credited on the account at par,—i. e. for \$310,000,—but that this credit was largely in excess of the market value of said bonds. From the figures reported by the master it would appear that, adding the total found due on the open account to the \$157,250 due for the bonds

loaned to the Lackawanna Company, and deducting the \$310,000 credited for the 310 bonds pledged as security, and deducting also certain partial payments, leaves the railway company indebted to the Southern Development Company in the sum of \$506,025.34. The master further found: "I find that during the year 1884, and for several years prior thereto, the finances of the defendant company were in an embarrassed condition. Its expenses, including fixed charges, interest, etc., exceeded its income for the year 1881, \$670,839.42; 1882, \$430,177.16; 1883, \$570,979.25; 1884, \$991,481.44; and it reasonably appears that, without the advances made by petitioner, as herein recited (constituting about one-sixth of its floating debt as it existed in 1884), it would not have been able to maintain its credit and meet its obligations. It appears that of the money so advanced by petitioner \$327,198.97 was applied by the defendant company to the discharge of interest due upon its bonds. * * * I find that by the advances so made by petitioner to said defendant railway company, the railways of said defendant company were kept in safer running order, and its property and business increased, and rendered more valuable to the bondholders under the mortgage described in the bill of complaint filed in this case, as also to all other creditors of the defendant railway company; that said advances were so made to said defendant railway company for the purposes aforesaid, and without them said company would not have been able to maintain its credit, and meet its obligations; and that said advances were made in consideration of the promise of the defendant railway company to pay the same." The master's report was not excepted to. The lower court confirmed the report, and dismissed the intervention. The Southern Development Company appealed.

E. B. Kruttschnitt, for appellant.

L. W. Campbell, for appellees Moran Bros. and Henry K. McHarg.

Before TOULMIN, MAXEY, and PARLANGE, District Judges.

PARLANGE, District Judge (after stating the facts as above). The views expressed by us in the case of Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co. (No. 505 of the docket of this court) 79 Fed. 202, apply to this case, and are decisive of the issues here presented. The case of Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61, is in point. We see no error in the action of the circuit court in dismissing the petition of the intervenor, and the decree appealed from is therefore affirmed.

DOWNS v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1897.)

No. 502.

RAILROAD MORTGAGES—FORECLOSURE—RIGHTS OF PURCHASER—NET EARNINGS OF RECEIVERSHIP.

On the foreclosure sale of a railroad, then in possession of a receiver, one division of the road was sold subject to a prior mortgage, which expressly secured to the bondholders the net income of the property after default in interest. While the road was still in possession of the receiver, a suit was brought to foreclose this senior mortgage, and the existing receiver was also appointed as receiver in that suit, and continued in possession until the sale, some years later, under the senior mortgage. *Held*, that the purchaser at the first sale was not entitled to the net earnings of the division covered by the senior mortgage, which had accumulated in the hands of the receiver, after his appointment in the second suit, but the same belonged to the bondholders under the terms of the mortgage.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Prior to May 27, 1886, separate bills were filed in the circuit court to foreclose certain mortgages executed by the Houston & Texas Central Railway Company, and for the appointment of a receiver. The mortgages sought to be foreclosed in these suits covered the main line of the Houston & Texas Central Railway, the Western Division, and the Waco & Northwestern Division of said railway. On May 27, 1886, the suits above mentioned were consolidated, and thereafter proceeded as consolidated cause No. 198, in which Nelson S. Easton and James Rintoul, trustees, and the Farmers' Loan & Trust Company, trustee, were complainants, and the Houston & Texas Central Railway Company and others were defendants. Of all the property of the Houston & Texas Central Railway Company receivers were duly appointed, who took possession and operated the railway under orders of the court. In the consolidated cause, cross bills were filed for the foreclosure of the Main Line and Western Division consolidated mortgage, the Waco & Northwestern Division consolidated mortgage, and the income and indemnity mortgage. A decree of foreclosure and sale was entered by the court May 4, 1888. In pursuance of the decree the entire property of the Houston & Texas Central Railway Company was sold by the master commissioner September 8, 1888. At such sale all the property included in the Waco & Northwestern Division first mortgage, which was executed June 16, 1873, by the Houston & Texas Central Railway Company to the Farmers' Loan & Trust Company, was sold to George E. Downs, the appellant, for the sum of \$25,000 in cash. The decree of foreclosure in consolidated cause No. 198 provided that the sale of the Waco & Northwestern Division of the railway should be made in all things subject to the prior lien and mortgage executed on said division by the Houston & Texas Central Railway Company on the date last aforesaid. Thereafter, to wit, December 4, 1888, the sale was confirmed, and a deed executed by the commissioner to Downs, January 18, 1889, in which it was expressly stated that the purchase by Downs was made in all things subject to the first mortgage of appellee the Farmers' Loan & Trust Company. On April 6, 1889, the appellee the Farmers' Loan & Trust Company, trustee for the bondholders, filed its bill in this suit in the circuit court (equity cause No. 227) against the Houston & Texas Central Railway Company and Charles Dillingham, the sole receiver then operating the railway, to foreclose the first mortgage of June 16, 1873, on the Waco & Northwestern Division, and for the appointment of a receiver. Agreeably to the prayer of the bill, a receiver was appointed on the same day, to wit, April 6, 1889, by an order which, among other things, provided as follows: "Whereupon, and on consideration whereof, the court consenting that said Charles Dillingham, as receiver of the Houston & Texas Central Company, be a party defendant herein, it is ordered, adjudged, and decreed by the court that Charles Dillingham, who is already in possession of the Houston & Texas Central lines of railway as receiver under orders of this court, be, and he is hereby, appointed receiver, under the prayer of the bill so filed for the foreclosure of the said Waco & Northwestern Division first mortgage, of all the railway and property which is covered by said mortgage, with power to manage and operate the same, and prosecute and defend all suits connected therewith, and generally to discharge all the duties of receiver respecting such railway property, and that he be appointed such receiver without giving further bond than that which he has already filed in the consolidated cause." An amended bill was filed December 3, 1889, making the appellant a party defendant, and an order of dismissal was entered as to the Houston & Texas Central Railway Company, December 26, 1890.

The original bill filed by the Farmers' Loan & Trust Company in this suit alleged that the mortgage sought to be foreclosed was made to secure the payment of 1,140 bonds of the denomination of \$1,000 each, and that certain interest coupons were past due and unpaid; that the appellant, Downs, had purchased the property included in its mortgage at the sale made by the master commissioner under the order of the court passed in consolidated cause No. 198, subject in all things to the lien of said mortgage. It was further alleged "that holders of bonds to the extent of \$356,000 of principal now desire

your orator, as trustee, to proceed under those clauses of said mortgage which provide for your orator, as trustee, taking possession of the mortgaged premises and operating the same; that holders of bonds to the amount of \$234,000 of principal are opposed to that course, desiring the foreclosure of said mortgage; that holders of \$300,000 of said bonds (being unknown to your orator) have expressed no opinion on the subject whatever, and that the holder of \$250,000 of said bonds, having at one time joined in the first request, has expressed her wish to withdraw therefrom." The bill prayed an accounting, a sale of the property embraced in the mortgage, and, as affecting the questions here involved, contained the following prayer: "That out of the proceeds of said sale or the net earnings of said property there may be paid, first, the costs and expenses of your orator in this suit, and all its expenses of every sort and description involved in the execution of its trust, including proper attorneys' and counsel fees, with a proper compensation to your orator for its own services as trustee, to be allowed by the court, and that the residue thereof may be applied to the payment of the amount due upon the said first mortgage bonds and the coupons thereto, with interest thereon; that, if there be any surplus, it may be applied in such way as this court may direct; and that the defendants in this suit may be barred of and from any equity of redemption of, to, and in the said property and franchises; and that any deficiency on such sale may be entered in this cause as a judgment against the Houston & Texas Central Railway Company." A final decree was rendered March 16, 1892, foreclosing the mortgage, and ordering a sale of the property. By the terms of the decree the rights of all interveners were reserved for future adjudication, and were to be in no manner affected or prejudiced by the decree. And it was further provided that the disposition of surplus funds in the hands of the receiver, and arising from the earnings of the road or otherwise, should be reserved for future determination. The railway and other property described in the decree were sold, conformably to the order of the court, December 28, 1892, and upon confirmation of the sale by the court a deed was tendered to the purchaser. This deed the purchaser declined to accept, and a controversy resulted between him, the appellee the Farmers' Loan & Trust Company, and one of the bondholders, which eventually culminated, March 5, 1895, in an amendatory final decree setting aside the sale, relieving the purchaser from his bid, and ordering a resale of the property. The decree of March 5, 1895, contains the following reservation as to the surplus funds and the right of appellant to claim the net earnings of the property: "It is further ordered, adjudged, and decreed that * * * the right of said George E. Downs to a hearing on his claim to the earnings of the property since his purchase be, and they are hereby, reserved to be hereafter adjudicated, and are in no manner affected or prejudiced by this decree. It is further ordered that the disposition of any surplus funds, arising from the earnings of the road or otherwise, that may be in the hands of the receiver, or to the credit of this cause, be reserved for future determination." The decree directed the fund to arise from the sale to be applied as follows: "(1) To the payment of costs, etc. (2) To the payment of matured and unpaid coupons appertaining to the bonds issued under said mortgage, and interest thereon to the date of payment thereof, and any accrued but unpaid interest on account of coupons not then matured; or, if the funds be not sufficient to pay the same, then the said coupons, with the interest thereon, and such accrued interest, shall be paid pro rata. (3) To the payment of the principal of said bonds, or, if the funds be not sufficient to pay the same in full, then the principal of said bonds shall be paid pro rata." Pursuant to the directions of this decree, the property was resold by the master commissioner September 3, 1895.

The appellant, having been made a party defendant to the suit December 3, 1889, answered the bill February 2, 1891. On March 15, 1892, a motion, made by the appellant to vacate the order of April 6, 1889, for the appointment of a receiver, was heard and overruled by the court. A petition was filed by the appellant in the cause, October 22, 1895, in which he asserted ownership of the net earnings derived from the operation of the railway for the period intermediate his purchase of the property, September 8, 1888, pursuant to the order of sale entered in consolidated cause No. 198, and the sale of the railway made September 3, 1895, as directed by the final decree in this

suit. Moran Bros. and others, who had previously intervened in the cause, and the Farmers' Loan & Trust Company, filed their objections to the petition of appellant, all of which were, by order of the court, referred to a master for examination. The master made his report thereon January 6, 1896, to which no exceptions were taken, and an order was entered confirming the report, denying the right of appellant to the earnings of the railway, and dismissing his petition. From this order Downs appeals, and assigns error.

Wm. Grant, for appellant.

L. W. Campbell, for appellees Moran Bros. and Henry K. McHarg.

Before TOULMIN, MAXEY, and PARLANGE, District Judges.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

The appellant was made a party defendant to the suit in the court below December 3, 1889. On March 15, 1892, it appears that the circuit court overruled a motion made by him to vacate the receivership, from which no appeal was taken; nor did he appeal from the final decree of the court, passed March 8, 1895. His petition, in which he claimed the right to the net earnings of the railway as purchaser of the property, was filed October 22, 1895, and it was to the order made thereon January 6, 1896, that he objected, and from which he appealed. It is clear, therefore, that he is not in a position to assail here the action of the court in the appointment of a receiver, and it is deemed altogether useless to cite authorities in justification of the order made by the court. The bill filed by the appellee the Farmers' Loan & Trust Company made out a plain case of equitable cognizance, and one in which the court was authorized to take possession of the property for the security of the creditors of the railway company and the protection of its stockholders.

The only question, then, which properly arises upon the specifications of error is whether the appellant, by virtue of his purchase of the Waco & Northwestern Division of the Houston & Texas Central Railway, September 8, 1888, is entitled to the net earnings resulting from the operation of the railway by the receiver from the date of his purchase to the final sale of the property, September 3, 1895. As to the period embraced between the date of appellant's purchase and the filing of the bill in this suit, April 6, 1889, the report of the master, which was not excepted to, shows that no net earnings accrued from the operation of the Waco & Northwestern Division. Hence the claim to net earnings for that period has been properly abandoned. The master further reports that a considerable amount of net earnings was derived from the operation of said division between April 6, 1889, and September 3, 1895, and, at the date of the report there remained of net income in the hands of the receiver, or in the registry of the court, the sum of \$362,855.37. To the income thus accruing between April 6, 1889, and September 3, 1895, the appellant asserts a right superior to that claimed by the appellees, who are in part the owners, and partly the representatives of the owners, of the first mortgage bonds, secured by the mortgage which was foreclosed in this suit.

It is conceded that the net earnings, superadded to the proceeds of the sale of the Waco & Northwestern Division, are not sufficient

to discharge the principal of the bonds and accrued interest. The record discloses that for several years prior to the filing of the bill in this suit the property was in the hands of a receiver duly appointed by the court in other causes then pending, which embraced the entire property of the Houston & Texas Central Railway Company. Upon the day that the bill was filed, an order was made, pursuant to its prayer, appointing a receiver in the suit, who continued in possession as receiver of the Waco & Northwestern Division, and such receivership went on until the property was finally sold. It is thus seen that the Waco & Northwestern Division of the Houston & Texas Central Railway was in the sole and exclusive possession of receivers, duly appointed by the court in foreclosure proceedings, throughout the entire period for which net earnings are claimed by the appellant. Neither the appellant nor the railway company was in possession of the property a single day during the period mentioned, nor did either have aught to do with the management and operation of the railway. Therefore the Texas cases cited by counsel for the appellant as to the rights of a mortgagor in possession under an ordinary trust deed, or his right under such a deed to demand the premises from a mortgagee who has unlawfully acquired possession (*Silliman v. Gammage*, 55 Tex. 369, *Loving v. Milliken*, 59 Tex. 427, *Edrington v. Newland*, 57 Tex. 633, and others of similar type), are without application to the facts of this case. The mortgage which was executed by the Houston & Texas Central Railway Company to the appellee the Farmers' Loan & Trust Company, as trustee, expressly authorized the trustee, upon the failure of the railway company to pay any part of the interest or principal of the bonds when the same should become due and payable, and for 60 days after having been demanded, to take possession of the railway, operate and manage the same, and receive the revenue and income thereof, and apply the surplus to the payment of the interest and principal of all the matured outstanding bonds. And the trustee was further empowered, upon the request of the holders of one-fifth in amount of the outstanding bonds, in case of default in the payment of any part of the interest due on the bonds, "to enter upon and take actual possession, with or without entry or foreclosure, of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management, until the arrears of both principal and interest be paid, or the property sold as herein prescribed, receiving the rents, revenues, and income thereof, and applying them in the same manner as above stated." And by the following clause of the mortgage the discretionary right of the railway company to appropriate the income of the property was restricted to the time when default should be made in the payment of the interest or principal of the bonds: "It is, however, expressly agreed that the said party of the first part [referring to the railway company] may dispose of the current net revenues and income of all the said property and railway hereby conveyed, in such manner as it shall deem best, until default shall be made in the payment of the interest or principal of said bonds, or of any one or more of them." The railway company having defaulted in the payment of the in-

terest, the trustee resorted to the courts for the more effectual protection of the rights of the beneficiaries under the mortgage, and upon its application the property was withdrawn from the possession of the railway company, and placed under the control of the court.

In view of the provisions of the mortgage and the uninterrupted possession of the railway by the receiver from the filing of the bill to its final sale, we confess our inability to understand how the appellant can justly assert a claim to the net income accruing during the receiver's control and management of the property. Surely, the railway company itself could not have preferred such claim, because, having made default in the payment of interest, it was debarred by the very terms of its contract. The appellant, in that respect, has no right superior to that of the railway company. He purchased the property subject "in all things" to the lien of appellees' mortgage, which secured to the bondholders, as we have seen, the net income of the property, upon default by the railway company in the payment of interest. We have, then, before us a case where the contingency contemplated by the parties has occurred which authorized the trustee of the bondholders to act. A receivership was the result of such action, and we are clearly of opinion that the net income derived from the operation of the railway by the receiver should be appropriated to the payment of the debt, principal and interest, for the security of which the mortgage was executed. The rule announced is consistent with reason, and finds support in judicial decisions. It must be borne in mind that we are here treating of net income; the question of preferential claims arising out of expenses incurred, equipment supplied, betterments made, and other kindred demands, not being involved. The issue is solely between the bondholders and one who purchased the property under a junior mortgage, subject to their rights. The circumstances which determine the respective rights of the mortgagor and mortgagee to the earnings of the property mortgaged are stated by the supreme court in several cases. Thus, in *Dow v. Railroad Co.*, 124 U. S. 654, 8 Sup. Ct. 674, says the court:

"It is well settled that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage."

In concluding the opinion, at page 656, 124 U. S., and at page 675, 8 Sup. Ct., it is further said:

"Under these circumstances, as there are no current expense creditors claiming the fund, we are satisfied that the money is to be treated as income covered by the mortgages, and should be paid to the trustees, to be held as part of that security."

See *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, and authorities there cited.

It is said by Mr. Justice Woods, speaking for the court in *Teal v. Walker*, that:

"The American cases sustain the rule that so long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents, he must take means to obtain the possession." 111 U. S. 249, 250, 4 Sup. Ct. 424.

And at pages 250, 251, 111 U. S., and at page 425, 4 Sup. Ct., it is further said:

"Chancellor Kent states the modern doctrine in the following language: 'The mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover the possession by regular entry by suit before he can treat the mortgagor, or the person holding under him, as a trespasser.' 4 Kent, Comm. 157. See, also, *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Clarke v. Curtis*, 1 Grat. 289; *Bank v. Arnold*, 5 Paige, 38; *Hunter v. Hays*, 7 Biss. 362, Fed. Cas. No. 6,906; *Souter v. Railroad*, Woolw. 80, 85, Fed. Cas. No. 13,180; *Foster v. Rhodes*, 10 N. B. R. 523, Fed. Cas. No. 4,981. The authorities cited show that, as the defendant in error took no effective steps to gain possession of the mortgaged premises, he is not entitled to the rents and profits while they were occupied by the owner of the equity of redemption."

The same rule obtains in the jurisprudence of Texas, as the following extract from *Giles v. Stanton*, will disclose:

"The mortgagees under this mortgage," says the court, "had no lien upon the earnings of the road while it remained in the hands of the company. * * * The lien of the mortgage upon the earnings of the railway depended solely upon the terms of the mortgage, and until the trustee took some steps authorized by the mortgage to appropriate the earnings no lien attached to the earnings. * * * By the terms of the mortgage the company was to remain in possession of the road, and had the right to operate the same, and to appropriate the earnings and income. Upon default in the payment of interest continuing for six months, the trustee was empowered to take possession of the railway, and operate it, applying the net earnings to the satisfaction of the interest, or he might sue to foreclose the mortgage; and if such default continued for twelve months, the trustee was authorized to sue to foreclose the mortgage. The trustee did not demand nor take possession of the road, and took no steps towards foreclosing the mortgage until the 18th day of June, 1891, when the plea of intervention was filed. It follows that the lien of the mortgage did not attach to the earnings of the road in the hands of the receiver which were earned before the date of the filing of the intervention; but from that time the lien of the mortgage attached to such earnings, subject to the expenditures and claims which by law were given a preference over it." 86 Tex. 627, 26 S. W. 618.

The lien of the mortgage attached to the earnings certainly from the date of filing the bill and appointing the receiver in this suit, and the net earnings subsequently acquired are properly attributable to the payment of the principal and interest of the mortgage debt. Such was the ruling of the circuit court, and in it there was no error. The decree appealed from should be affirmed, and it is so ordered.

FARMERS' LOAN & TRUST CO. et al. v. GREEN et al.
GREEN et al. v. FARMERS' LOAN & TRUST CO. et al.
(Circuit Court of Appeals, Fifth Circuit. February 25, 1897.)

Nos. 500 and 501.

RAILROAD MORTGAGE FORECLOSURE—ALLOWANCE FOR ATTORNEY'S FEES AND EXPENSES—PURCHASER RESISTING CONFIRMATION OF SALE.

A purchaser of a railroad at foreclosure sale, who resists the confirmation of the sale, and ultimately procures the setting aside of a decree of confirmation, and a release from his bid, is not entitled to be paid, out of the trust fund, his attorney's fees and expenses incurred in that behalf, but can only receive the ordinary taxable costs; and it is immaterial that the services of his counsel may have incidentally benefited the fund.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The Farmers' Loan & Trust Company, as trustee under the first mortgage bonds on what was known as the "Waco & Northwestern Division of the Houston & Texas Central Railway," filed its bill of complaint against the Houston & Texas Central Railway Company et al., seeking a foreclosure on said Waco & Northwestern Division. On March 16, 1892, the court entered a final decree ordering a sale of the trust property. On December 28, 1892, the property was offered for sale by a special master, and E. H. R. Green, appellant in cause No. 501 and appellee in cause No. 500, being the highest bidder therefor, became the purchaser of the property, and deposited with the master the sum of \$25,000, as required by the terms of the sale. On January 11, 1893, the master filed his report of the sale, stating that the bid of E. H. R. Green for \$1,375,000 was the highest made at the offering, and that the property had been struck off to him. On January 18, 1893, Collis P. Huntington filed a petition of intervention, alleging that he was a holder of a majority of the first mortgage bonds of the said Waco & Northwestern Division, and praying that he be permitted to intervene pro interesse suo, and to become a party to the cause, which petition was granted by the court. On February 3, 1893, said Huntington filed qualified or conditional exceptions to the master's report of sale, alleging therein that in the notice of sale by said master reference was made to the foreclosure decree "and the schedules on file with the clerk of said court, at Galveston, Texas, subject to the inspection of all intending bidders at such sale," for further details of the properties to be sold; that on October 28, 1892, the receiver, Dillingham, had filed in the court a schedule of property, which contained the following vague reference to certain land notes: "The receiver has in hand land notes, secured by deed of trust on lands conveyed, of the face value of ninety-six thousand three hundred and thirteen dollars and eighty-seven cents (\$96,313.87)"; that neither the decree of foreclosure rendered on March 16, 1892, nor any other order or decree of the court, authorized the sale of said land notes; that the master had filed in the court his report of said sale at Waco, Tex., on December 28, 1892, and had made mention therein of said notice of sale, and of the reference to the receiver's schedule on file with the clerk of the court; and he excepted to said master's report, and to the confirmation of said sale, if and so far as the references in said notice and report may be construed as including said land notes in the properties to be sold at said foreclosure sale. On February 22, 1893, the complainant moved the court to confirm the sale of December 28, 1892, and to direct that proper conveyances be made to the purchaser. On March 14, 1893, the purchaser, Green, filed his first pleading in court, and alleged that his bid at the sale was based upon the schedule of property of said railroad referred to in the notice of the master's sale; that among other items set out in said schedule was that about \$95,000 in vendor's lien notes were in the hands of the receiver, being a part of the property of said railroad ordered by the court to be sold; that upon the strength of said items in said schedule (the decree but vaguely and generally describing the property ordered to be sold), to which

he was referred by the master's notice of said sale, the bid made by him was based in good faith; and that O. P. Huntington had filed in the court exceptions to the passage of said notes under the sale. Wherefore he prayed the court "that in the event such exceptions of said Huntington be sustained, that he be relieved from his bid as made, and the deposit made by him in this matter be returned to him, and that said property be resold under such directions as by the court may be proper." Depositions were taken at the hearing on March 14, 1893, and on that day the matter of the confirmation of the master's report of sale and of exceptions of the intervener, Collis P. Huntington, and of the petition of the purchaser, E. H. R. Green, for relief from his bid, came on to be heard. It was found by the court that the land notes referred to did not pass at the master's sale, and it was ordered, adjudged, and decreed that the sale be confirmed, excluding the land notes, and that the special master make a deed to the purchaser in accordance with the final decree rendered in the cause on the purchaser's compliance with the terms of the sale; and it was further ordered, adjudged, and decreed that the application of the purchaser, E. H. R. Green, for relief from his bid, be denied. On April 1, 1893, the term of the court at which the said decree of confirmation was rendered adjourned sine die. On April 13, 1893, said Green filed a petition for a rehearing of all the matters embraced in the decree of March 14, 1893, and prayed that said decree be set aside, and that he be released from his bid. There were several grounds stated in the petition for the relief prayed for, the most material of which was that there was a deficiency in the property sold, in that in the notice there were offered for sale about 277,230 acres of land, while the actual amount sold was found to be 222,459 $\frac{1}{4}$ acres. On June 10 and 15, 1893, respectively, exceptions and answers were filed by the complainant and by the intervener, Huntington, to said petition, and on June 27, 1893, the matter of said petition came on to be heard, and a decree was rendered by the court denying the same. On November 6 and December 16, 1893, respectively, motions were filed by said intervener and the complainant to require said Green to comply with his bid, and complete his purchase, and, in default thereof, that the property be resold at his risk and expense. On December 9, 1893, and March 16, 1894, respectively, Green filed answers to the said motions. On March 5, 1895, the cause came on to be further heard upon the said motions and upon the answers and objections thereto of the said Green, whereupon it was adjudged and decreed by the court that the said sale of December 28, 1892, be set aside, and that the said purchaser, E. H. R. Green, be relieved from his bid, and the deposit made by him of \$25,000 be returned to him, without interest, and that he go hence without day; and that the cost of the proceedings subsequent to said sale, in regard to the confirmation and enforcement thereof, so far not heretofore paid, be taken and paid out of the proceeds of the sale of the property hereinafter provided for, or funds in the hands of the receiver, as the court may hereafter order; and that the said property be resold in the manner and upon the terms described in the decree. By this decree there was reserved to said Green the right to apply to the court for an allowance to cover his expenses and counsel fees, the right to such allowance being reserved for future determination in the cause. On October 22, 1895, an application was made by Green for an allowance to cover his expenses and counsel fees. The application contained substantially the history of the proceedings in the cause. To this application demurrers were filed by the complainant the Farmers' Loan & Trust Company, and by the intervener, Collis P. Huntington. The cause coming on to be heard upon the said application and upon the demurrers thereto, the court overruled the demurrers, and held that the applicant was entitled to a reasonable fee in the premises, to be paid out of the funds in court; and the application was referred to a special master to hear proof thereon, and to report the amount for which the allowance should be made to cover such reasonable counsel fees; and also to hear proof upon and report the amount of the expenses and disbursements of the said Green. The report of the master was filed February 18, 1896, and on February 24, 1896, exceptions to the said report were filed by the complainant and Collis P. Huntington, Moran Bros., and H. K. McHarg, bond owners and interveners in the cause, and by E. H. R. Green. The substance of the exceptions taken by the complainant and

Interveners was that the master erred in reporting that the said Green was entitled to any allowance for counsel fees and expenses; and the substance of Green's exceptions was that sufficient allowance was not made for his expenses. On February 26, 1896, the court overruled all exceptions to the master's said report, and decreed that said Green be allowed the sum of \$10,889.55, with 6 per cent. per annum interest from date until paid, together with the costs, to be paid out of any funds in the hands of the receiver in this cause. From this decree these appeals were taken.

L. W. Campbell, for appellants Moran Bros. and Henry K. McHarg.

J. P. Blair, for appellant Huntington.

Chas. W. Ogdon, for appellee Green.

E. B. Kruttschnitt, for appellees Lackawanna Iron & Coal Co., Southern Development Co., Morgan's Louisiana & T. R. & S. S. Co., and Pacific Improvement Co.

Before TOULMIN, MAXEY, and PARLANGE, District Judges.

TOULMIN, District Judge, after stating the case as above, delivered the opinion of the court.

In our view of this case, we need only to consider the question whether Green is entitled to any allowance for counsel fees and expenses to be paid out of the funds in the hands of the receiver, without regard to the question whether he was an innocent purchaser, free from laches or fault in the premises. There is no question as to the power of a court of equity, in cases of administration of funds under its control, to make such allowance to those who have instituted proceedings for the benefit of the fund as justice and equity may require. It is a well-recognized rule of equity that when a trust fund is brought into court for administration and distribution, it must bear the expense incurred in proper proceedings taken for the purpose. This expense necessarily includes the fees of the counsel who brings the suit, and who is considered as representing all persons having a common interest in the fund brought into court by it, and who avail themselves of its benefits, and of counsel who may be employed by authority of the court to perform services beneficial to the trust fund. *Trustees v. Greenough*, 105 U. S. 527; *Jacksonville, T. & K. W. Ry. Co. v. American Const. Co.*, 6 C. C. A. 249, 57 Fed. 66; *Bound v. Railway Co.*, 59 Fed. 509; *Insurance Co. v. Dellatorre*, 17 C. C. A. 310, 70 Fed. 643. But this rule does not apply in favor of one who sets up an independent right to participate in the funds in litigation, and whose claim involves an antagonistic interest to that of the complainant in the suit, and those of the same class or of like interest. *Insurance Co. v. Dellatorre*, supra; *Bound v. Railway Co.*, supra; *Strong v. Taylor*, 82 Ala. 213, 2 South. 760; *Grimball v. Cruse*, 70 Ala. 534; *Ryckman v. Parkins*, 5 Paige, 545.

The contention of the Farmers' Loan & Trust Company and others is that Green's case does not belong to that well-defined and limited class of cases in which courts of equity have allowed a successful litigant to be paid his counsel fees and expenses out of a trust fund under the control of the court; that the proceedings for the counsel fees and expenses in which Green now seeks an allowance were not brought to create or preserve any fund in which the complainant or intervening bondholders are interested, but that Green's attitude in

such litigation has always and necessarily been adverse and hostile to the complainant and the bondholders. The litigation between the complainant and the interveners, the bondholders, on the one side, and Green, the purchaser, on the other, was a contest as to the right of the former to have the sale confirmed and the purchase completed, and of the latter to have the sale set aside, and to be released from his bid. Clearly, this litigation involved antagonistic interests, and the parties to it occupied adverse positions in reference to its subject-matter. A purchaser under a decretal sale is one of the parties litigant, where he resists, as he has the right to do, the confirmation of the sale. He occupies the position, respecting costs and expenses, of any other party litigant. If causes exist why the sale should be set aside, and it is for equitable reasons set aside, the party unsuccessful in the litigation should pay the costs. It will not do to invite or encourage the purchaser to resent any effort to have the sale confirmed, and to compel him to comply with his bid, upon the idea that he will incur no cost or expense in the litigation. The purchaser under a judicial sale submits himself to the jurisdiction of the court, and may be compelled to carry out his contract, but he is also entitled to the protection of the court in respect to the avoidance of the purchase if by reason of imperfections in the title or otherwise he is freed from his bid. He should be treated fairly, and, being discharged from his purchase, he is entitled to have his deposit restored to him, and to have his costs,—the ordinary taxable costs which are chargeable as between party and party. 2 Jones, Mortg. § 1648; *Morris v. Mowatt*, 2 Paige, 586; *Ryckman v. Parkins*, supra. To direct the payment to the purchaser in this case of any allowance for counsel fees and disbursements out of the funds in the hands of the receiver would be tantamount to taxing it against the bondholders. The practical question, then, is, shall the bondholders bear the burden of the litigation arising out of this contest between the parties? Must they pay the fees of the purchaser's counsel, who were not employed or controlled by them? We see no reason why the bondholders should be required to do more than pay the legal, taxable costs, like any other unsuccessful litigant, and we know of no principle of law or of equity which authorizes the court to tax as a part of the costs the counsel fees and disbursements of the successful party in the litigation. The United States supreme court, in the case of *Oelrichs v. Spain*, 15 Wall. 211, after stating that the rule at law in debt, covenant, and assumpsit was against the allowance of counsel fees, held that counsel fees were not recoverable on an injunction bond, and said that:

"In equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expense litis to which he may have been subjected. The parties, in this respect, are upon a footing of equality. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. * * * We think the principle of disallowance rests upon a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

Suppose the circuit court had not concluded to render the decree of March 5, 1895, releasing Green from his purchase and directing a resale of the property, but had maintained the correctness of the decree

of March 14, 1893, confirming the sale and denying Green relief therefrom; could it be reasonably claimed, or even suggested, that the complainant and the interveners should recover from Green their counsel fees, and incidental expenses incurred by them, in resisting his application to be released from his purchase, and in prosecuting their motion to have him comply therewith, or that he should be taxed with such fees and expenses as a part of the costs of the contest? Clearly not, and, if not, then the parties to the litigation were not "upon a footing of equality" if Green's claim is well made.

But it was submitted in the argument of Green's counsel that the disbursements by him for counsel fees, and for other expenses incurred by him in securing a release from his purchase, resulted in curing many defects in the foreclosure proceedings, the correction of which necessarily benefited the trust property, and increased its salable value. If it be admitted that Green's counsel, in representing the interest which retained him, incidentally contributed to the benefit of the trust fund, and to the common interest of the bondholders, still he can legally claim from them no compensation for his services. They were voluntary services, as far as they were concerned. They were not rendered under any contract of employment, either expressly made by them, or superinduced by the law upon the facts of the case, and they were rendered with no view or purpose of benefiting the bondholders or the trust fund. To make such services a charge on the trust fund they must have been rendered for the purpose of benefiting that fund. *Bound v. Railway Co.*, supra; *Grimball v. Cruse*, 70 Ala. 544, 545; *Trustees v. Greenough*, supra. The supreme court of South Carolina, in *Hand v. Railroad Co.*, 21 S. C. 179, in stating the rule, said:

"No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one flowing to him on account of services rendered to another by whom he may have been employed. Before a legal charge can be sustained, there must be a contract of employment, either expressly made or superinduced by the law upon the facts."

Our opinion is that the decree appealed from is erroneous in so far as it overrules the exceptions to the master's report filed by the complainant and the interveners, and decrees an allowance to E. H. R. Green for counsel fees and expenses to be paid out of the funds in the hands of the receiver. The case must accordingly be reversed, and the cause remanded, with directions to the circuit court to set aside its former decree, and, in lieu thereof, to make and enter a decree consistent with this opinion. The decree to be entered by the circuit court pursuant to the mandate of this court should order, adjudge, and decree that the exceptions of the Farmers' Loan & Trust Company and the interveners, Collis P. Huntington, Moran Bros., and Henry K. McHarg, to the report of the said special master, be sustained; that it should further order, adjudge, and decree that said Green be denied any allowance to cover counsel fees and expenses other than the ordinary taxable costs of court which are provided for in the decree from which these appeals were taken. Reversed and remanded.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

INSOLVENT RAILROAD COMPANIES—PREFERENTIAL CLAIMS—JUDGMENTS FOR PERSONAL INJURIES.

A judgment creditor of a railroad corporation, whose claim originated in the negligent act of the corporation's servants, is not entitled to be paid in preference to the holders of pre-existing liens upon the corporation's property.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Crowley & Grosscup and John B. Allen, for appellant.

Carr & Preston and S. H. Piles, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On October 1, 1889, J. B. Irvine, the petitioner, sustained a personal injury, resulting from the negligence of an engineer of the Northern Pacific Railroad. On April 17, 1893, the petitioner recovered a judgment against the railroad company for \$600 and costs on account of the injury. On October 30, 1893, the appellant, as the trustee of certain bonds of the railroad company, instituted a suit to foreclose the mortgage liens which had been placed upon the railroad property to secure said bonds. In the foreclosure suit receivers were appointed to take possession of and manage and operate the mortgaged property. On May 13, 1896, the petitioner intervened in said foreclosure suit by filing a petition, in which he alleged that he had recovered the judgment above referred to, and prayed for an order that the receiver pay his claim in full. The trust company answered the petition, alleging that the incumbrances which it sought to foreclose were existing liens upon the railroad company's property at and prior to the time when the negligent act occurred upon which the plaintiff's judgment was based, and alleging that the mortgaged property was insufficient to pay the mortgage debt. The petitioner demurred to the answer, and the court below sustained the demurrer, and made an order directing the receiver to pay the petitioner's judgment out of the funds in his hands as such receiver. The trust company appeals from this order, and contends that the funds out of which the receiver was ordered to pay the judgment were subject to the prior and superior liens of the mortgage bonds and the interest thereon. The question which is presented, therefore, is whether a creditor of a railroad corporation, whose claim originated in the negligent act of the corporation's servant, shall be paid in preference to the holders of pre-existing liens upon the corporation's property. We hold that such a judgment creditor is not entitled to be preferred to the lien holder, under the authority of *Trust Co. v. Riley*, 16 C. C. A. 610, 70 Fed. 32, *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 74 Fed. 431, and *Whiteley v. Trust Co.*, 22 C. C. A. 67, 76 Fed. 74. The order appealed from will be reversed, at the appellee's costs.

MERRITT et al. v. AMERICAN STEEL-BARGE CO.
(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 741.

1. COURTS—CONCURRENT JURISDICTION—POSSESSION OF RES—SUITS IN PERSONAM.

While, in cases in which a court has taken, or, in order to administer the relief sought, may be compelled to take, possession of specific real or personal property to which the suit relates, the court which first acquires jurisdiction of the cause is entitled to retain it, to the exclusion of any other court, this rule does not apply to suits merely in personam, though involving the same issues; and the pendency of such a suit in one jurisdiction does not prevent a party thereto from bringing a similar suit, involving the same issues, against the other party, in another jurisdiction.

2. CORPORATIONS—CERTIFICATES OF STOCK—SUIT TO ESTABLISH LIEN—SUBSTITUTED SERVICE.

Though certificates of corporate stock are technically only written evidences of interests in the corporate property, they are so far in the nature of chattels that, when certificates of stock in a corporation of one state are held in pledge or as collateral in another state, the courts of such latter state are authorized to proceed to establish a lien thereon in a suit commenced by substituted service, under a statute authorizing such service in suits to establish liens on personal property within the state.

3. APPEAL AND ERROR—REVIEW—PLEA OF RES JUDICATA—DEMURRER.

In reviewing a decision sustaining a demurrer to a plea which alleges that a judgment set up in bar of the action was rendered upon due and proper notice, and that the court had and acquired jurisdiction of the subject-matter and the parties, the appellate court must take such allegations as true, and cannot look into exhibits attached to the answer in the case to ascertain whether the judgment does in fact show all the elements of jurisdiction.

In Error to the Circuit Court of the United States for the District of Minnesota.

This case was before this court, at the May term, 1896, on a motion to dismiss the writ of error. *Merritt v. Barge Co.*, 40 U. S. App. 127, 21 C. C. A. 525, and 75 Fed. 813. On the present occasion it is here for determination on the merits. Alfred Merritt and Leonidas Merritt, the plaintiffs in error, who were the plaintiffs below, on April 10, 1894, sued the American Steel-Barge Company, the defendant in error, in the district court for St. Louis county, state of Minnesota, to recover the value of 11,331.3 shares of stock in the Lake Superior Consolidated Iron Mines. The complaint alleged, in substance, the following facts: That in the months of January and February, 1893, the plaintiffs borrowed of Charles W. Wetmore \$432,575, giving as an evidence of such indebtedness their five negotiable promissory notes, which were secured by the pledge of certain shares of stock in the Duluth, Missabe & Northern Railway Company and in the Mountain Iron Company and the Missabe Iron Company, the shares of stock in said railway company alone being of the value of \$565,000; that at the time said loan was effected it was agreed that said Wetmore "should not repledge, sell, or dispose of" any of said stock, and that, if the plaintiffs so desired, the first four of the aforesaid notes should be extended for a period of six months from their maturity; that on April 24, 1893, said Wetmore, in violation of his agreement, transferred all the shares of stock in said railway company by him held in pledge to John D. Rockefeller, as security for an individual debt which he owed to said Rockefeller, which stock was at the time fairly worth \$565,000; that the plaintiffs had elected to waive the tort thus committed by said Wetmore, and to consider the transaction last aforesaid as a sale of the stock by said Wetmore for their benefit; that on March 13, 1893, said Wetmore had further converted to his own use certain bonds belonging to the plaintiffs, which were of the value of \$90,000, and

that the plaintiffs had further elected to treat the conversion of said bonds as a sale of the same by said Wetmore for their account; that after these several transactions said Wetmore had sold and transferred the five promissory notes heretofore mentioned, and the remaining shares of stock which had been pledged to secure the payment of the same, to the American Steel-Barge Company; that said Wetmore was at the time the vice president and chief managing officer of said barge company; that said notes and stocks were so transferred to the barge company to secure an indebtedness of said Wetmore to said company which had been theretofore contracted; that at the time of such transfer said barge company well knew the terms and conditions under which the said Wetmore held the aforesaid notes and stock, and that he had no right or authority to make the transfer in question; that after the last-mentioned transfer the barge company had converted the stocks by it received into 11,331.3 shares of the capital stock of the Lake Superior Consolidated Iron Mines, a corporation organized under the laws of New Jersey; that the plaintiffs had demanded of the barge company the surrender and return of the stocks last aforesaid; that it had refused to accede to such request; and that the plaintiffs had thereupon elected to waive the tort so committed, and to sue the barge company in assumpsit for the value of the shares of stock by it received and retained. The case was removed by the barge company, it being a corporation organized under the laws of New Jersey, from the state court to the circuit court of the United States for the district of Minnesota on April 18, 1894. After such removal the barge company filed an amended answer to the aforesaid complaint, whereby, among other defenses, it interposed the following plea, in substance: That being the legal owner and holder of the five promissory notes referred to in the complaint, and having in its possession, as pledgee, the collateral attached thereto, consisting of 11,331.3 shares of stock in the Lake Superior Consolidated Iron Mines, it had attempted, after the maturity of said notes, and prior to May 18, 1894, to sell the collateral at public auction in the city of New York, where the notes were made payable, for the purpose of satisfying said notes, but that it had been prevented from so doing by an injunction restraining such sale, which had been obtained by the plaintiffs, Alfred Merritt and Leonidas Merritt, in an action brought by them against the defendant barge company in the supreme court of the city and county of New York; that said action so brought by the plaintiffs was dismissed by them prior to a final judgment therein, whereupon the barge company, in May, 1894, had itself brought a suit in said supreme court of the city and county of New York against Alfred Merritt and Leonidas Merritt for the purpose of determining the rights of the parties in and to the five promissory notes mentioned in the complaint, and in and to the aforesaid 11,331.3 shares of stock held as collateral thereto; that in the suit so instituted by the barge company it prayed judgment that the defendants in said suit might be excluded from any interest in said notes, and in said shares of stock so pledged as collateral, except as subordinate to the lien of the barge company; that the lien of the latter company upon said stock might be fixed and defined; that the right to sell the same for the satisfaction of the five notes by it held might be established; that said stock might be sold pursuant to the decree of the court; and that the proceeds might be applied to the payment of said notes. The plea further averred that said notes were payable in the city of New York; that when said suit was brought by the barge company the certificates representing the shares of stock in controversy were situated in the city of New York, and were subject to the jurisdiction of the supreme court for the city and county of New York; that said court then and there had full jurisdiction of said stock for the purpose of establishing and foreclosing the alleged lien of the barge company; that after due proceedings had in said court a final decree was rendered in accordance with the prayer of the complaint, whereby the said Alfred Merritt and Leonidas Merritt were excluded from all interest in said notes and stock, except as subordinate to the lien of the barge company, and whereby the barge company's title to the notes and its title to the stock, as a pledgee thereof, were established, and whereby the stock was adjudged to be sold at public auction and the proceeds thereof applied to the payment of the aforesaid notes. The plea further averred that the judgment and decree last aforesaid was rendered upon due and proper notice to the defendants, Alfred Merritt and Leonidas Merritt, and upon testimony duly and properly

taken, proving all of the allegations contained in the bill of complaint; that pursuant to the decree so obtained the stock in question was afterwards sold at public auction; and that at such sale it was purchased by the barge company, on the 24th day of October, 1894, for the sum of \$25,000. To the aforesaid plea setting up the proceedings in the supreme court of the city and county of New York as a bar to the present action, the plaintiffs demurred, but the demurrer was overruled. Subsequently, the plaintiffs having declined to reply to the facts alleged in the aforesaid plea, a judgment was rendered on the pleadings in favor of the defendant. The writ of error is brought to reverse that judgment.

A. A. Harris and Henry E. Harris, for plaintiffs in error.

James H. Hoyt and Frank B. Kellogg (Cushman K. Davis and C. A. Severance with him on brief), for defendants in error.

Before CALDWELL and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The suit which was instituted in the supreme court of the city and county of New York by the American Steel-Barge Company against Alfred Merritt and Leonidas Merritt, the plaintiffs in this suit, according to the averments of the plea, was an action to establish and foreclose a lien on personal property alleged to be situated in New York, and it was brought under the provisions of a local statute of that state which authorized such a proceeding to be maintained on constructive or substituted service. Code Civ. Proc. N. Y. 1877, §§ 438-444, inclusive. It was a suit in the nature of a proceeding in rem, and it retained that character to the end, inasmuch as the defendants, although served with summons outside of the state of New York, as provided by the laws of that state, did not appear at any stage of the proceedings so as to authorize the rendition of a personal judgment against them. The fundamental fact to be alleged and proven in such proceeding was the existence of a valid lien in favor of the barge company upon the property in controversy, to wit, 11,331.3 shares of stock in the Lake Superior Consolidated Iron Mines. On the other hand, it appears from the complaint in the case at bar that it was a suit which was brought upon the theory that the barge company had no lien upon the property in question, and that it had rendered itself liable to the plaintiffs for the value of said property by refusing to restore it to the plaintiffs when a return thereof was demanded. The plaintiffs do not deny the practical identity of the issues in the two suits, —the one pending in Minnesota, and the other in New York,—and they concede, as we understand, that because the issues were identical, each having reference to the existence of the alleged lien, the judgment of the New York court with respect thereto was well pleaded in bar to the present action, provided the New York court rightfully proceeded with the hearing and determination of the case before it, notwithstanding the pendency of the prior suit in Minnesota, and provided, further, that the New York court acquired lawful jurisdiction of the subject-matter. Assuming the proposition so conceded to be correct, we proceed to inquire whether, as is contended by the plaintiffs in error, the fact that the Minnesota

suit was first brought precluded the New York court from entertaining jurisdiction of the suit which was subsequently instituted in that forum.

The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired. While property is so held it cannot be sold under the judgment, sentence, or decree of any other tribunal. Moreover, so long as the property remains in custodia legis, no other court, unless by special leave of the court which first acquired jurisdiction, can lawfully proceed with the trial and determination of a suit the object of which is to establish a lien against the property, or to subject the specific property to the payment of debts, or which may result in creating conflicting rights or titles thereto. The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. *Freeman v. Howe*, 24 How. 450; *Peck v. Jenness*, 7 How. 612, 624, 625; *Taylor v. Carryl*, 20 How. 583, 596, 597; *Wiswall v. Sampson*, 14 How. 52; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 302, 5 Sup. Ct. 135; *Riggs v. Johnson Co.*, 6 Wall. 166, 196; *Central Trust Co. of New York v. South Atlantic & O. R. Co.*, 57 Fed. 3. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to federal and state courts, being the outgrowth of necessity, is "a principle of right and of law," which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants. *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961; *Chittenden v. Brewster*, 2 Wall. 191; *Orton v. Smith*, 18 How. 263, 265; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197, 24 Fed. Cas. 704; *Owens v. Railroad Co.*, 20 Fed. 10; *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. 443. In the cases of *Wallace v. McConnell*, 13 Pet. 135, and *Five Hundred and Five Thousand Feet of Lumber*, 24 U. S. App. 509, 12 C. C.

A. 628, and 65 Fed. 236, the doctrine under consideration was extended to garnishment proceedings brought in the courts of a state while the existence of the indebtedness was in litigation in a federal court. It was held, in substance, that, while the alleged debtor was contesting the existence of the debt in a suit brought against him in the federal court, the debt could not be attached by a third party under process emanating from a state court. And in the case of *Sharon v. Terry*, 36 Fed. 337, where a suit had been brought in the federal court to compel the surrender and cancellation of a paper purporting to be a written declaration of marriage, and to restrain the use thereof on the ground that it was a forgery, and a suit for divorce had subsequently been brought in a state court, wherein the writing was found to be genuine, Mr. Justice Field declined to recognize the latter adjudication; holding that, as the federal court had first acquired jurisdiction of the controversy to compel the surrender and cancellation of the forged document, it was not bound to adopt the finding of the state court that the document was genuine.

It does not follow, however, that the rule of comity to which we have referred operates to prevent a court from taking jurisdiction of a cause in all cases where a prior suit involving the same issue or issues has been commenced in some other forum, and jurisdiction has been acquired by such other court over the parties litigant. Whether the pendency of a prior suit has such effect depends, as Mr. Justice Miller remarked, in substance, in *Buck v. Colbath*, 3 Wall. 334, 335, upon the character of the prior suit, the nature of the remedy and the relief sought, and the identity of the parties. If the prior action does not deal either actually or potentially with specific property or objects, but is strictly a suit in personam, in which nothing more than a personal judgment is sought, no reason is perceived why a subsequent action may not be brought and maintained in another jurisdiction, although it involves the determination of the same issue or issues on which the right to recover in the first suit depends. The bringing of such second suit, under the circumstances supposed, does not oust the court in which the first suit was instituted of its jurisdiction, or delay or obstruct it in the exercise of its jurisdiction, or lead to a conflict of authority, where each court acts in accordance with well-established rules of law. Although a judgment may be rendered in the second suit before the first suit is tried, and may be pleaded in bar in the latter suit because the issue and the parties to the two suits are the same, yet it has never been supposed that the fact that a judgment of another court is offered in evidence to conclude the parties on a given issue or issues either defeats or impairs its jurisdiction, or has any necessary tendency to occasion a conflict of authority. Whatever doubt we might otherwise entertain concerning the question whether the pendency of a suit strictly in personam has the effect of preventing a party to that suit from subsequently bringing a suit in another jurisdiction involving the same issue, and from pleading the judgment there recovered as an estoppel in the former action, is resolved by the fact that in a number of cases such prac-

tice has been sanctioned by the highest authority. Thus, in *Stanton v. Embrey*, 93 U. S. 548, the plaintiff first brought a suit in personam in the superior court of New London county, state of Connecticut, and while it was there pending and undetermined he brought a suit on the same cause of action in the supreme court of the District of Columbia. A plea of lis pendens was interposed in the latter suit, and was overruled; the court holding that the pendency of the suit in Connecticut did not prevent the bringing, nor the prosecution to final judgment, of a suit in the District of Columbia. In *Insurance Co. v. Harris*, 97 U. S. 331, suits were brought by Harris, as assignee of William H. Brune, who was himself an assignee of certain insurance policies, against the Mutual Life Insurance Company of New York, in the circuit court of the United States for the district of Maryland. Prior thereto a suit had been commenced by Mrs. Barry, the beneficiary named in the policies, in the supreme court of New York, against said William H. Brune and the insurance company, to recover the policies and have the assignment thereof to said Brune declared to be void. In the suit brought in New York, the insurance company filed an answer and a bill of interpleader, and obtained an order on the bill of interpleader permitting it to pay the amount due on the policies into court, and restraining the several claimants of the policies from prosecuting actions against it after the money had been so paid. At what precise time the bill of interpleader was so filed, with reference to the commencement of the suit in the district of Maryland, does not appear; but the supreme court, through Mr. Justice Strong, declared that it was "perfectly immaterial whether the New York court first obtained jurisdiction of the subject and the parties," as the order made by the New York court on the bill of interpleader would in any event prevent a recovery against the insurance company in the suit pending in the district of Maryland, inasmuch as that order had been made before the latter suit was brought to trial. In the case of *Buck v. Colbath*, 3 Wall. 334, 345, while discussing the effect to be given to the pendency of a prior suit, the supreme court said:

"But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same questions exactly."

And in *Standley v. Roberts*, 19 U. S. App. 407, 421, 8 C. C. A. 305, and 59 Fed. 836, this court said:

"There is no doubt that, in a suit in which the court obtains jurisdiction by the seizure or control of the subject-matter of the suit, the court which first acquires jurisdiction over it may retain the property in its custody until final judgment, and in many cases until such judgment is satisfied, and that it may use its writ of injunction or other proper process to effect this result. * * * It is equally well settled that the pendency of an action in one court will not bar or abate another action between the same parties, involving the same issues, in a court of co-ordinate jurisdiction, in which that jurisdiction is exercised, not by the seizure of the property, but by personal service of original process upon the defendants."

The decisions of the state courts likewise support the view that the pendency of a suit which is strictly a suit in personam will not prevent the commencement of a suit in another forum which involves the determination of the same issue or controversy. *Paine v. Insurance Co.*, 11 R. I. 411; *Duffy v. Lytle*, 5 Watts, 120; *Child v. Powder Works*, 45 N. H. 547; *Allis v. Davidson*, 23 Minn. 442; *Poorman v. Mitchell*, 48 Mo. 45; *Railroad Co. v. Grayson*, 88 Ala. 572, 7 South. 122; *Rogers v. Odell*, 39 N. H. 452; *Bank of U. S. v. Merchants Bank of Baltimore*, 7 Gill, 415; *Westcott v. Edmunds*, 68 Pa. St. 34. In the case of *Sharon v. Terry*, 36 Fed. 337, 359, 360, it was conceded by Mr. Justice Field that a plaintiff has a right to sue on the same cause of action in different jurisdictions, where nothing more than a personal judgment against the defendant is demanded; and, if such be the law, we can see no sufficient reason for denying the right of a defendant who has been sued in one jurisdiction for the recovery of a personal judgment against him, to bring an action against the plaintiff in another jurisdiction, although that action is of such nature that it may require a determination of the same issue which is involved in the first suit. We are of opinion, therefore, that the New York judgment was entitled to full faith and credit when pleaded in the case at bar, notwithstanding the fact that it was rendered in another jurisdiction, in an action which was there commenced after the suit at bar had been instituted, and after the court, in the case in hand, had acquired jurisdiction of the parties by the issuance and service of process. The latter action was a suit in personam, in which the only relief sought, or that could be afforded, was a money judgment against the barge company for the alleged wrongful conversion of the stock. Moreover, the bringing of such suit was an irrevocable election on the part of the plaintiffs to abandon all claim to the stock, and in lieu thereof to demand a judgment for its value. *Butler v. Hildreth*, 5 Metc. (Mass.) 49; *Thompson v. Howard*, 31 Mich. 309; *Morris v. Rexford*, 18 N. Y. 552; *Town of Hartland v. Hackett*, 57 Vt. 96; *Rodermund v. Clark*, 46 N. Y. 354; *McDonald v. Pike*, 60 Wis. 222, 19 N. W. 44; *Kennedy v. Thorp*, 51 N. Y. 174, 176; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272. Under these circumstances, it must be conceded that the barge company was at liberty to bring an action to foreclose its alleged lien on the stock, if the laws of New York authorized a proceeding of that kind, and in so doing no rule of comity was violated. It must be further conceded, we think, that the conduct of the barge company in bringing the suit to foreclose its lien finds some justification in the fact that its right to sell the stock as pledgee had been challenged by the plaintiffs in the injunction suit brought in the supreme court of New York to restrain the sale, and that by such proceeding its title as pledgee had become clouded.

It is next insisted that the judgment of the supreme court of New York was void because the plea interposed by the defendant showed that the stock to which the suit in New York related was the stock of a New Jersey corporation, over which the courts of New York could exercise no jurisdiction or control. The rule of law is not

disputed that, in a suit commenced and prosecuted upon constructive or substituted service of process, the courts of a state or country may lawfully adjudicate on the title to real or personal property situated within its borders, or upon liens or claims against property which is so situated, provided they are authorized to do so by local statutes. *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557. It is contended, however, that this rule has no application to the stock of a foreign corporation, that stock certificates are mere evidence of the ownership of stock, and that the stock of a corporation can have no situs outside of the state in which the corporation was created. Speaking technically, it is true that a stock certificate is written evidence of a certain interest in corporate property. The same may be said of notes and bills. They are simply evidence of indebtedness on the part of the individuals or corporations who issue them. But in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property. *Allen v. Pegram*, 16 Iowa, 163, 173; 1 Cook, Stock, Stockh. & Corp. Law, § 12; *Schouler, Pers. Prop.* § 482; *Bank v. Byram* (Ill.) 22 N. E. 842. Stock certificates may be made the subject-matter of a suit in replevin, and, if they are dealt with wrongfully by the person having the possession thereof, a suit for the conversion of the stock may be maintained, as the present action and many others will serve to demonstrate. *McAllister v. Kuhn*, 96 U. S. 87, 89. In some states, certificates of stock in a foreign corporation are subject to garnishment (*Bank v. Mather* [Minn.] 62 N. W. 396), while in other states, owing in a measure to a difference in local laws, they are not subject to such process, or at least stock in a foreign corporation cannot be reached and subjected to the payment of debts merely by notice or process served upon the officers of the corporation while they are within the state in which the attachment proceedings are instituted (*Plimpton v. Bigelow*, 93 N. Y. 592). It must be admitted, however, that stock in a corporation may be transferred by the owner, without any action on the part of the corporation, so as to vest a good title thereto in the transferee, by a simple transfer of the stock certificate, since it is now well settled that regulations made by a corporation for the transfer of stock on its books are for its own convenience and protection; that they are simply cumulative, and do not operate as a prohibition against other modes of transfer. *Bank of Commerce v. Bank of Newport*, 27 U. S. App. 486, 11 C. C. A. 484, and 63 Fed. 898; *Horton v. Mercer*, 36 U. S. App. 234, 18 C. C. A. 18, and 71 Fed. 153; *McNeil v. Bank*, 46 N. Y. 331, and cases cited. The New York statute under which the suit in New York was instituted authorizes a proceeding on substituted service "where the complainant demands judgment that the defendant be excluded from a vested or contingent interest in, or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined

or limited, or otherwise affecting the title to such property." Code Civ. Proc. N. Y. 1877, § 438. In view of the foregoing considerations, we are of opinion that stock certificates are personal property, within the purview of the foregoing statute, and that when such certificates are held in pledge, or as collateral, within the state, the courts of that state have jurisdiction to establish the existence of a lien thereon, and to enforce the same by directing a sale of the property.

It is urged finally that the judgment of the supreme court of New York is a nullity, because the proper affidavit was not made and filed to authorize an order of publication or service of summons outside of the state of New York, that the filing of such affidavit was jurisdictional, and that the failure to file an affidavit stating all the facts necessary to be stated rendered all subsequent proceedings in the suit void. The order made by the New York court authorizing service outside of the state contains a recital showing that all the facts necessary to warrant the order had been duly proved to the satisfaction of the court by affidavits; and counsel for the defendant company insist that such recitals are in themselves sufficient in a collateral proceeding, although the affidavits upon which the order was obtained were inadvertently omitted from the judgment roll in making up the exemplified copy. We do not find it necessary, however, to notice the latter contention. The case was decided in the trial court on demurrer to the plea, and on a subsequent motion for judgment on the pleadings, after the plaintiffs had declined to take issue with the facts averred in the plea. There is nothing to show that the point last urged by the plaintiffs was raised or considered by the trial court, and in any event, this being a law case, we think we cannot go outside of the facts averred in the plea, and make an examination of exhibits attached to the answer. The plea itself avers that the New York "judgment and decree was rendered upon due and proper notice to the defendants"; also, that "the court then and there had and acquired jurisdiction of the subject-matter of said cause, and jurisdiction over said stock and notes, and of the parties defendant for the purpose of such action." These were material averments which were admitted by the demurrer to the plea, and they preclude us from examining the judgment roll with a view of ascertaining whether it supports the averments of the plea. It is also proper to add that counsel for the defendant company have appended to their brief copies of the affidavits on which the order of publication was obtained in the supreme court of New York, and they clearly satisfy every requirement of the statute, so that in any event there would seem to be no real foundation for the contention that the order of publication was not made upon a proper showing of jurisdictional facts. Finding no error in the record, the judgment of the circuit court must be affirmed, and it is so ordered.

DEXTER, HORTON & CO. v. SAYWARD.

(Circuit Court, D. Washington, N. D. February 12, 1897.)

LIABILITY OF SURETIES IN APPEAL BOND.

An appeal bond in an action in which an attachment has been levied operates as security only for the costs of appeal, where there has been no impairment of the security by waste of the property, and no burdens accruing upon it by nonpayment of taxes.

Memorandum of Decision on Motion for Judgment against Sureties on Supersedeas Bond.

E. F. Blaine and E. C. Hughes, for plaintiff.

J. B. Howe, Alfred Battle, and Thomas Burke, for defendant and his sureties.

HANFORD, District Judge. In this action a writ of attachment was issued and levied upon property of the defendant to secure the judgment, and the judgment rendered by this court contained an order to sell the attached property, and apply the proceeds to payment of the debt. The attached property has been sold for sums aggregating a great deal less than the amount of the judgment, and the plaintiff has now applied by motion for a judgment against the sureties on the supersedeas bond for the amount of the penalty thereof, which is less than the deficiency. In the case of *Hotel Co. v. Kountze*, 107 U. S. 378-402, 2 Sup. Ct. 911, the supreme court of the United States decided that an appeal bond in a foreclosure suit in the courts of the United States does not operate as security for the amount of the original decree, but only for the costs of appeal and damages by deterioration of the security by waste of the property, and burdens accruing upon it by nonpayment of taxes, and loss by fire. That is so because the judgment is otherwise secured by a lien upon the mortgaged property. In the opinion of the court the statutes and rules, and previous decisions of the supreme court, and the practice of the courts in this country from colonial times, and the practice in England, were carefully reviewed. The case is entitled to recognition as an authority by reason of the great research and learning appearing in the opinion, as well as for the fact that it is a declaration of the law by the highest court of this country. In this case the judgment was otherwise secured by the lien of the attachment, which was not disturbed by the proceedings upon the writ of error. Therefore it comes fairly within the rule of the decision of the supreme court in the case cited, and I am constrained by that authority to deny the relief applied for, without considering the other grounds of opposition suggested by counsel representing the defendant and the sureties upon the bond. It is not shown that the security was impaired during the pendency of the case in the circuit court of appeals (19 C. C. A. 176, 72 Fed. 758) by waste or destruction of any part of the attached property, nor that it became burdened by accruing taxes. Therefore the sureties are only liable for the costs upon the writ of error. The motion will be denied unless the plaintiff shall elect to take a judgment for the amount of the costs taxed on the writ of error.

AULTMAN & TAYLOR CO. v. SYME.

(Circuit Court of Appeals, Second Circuit. March 19, 1897.)

LIMITATION OF ACTIONS—NONRESIDENTS—ACTION ON JUDGMENT.

The New York Code of Civil Procedure provides (section 390) that when a cause of action, not involving the title to real property within the state, accrues against a person not then a resident of the state, an action cannot be brought thereon against him in a court of the state, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the state in certain cases. *Held*, that the words "the laws of his residence" in such statute refer to the residence of the debtor at the time the cause of action accrues, and not at the time the action is brought, and accordingly that when a judgment has been recovered by one nonresident of New York against another, in the state of the latter's residence, and the judgment debtor afterwards removes to New York, no action on the judgment can be maintained against him there by the nonresident creditor, after the expiration of the period of limitation provided by the laws of the state where the judgment was recovered and where the debtor resided at the time of its recovery.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error by plaintiff below to review a judgment of the circuit court, Southern district of New York. Upon the trial verdict was directed for the defendant.

Wm. H. Blymzer, for plaintiff in error.

Edward F. Brown, for defendant in error.

Before PECKHAM, Circuit Justice, and LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The action was commenced June 25, 1895, by service of summons on the defendant in the city of New York. Plaintiff, an Ohio corporation, sued upon two judgments obtained by it against defendant in courts of record in Louisiana on January 27, 1885, and February 2, 1885, respectively. Defendant was a resident of the state of Louisiana at the time of the commencement of each of the actions on which said judgments against him were obtained, and was a resident there at the time of the entry of both of said judgments, but about one year thereafter he removed to New York, where he has since resided. He pleaded the statute of limitations in bar of plaintiff's claims.

The New York Code of Civil Procedure provides:

"Sec. 376 (Amended Laws 1877, c. 416; Laws 1894, c. 307). When Satisfaction of Judgment Presumed. A final judgment or decree for a sum of money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the state, or heretofore or hereafter rendered in a court of record within the United States, or elsewhere, or hereafter docketed pursuant to the provisions of section thirty hundred and seventeen of this act, is presumed to be paid and satisfied, after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby."

"Sec. 390. Where a cause of action which does not involve the title to or possession of real property within the state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative, after the expiration of the time limited by the laws of his residence, for bringing a like action, except by a resident of the state, and in one of the following cases: (1) Where the cause of action originally accrued in favor of a resident of the state. (2) Where, before the expiration of the time so limited, the person in whose favor it originally accrued was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by a resident of the state."

The statute of the state of Louisiana (Rev. Civ. Code, art. 3547) provides:

"Art. 3547. All judgments for money, whether rendered within or without the state, shall be prescribed by the lapse of ten years from the rendition of such judgments: provided, however, that any party interested in any judgment may have the same revived at any time before it is prescribed by having a citation issued according to law, to the defendant or his representative, from the court which rendered the judgment, unless the defendant or his representative shows good cause why the judgment should not be revived, and if such defendant be absent, or not represented the court may appoint a curator ad hoc to represent him in the proceedings, upon which curator ad hoc the citation shall be served. Any judgment revived, as above provided, shall continue in full force for ten years from the date of the order of court reviving the same, and any judgment may be revived as often as the party or parties interested may desire."

Neither the plaintiff nor any party interested had taken any action or legal proceedings whatsoever to have said judgments revived. The New York Code of Civil Procedure further provides:

"Sec. 1913. Action upon Judgment Regulated. Except in a case where it is otherwise specially prescribed in this act, an action upon a judgment for a sum of money, rendered in a court of record of the state, cannot be maintained, between the original parties to the judgment, unless either: (1) It was rendered against the defendant by default, for want of an appearance, or pleading, and the summons was served upon him, otherwise than personally; or (2) the court in which the action is brought has previously made an order granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court, that personal notice cannot be given, with due diligence; in which case, notice may be given in such a manner as the court directs."

It would seem, therefore, that upon these judgments obtained in Louisiana, not being rendered in a court of record of the state of New York, action could have been commenced forthwith against the defendant in this state if found here. "As a general rule, a party has a right to sue on any cause of action which he holds. Any statutory exception to that right must be distinctly expressed. The language of the section above cited (section 71, Old Code Civ. Proc.) does not distinctly or by implication include judgments recovered in courts other than of this state. Nor do we think the policy of the statute applies to any others." *Vulcanite Co. v. Frisselle*, 22 Hun, 174; *Morton v. Palmer* (Sup.) 14 N. Y. Supp. 912. The cause of action against defendant on these two judgments, therefore, accrued as soon as they were entered.

The sole question presented here is one of construction of section 390, *supra*, viz.: Do the words "expiration of the time limited by the

laws of his residence" refer to the laws of the state where he resides when the action is brought or of the state where he resided when the cause of action accrued? The answer to such a question should be looked for in the decisions of this state. The section makes its first appearance in the Code of Civil Procedure. The Old Code contained no such provision. Until section 390 took effect, the statute of limitations of another state was no bar in this state, although the cause of action accrued in the other state and the parties were residents thereof until the statute had run. The manifest intention of the section was to provide that except where the interests of residents of this state were believed to require a different rule, which is embodied in the exceptions, our courts should not be used to enable a nonresident to commence an action here, when the cause of action accrued elsewhere, and has been completely barred by the laws of the parties' common domicile. Throop's notes to Code Civ. Proc. p. 160. The plaintiff refers to *Beer v. Simpson*, 65 Hun, 20, 19 N. Y. Supp. 578, but in that case it is stated in the opinion that it did not appear whether, when the Colorado judgment there sued on was entered, defendant was a resident of Colorado or of New York. Therefore, since he was a resident of New York when the action was brought, the statute of limitations of the latter state only applied. "It does not appear," says the court, "that the conditions, as to residence of either of the parties, * * * were such as to bring the case within section 390." The defendant refers to *Howe v. Welch*, which is reported in its successive stages in 2 How. Prac. (N. S.) 507, 3 How. Prac. (N. S.) 465, and 3 N. Y. St. Rep. 577. The final decision is by the general term of the New York common pleas, which holds that "the sole question to be tried was whether or not, in a court of the state of Iowa, an action against the defendant upon the note would have been barred by the statute of limitations of Iowa." And the opinion concludes: "If the debt were barred by the statute of Iowa, no action could be maintained in a court of this state; but, if the debt were not barred in Iowa, the statute of limitations of the state of New York might nevertheless been a bar in this action." In that case the cause of action accrued to one Gregg in February, 1869. Gregg was a resident of Ohio. He, and his Ohio executors after his death, held it till August, 1884, when the latter assigned to plaintiff, a resident of New York, who began suit in September, 1884. Defendant was a resident of Missouri when the cause of action accrued. Three years afterwards he removed to Iowa, where he resided over 10 years, and then removed to New York. In *Goldberg v. Lippmann* (City Ct. N. Y.) 25 N. Y. Supp. 1003, action was brought upon a note made by defendant to the order of plaintiff, and dated, "Denver, August 27, 1883." It does not appear whether or not defendant was then a resident of Denver, but when sued on the note in November, 1892, he averred a continuous residence in New York for more than six years prior to the commencement of the suit. The trial court refused to let him make proof of this averment, ruling that the law of Colorado, and not of New York, was applicable. It was sought to sustain this ruling, on appeal to the general term of the city court, by reference to section 390; but that court reversed, holding that the section "applies to a nonresident defendant sued here to

enable him to avail of his residence in the foreign state during the period of limitation there, as a defense in the action against him here." So far as we have been able to find, there is no adjudication in the state courts directly in point, and we are therefore left to find the meaning of the section in the language used. The use of the phrase "not then a resident of the [this] state" seems plainly to import that the person referred to thereafter becomes such resident. If this be so, and the phrase "laws of his residence" be construed to refer to the laws of such subsequent residence only, the enactment would be superfluous. As pointed out in *Howe v. Welch*, *supra*, he could avail of the statutes of this state by virtue of his residence here without any such provision. It seems to us very clear that the words "laws of his residence" apply to the residence already referred to, namely, his residence when the cause of action accrued. No reasons of public policy seem to call for any other interpretation. The rights of resident creditors are fully safeguarded by the exceptions, and there is nothing extraordinary or objectionable in a provision that when a cause of action arises between nonresidents of this state, and the laws of the state where it arose give it but a limited lifetime, which has expired, the removal of one of the parties into this state, to become a resident thereof, shall not operate to revive the cause of action in favor of the nonresident. The judgment of the circuit court is affirmed.

KRALL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

No. 320.

WATERS AND WATER COURSES ON PUBLIC LANDS—APPROPRIATION BY MINERS, ETC.—GOVERNMENT RESERVATIONS.

Miners and others, in the region where the artificial use of water is an absolute necessity, have the right, though not riparian proprietors, to appropriate for mining, irrigation, etc., the waters of nonnavigable streams flowing through the public lands, so far as not already appropriated by others; and the previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation. *Gilbert*, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Idaho.

Silas W. Moody, for appellant.

Jas. H. Forney, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The decision of the court below was in large measure based upon the idea that the government, as the sovereign power, has, in respect to the waters of nonnavigable streams upon the public lands, a superior right to any which citizens can acquire. "Save such Indian title to the public lands

as it chooses to recognize," said the court below in its opinion, "it has such absolute title to them and the waters therein that it may do with them as it will, including their withdrawal from all claim or appropriation by the citizen, when not already granted or conveyed." That the government, in the exercise of its sovereign power, may condemn for its uses the private property of the citizen, no one will deny; but we cannot at all agree that it can withdraw or take, without compensation, any right to the waters of a stream upon the public lands acquired by the citizen under its laws or by its sanction. By the ninth section of the act of July 26, 1866, congress provided that:

"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed." 14 Stat. 253.

But prior to the enactment of this statute it was the established doctrine of the supreme court of the United States—

"That rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866."

It was so expressly held in the case of *Broder v. Water Co.*, 101 U. S. 274, 276. And it was in that case further held that the act of July 26, 1866, was "rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." That doctrine of prior appropriation in respect to the waters upon the public lands was in full force when, according to the record in the case at bar, the plaintiff in error went upon the public lands and appropriated, for the purpose of irrigating his own land, a certain amount of the water of Cottonwood creek, there flowing. His appropriation was, of course, subject to the prior appropriation and use of the waters of the stream made by the government officials for the purposes of the military post reservation, which consisted of 640 acres of land, and was located on the stream in question below the point of the appellant's diversion. The military reservation was established by presidential proclamation in January, 1868,—subsequent not only to the time when the government, by its conduct in recognizing and encouraging the local custom of appropriating the waters of the nonnavigable streams upon the public lands for agricultural and other useful purposes, had become bound to recognize and protect a right so acquired, but subsequent, also, to the passage of the act of congress of July 26, 1866, making statutory recognition of that right, and confirming the holder in its continued use. The creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the government in respect to the waters of the nonnavigable streams

upon the public lands. They continued subject to appropriation for any useful purpose. The appropriation of a part of those waters for the uses of the military post secured it in the use of the portion so appropriated, but it did not take from others the right to make such appropriation above the reservation as would not interfere with its prior appropriation. In *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, relied on by the court below, the appropriator entered upon the land which the grantor of the plaintiff in that suit had previously entered in the land office, and to which he had acquired a vested right, and took the water there flowing, which the court held was part and parcel of the entryman's land, and which the appropriator could not take. We do not think the supreme court by that case intended to do away with the doctrine of prior appropriation as previously recognized by its decisions and by the statute of July 26, 1866; for in its opinion in *Sturr v. Beck* it expressly referred to that statute and to the cases of *Atchison v. Peterson*, 20 Wall. 507, 512, and *Broder v. Water Co.*, 101 U. S. 274, 276, the doctrine of which cases and of *Basey v. Gallagher*, 20 Wall. 682, in our opinion, requires a reversal of the judgment of the court below. If by the decision in *Sturr v. Beck* the court had intended to overrule its former decisions, it does not seem to us it would have cited them without disapproval. The judgment is reversed, and the cause remanded for further proceedings in accordance with the views here expressed.

GILBERT, Circuit Judge (dissenting). The appellant and the appellee sustain to one another neither the relation of riparian proprietors nor that of locators of water rights. The appellant is not a riparian owner. He has not acquired title from the United States to any lands adjacent to Cottonwood creek. He has gone upon the public land, and has diverted from the stream, through his ditch, a quantity of water, which he has conveyed thereby to other lands. By this act he could acquire no rights against the United States. What rights he may have acquired as against other appropriators of the waters of the same creek, it is not necessary to consider. The United States have, to a certain extent, recognized the rights to water by appropriation which were conferred under local laws, which rights are in some respect a departure from the doctrine of the common law respecting riparian owners, in cases where such appropriators had no title to the soil, but had applied the waters of streams upon public lands to a useful purpose; and the courts, in construing such laws, have generally decided that the first appropriator might divert water from the stream to any useful purpose, without obligation to return it to the stream. It was for the protection of rights upon the public lands, such as these, that had accrued without claim to the title or entry under the land laws, that the act of 1866, section 9 of which appears in the Revised Statutes as section 2339, was enacted. But there is nothing in the statute, nor in any decision of the courts construing the same, to uphold the doctrine that an appropriator of water upon the public lands of the United States may, by virtue of such

appropriation or the continued use of the water, acquire rights therein adverse to the United States. It needs no citation of authorities to sustain the proposition that, at the time when the land included within the military reservation was set apart by the government for a post, the United States was the sole proprietor of the land, and of the water of Cottonwood creek, which flowed through it. In so setting apart and reserving the land, there was undoubtedly included in the reservation the same right to the waters of the stream which traversed it, and the same right to have the stream flow as it was accustomed to flow, undiminished, that would have been conveyed to any grantee of the government in case of a grant of these lands. The right of such a grantee has been defined by the supreme court in the case of *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350. In that case a homestead entryman had entered lands over which the waters of a creek flowed in its natural channel. Subsequent to his entry, and prior to his conveyance of the homestead to Beck, Sturr went upon the homestead, and located a water right under the laws of Dakota, and constructed a ditch, and diverted the waters of the creek to his own adjacent land. It was contended on behalf of Sturr that the doctrine of the prior appropriation of water on the public land, and its beneficial use, protected him from interference as against the grantee of the homestead entryman; but the court held that the latter obtained a vested right to have the creek flow in its natural channel, by virtue of the homestead entry and his possession thereunder, and that the filing of a homestead entry upon land across which a stream of water runs in its natural channel, before a right or claim has vested in another to divert it therefrom, confers the right to have the stream continue to run in that channel, without diversion. The doctrine of that decision is distinct. It announces the general principles applicable to the diversion of water from a stream upon the public lands after a homestead right has attached below upon the same stream. The fact that the point of diversion was upon the homestead itself was not taken into account. The law is announced irrespective of that fact, and the case is decided as one purely of the invasion of the water rights acquired by the homestead settler, and not as a case of trespass upon the homestead itself. I find nothing in the decision inconsistent with the three prior decisions of the same court which were cited in the opinion with approval. The first of those cases is *Atchison v. Peterson*, 20 Wall. 507. In that case it was said that on the mineral lands of the public domain the doctrines of the common law concerning the rights of riparian proprietors to the use of running waters are modified, and that "the first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, as against the government, as the source of title, in all controversies relating to the property"; and the court decided that, in controversies between the first appropriator and parties subsequently claiming the water, the question for determination is whether his use and enjoyment of the water to the extent of his original appropriation has been impaired by the others. In *Basey v. Galla-*

gher, 20 Wall. 670, the decision goes no further than to hold that in the Pacific states and territories a right to running water on the public lands of the United States for the purpose of irrigation may be acquired by prior appropriation, as against parties not having the title of the government. In the opinion it was said:

"Neither party has any title from the United States. No question as to the right of prior appropriators can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government."

The event referred to in this quotation from the opinion did not occur until the case of *Sturr v. Beck*. In that case the court was called upon to consider the rights of one who had obtained a patent of the government, and I know of no way to explain away the plain import of the decision, however much its doctrine may be opposed to the trend of the decisions of the state courts in the Pacific states. In the third case (*Broder v. Water Co.*, 101 U. S. 274) it was held that a water right and canal upon the public lands, acquired and constructed in 1853, was by the act of July 26, 1866, made paramount to the right of one who thereafter acquired the title to the lands, whether he obtained title by pre-emption, or under the grant to the Central Pacific Railroad Company made on July 2, 1864, in which grant there was confirmed to the owners of such canals a pre-existing right. Recurring to the decision in *Sturr v. Beck*, it may be said that, if the rights of a grantee from the United States under the public land laws are as there defined, it necessarily follows that the reservation to its own use by the United States of public land which is traversed by a running stream, before any rights have accrued to divert the water from its natural channel, includes the reservation of the water, and the right to have it flow as it was accustomed to flow, and that if the appellant in this case acquired, by his appropriation of the waters from the creek, and the diversion thereof, and the continued use of the same, any right to the water, it is not adverse to the rights of the United States, and cannot affect the right of the government to demand the unrestricted flow of the water through the reservation, as it flowed at the time when it was so set apart for a military post. As against this reservation of property and the incidents thereto, the appellant has acquired no rights whatever. I think the decree, therefore, should be affirmed.

PHOENIX INS. CO. v. WARTTEMBERG.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

FIRE INSURANCE—MISREPRESENTATIONS IN APPLICATION—INTERPRETATION OF FACTS BY AGENT.

When an applicant for insurance has told the soliciting agent of the insurance company the facts in relation to an incumbrance on the property it is proposed to insure, and the agent, asserting that such facts are not material, has inserted in the application which is signed by the applicant a statement that there is no incumbrance on the property, but there is nothing to show that the company would have declined the risk if it had

known of the incumbrance, nor that either the insured or the agent perpetrated any fraud on the company, the insurance company, in case of a loss, is liable upon a policy issued upon such application, notwithstanding it contains a stipulation that any false answer in the application should render it void. *Insurance Co. v. Fletcher*, 6 Sup. Ct. 837, 117 U. S. 519, distinguished.

In Error to the Circuit Court of the United States for the Northern Division of the District of Idaho.

Forney, Smith & Moore and James H. Forney, for plaintiff in error.
Eugene O'Neill and James E. Babb, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The defendant in error was the plaintiff in an action which was brought against the Phoenix Insurance Company to recover, upon a policy of fire insurance, the loss and damage by fire to the property of Peter Thompson. On October 23, 1893, Peter Thompson made a written application for insurance to the amount of \$3,500, upon his barn, hay, grain header, binder, and other farming implements, with the loss, if any, payable to C. Warttemberg, mortgagee. One of the defenses made by the insurance company to the action was that the insured, in his written application, had falsely warranted that the property upon which the insurance was sought was not incumbered. The insurance was obtained through one R. D. McConnell an agent of the insurance company residing at Moscow, Idaho, and, when the policy was delivered to the insured, it bore the indorsement, "McConnell & Cobbs, Agents." The application contained the following:

"It is expressly understood and agreed that the valuation of all the property herein described is made by the applicant, and, if this blank be filled out by the agent, it is done at dictation of applicant, and every statement herein contained is to be deemed his own. This company will be bound by no statement made to or by the agent, unless embodied in writing herein."

The policy contained also the following:

"This insurance is based upon the representation contained in the assured's application of even number herewith, on file in the company's office in San Francisco, each and every statement of which is hereby specifically made and warranted and a part hereof; and it is agreed that, if any false statements are made in said application, this policy shall be void."

And the following:

"No agent or employé of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, except only the general agent at San Francisco. Any waiver or alteration by them must be in writing."

At the trial, the plaintiff, in answer to the question, "What, if any, answer was made to this question in the application, 'Is the personal property incumbered? If so, in what manner and what amount?'" testified as follows:

"A. I told him it was mortgaged to John P. Volmer, First National Bank of Lewiston, for \$1,000. Q. State the whole conversation at that time. A. And he says, 'Are you going to pay it?' I told him I was going to pay it off right away, and he said that did not make any material difference if I was going to pay it off right away, and he would write the word, 'No.'"

It was proven that at the time the insurance was applied for, on October 23, 1893, there was upon a portion of the personal property a mortgage for \$1,000. On October 27th the insured paid \$500 on account of the mortgage debt, and on November 20th made a further payment of \$300, leaving about \$300 still due on principal and interest at the time of the fire, which occurred on December 21, 1893. The insured testified, further, that the agent of the insurance company came to his place, and wanted to insure his property, and that, when he finally agreed to insure, the agent "made out an application and insured the property"; that the application was not read to him at the time; that he had dealings with no other person than the agent with reference to the insurance; and that the agent at the time claimed to represent the Phoenix Insurance Company of Brooklyn; and that the policy was sent to him by the agent. There is no evidence that the agent gave any information to the insured concerning the limitations of his agency or the nature thereof. It appeared, upon his own testimony, that the agent had authority to write commercial risks for the Phoenix Insurance Company in towns in Idaho, such as Moscow, Kendrick, Leland, and other places, but that he had no authority to write insurance on farm risks; and that he was required to forward all applications on farm risks for the company's inspection and acceptance. The jury returned a verdict for the plaintiff for \$1,800. Under the instructions of the court, they found by their verdict that the conversation which the plaintiff alleged was had between him and the agent occurred as by him detailed. On the submission of the case to the jury, the plaintiff in error requested the court to instruct the jury to return a verdict for the defendant. The request was denied, and an exception was allowed, and thereon is based the principal assignment of error on which the case is presented in this court.

The plaintiff in error cites the case of *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, and urges that, under its authority, we are compelled to reverse the judgment of the trial court. In that case the applicant for life insurance made his application in St. Louis, to an agent of a New York insurance company. He made answers to the questions propounded to him by the agent, which, if correctly written down, would have made a material difference in the nature of the risk. The agent, without his knowledge, wrote down false answers, concealing the truth. The applicant signed the application without reading it, and the agent transmitted it to the company. Thereupon a policy was issued which contained the express condition that the answers in the application were a part of the policy, and that no statement made to the agent not contained in the application should be binding on the company. A copy of the answers, with these conditions conspicuously printed upon it, accompanied the policy. It was held that the policy was void. Mr. Justice Field, in delivering the opinion of the court, said:

"It is conceded that the statements and representations contained in the answers, as written, of the assured, to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the

face of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office. * * * It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others."

The court proceeded to distinguish the case from *Insurance Co. v. Wilkinson*, 13 Wall. 222, and from *Insurance Co. v. Mahone*, 21 Wall. 152, and said:

"In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Here the power of the agent was limited, and notice of such limitation given by being embodied in the application which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

It is contended by the defendant in error that the doctrine of the *Fletcher Case* has been modified by subsequent decisions of the supreme court, and we are referred to *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, in support of that proposition. That was a case in its facts and principles essentially identical with the case now before the court. The applicant for insurance stated in his application, in answer to the question whether he had other insurance, that he had certain certificates of membership in co-operative societies. The agent informed him that he did not consider such certificates insurance, and gave his reasons for so stating, and wrote the answer "No" in the application. But the decision of the court involved no modification of the doctrine of the *Fletcher Case*. It was based expressly upon the statute of Iowa, in which state the contract of insurance had been made, providing that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing the policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." The court held that an agent procuring an application for life insurance in that state became, by force of the statute, the agent of the company, and that if he filled up the application, or made representations, or gave advice as to the character of the answers to be given by the applicant, his acts in these respects were the acts of the insurer. There is no intimation in the opinion of what would have been the ruling of the court in the absence of a statute. In Idaho, unfortunately, there is no statute similar to that of Iowa. We find no other decision of the supreme court subsequent to the *Fletcher Case* which in any way modifies that case. But we are not

disposed to apply the doctrine of that case further than to the state of facts under which the decision was rendered. The controlling fact in that case was that fraud had been perpetrated upon the insurance company by its agent, whether with or without the connivance of the assured. The fraud consisted in the concealment of facts by the agent, who wrote false answers to the questions which he propounded to the applicant. In the opinion it is said that, if the company had been aware of the true state of facts, the risk would probably not have been assumed. There is nothing in the record in the case now before us to show that the insurance company would have declined the risk if it had been aware of the fact that a portion of the property on which insurance was sought was under a temporary incumbrance, which was to be shortly paid off by the insured. Nor is there anything in the record to show that either the insured or the agent perpetrated fraud upon the insurance company. The applicant truthfully stated the facts to the agent, and the latter advised him concerning the force of those facts, and placed a construction upon them by writing the answer as he did in the printed application. The clause of the contract of insurance by the force of which it is contended that the misstatement contained in the application amounts to a breach of warranty is this: "This company will be bound by no statement made to or by the agent unless embodied in writing herein;" and the stipulation of the policy to the effect that any false statement in the application should render the policy void. It is not stated, either in the policy or in the application or in the evidence, that the agent was not the agent of the insurance company. The jury have found, in effect, that the insured stated the facts concerning the incumbrance on his property truthfully and in good faith, and that an answer different from that which he gave was written in the application by the agent, and assented to by the insured, in consequence of his trust and confidence in the superior knowledge and information of the agent. It appears also that the insured, in good faith, was proceeding to pay off, and had paid off, the greater portion of the incumbrance before the fire occurred, which was but two months after the date of the application. It would be a harsh doctrine, indeed, to hold that insurance companies shall have the opportunity of perpetrating such wrong and injustice as would result from the application of the ruling in the Fletcher Case to the facts presented in the present case. It is well known that insurance is usually effected, especially upon farm property, by agents who travel through the country supplied with the printed blanks of the insurance companies for the purpose of taking applications, and forwarding them to their home offices. The applicant for insurance naturally relies upon the statements of him whose business it is to procure insurance, and the agent should not have it in his power, while obtaining premiums from the insured for the enrichment of his company, to absolve the latter from liability on its policies, provided he can, either honestly or otherwise, induce the applicant to adopt in his application such construction as the agent may persuade him to believe is proper to be placed upon the facts which he has honestly detailed.

The judgment will be affirmed, with costs to the defendant in error.

SPANG v. RAINEY.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. SALES—MEANING OF "GENERAL ADVANCE IN MARKET PRICE."

Under a contract for the sale of coke at 90 cents per ton, "said price to continue until there may be a general advance in the market price of coke, then and in that event the price to be the lowest rate at which coke is sold to the larger and better consumers of coke in the market," the expression "general advance in the market price of coke," must be regarded as meaning a general advance over the 90 cents per ton named in the contract, and not a general advance over what was the market price of coke at the time the contract was made.

2. SAME.

In determining whether there has been "a general advance in the market price of coke," within the meaning of the contract, proper regard must be given to all the different ways in which coke is bought and sold, and the advance, to constitute a general one, must be such according to the trade acceptance, and the general understanding of buyers and sellers, and not a special advance by a limited number of dealers, or by a combination taking advantage of the necessities of a limited class of customers.

3. SAME—MEANING OF "LOWEST RATE TO LARGER AND BETTER CONSUMERS."

The obligation to pay plaintiff the lowest rate paid by the larger and better consumers does not mean absolutely the lowest rates paid by any consumer, but the lowest rates prevailing among such consumers in general.

This is a writ of error to the circuit court, Southern district of New York, to review a judgment of that court entered April 21, 1896, against the plaintiff in error, who was defendant below. The judgment was entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below.

John E. Parsons, for plaintiff in error.

Wm. B. Hornblower, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The defendant was one of several partners who owned and operated a furnace under the name of the Isabella Furnace Company, and the action was brought to recover the price of coke delivered by the plaintiff under the following contract:

"Memorandum of agreement made this third day of May, eighteen hundred ninety-four, and to continue until the third day of February, eighteen hundred ninety-five, by and between W. J. Rainey, of Cleveland, Ohio, and Isabella Furnace Co., of Pittsburgh, Penna.: The said W. J. Rainey bargains and agrees to supply the said Isabella Furnace Co. coke to the extent of about fifteen car loads daily, at the rate of ninety (90) cents per ton of 2,000 pounds, railroad weight, at the mines in the Connellsville region,—good, merchantable coke, equal to the best made by the said W. J. Rainey. Said price to continue until there may be a general advance in the market price of coke. Then and in that event the price shall be the lowest rate at which coke is sold to the larger and better consumers of coke in the market. Settlements to be made in cash, say the 25th of the month following previous month's delivery. This contract to be held in abeyance in the event of strikes, or the inability of W. J. Rainey to produce coke.

"W. J. Rainey, per W. T. Rainey.

"Isabella Furnace Co."

There was no dispute as to the quantity delivered under this contract. The jury found the price payable therefor to be 90 cents up to May 10, 1894, \$2.50 from that date to and including June 30, 1894, and \$1.50 from that date to and including August 4, 1894, the date of the last delivery. The matters in dispute upon the proofs were whether there had been a "general advance in the market price of coke," within the meaning of the contract, and, if so, what, at the time of the several deliveries, was the "lowest rate at which coke was sold to the larger and better consumers." With the weight of the evidence bearing upon these points this court has no concern. That is a matter for the consideration of the trial judge upon motion for a new trial, and his disposition of such motion is not reviewable by writ of error. The only questions to be determined here are whether there was any evidence to go to the jury sustaining the plaintiff's contention; whether the case was submitted to the jury with correct instructions; and whether there was any harmful error in the admission or rejection of evidence.

It is assigned as error that the court refused to instruct the jury that by the expression, "a general advance in the market price of coke," as used in the contract, is meant a general advance over what was the market price of coke at the time the contract was made, on May 3, 1894, and not simply over the 90 cents per ton named in the contract. We see no reason for giving any such forced and awkward construction to the instrument. The contract evidently provides for a price initially of 90 cents, but which is to advance or recede (not in any event below 90 cents) so as to conform to the general market price, i. e. to the lowest market rate paid by the larger and better consumers. There was abundant evidence that, subsequently to the making of the contract, coke was bought by the larger and better consumers at prices above 90 cents, and as high as those found by the jury. To understand the theory upon which defendant contends that these purchases should not have been considered by the jury, it is necessary briefly to state some peculiarities of the business which were disclosed by the testimony. The great bulk of the output of coke from the region in question was supplied by three concerns,—the H. C. Frick Company, the McClure Company, and the plaintiff. There were some smaller concerns which produced it in limited quantities. The coke is bought by those who operate blast furnaces, and is absolutely necessary to the running of such furnaces. Since the assurance of a steady supply is important to the furnace men, they undertake to secure it in most cases by making contracts with the coke producers for deliveries of specified quantities during some specified time,—either a year or some fraction of a year. The price is definitely fixed in these contracts at some uniform rate, which presumably is what the seller thinks he can safely sell at, averaging any expected differences in the cost of production during the period. These are spoken of in the record as "time sales" or "time contracts." If, however, for any reason, a user of coke needs more than he can obtain under his time contracts, either because he is using more than he has provided for, or because he is not receiving all he bargained for under such contracts, he goes into the market and buys what he needs for

immediate delivery, or for delivery during some short future period. How much he will thus buy depends upon his needs,—that is, upon the amount of shortage he has to make up,—and no doubt, to some extent, upon the price he may have to pay for it. These sales are referred to in the record as “spot sales” or “emergency sales.” The time contracts contain a strike clause similar to that which is found in the contract in suit, so that purchasers of coke can never be sure that they will receive all they have provided for under their time contracts at the price fixed therein. They are liable at any time, in the event of a strike, to be compelled to pick up their coke where they can, and at prices regulated by the supply and demand. At the time the contract in suit was made, a strike was on, and its effect began to be felt immediately. During the month of May the H. C. Frick Company was able to produce only 2,557 car loads of coke, as against an ordinary running capacity of 19,000 to 22,000 car loads. Its condition improved subsequently, but even in the month of July it was able to produce barely 50 per cent. of its regular output. The consequence was that although the blast furnaces which it had contracted to supply were short of coke, were demanding coke, and in some cases had to stop business because they did not have coke, the Frick Company was obliged to avail of the strike clause in its existing contracts, not being able to carry them out except as it was protected by such clause. It disposed of the coke it did produce by distributing it around among such of its regular time customers as, for some sufficient reason, it chose to favor, at the price it had agreed to charge. The strike greatly reduced the output of the McClure Company. It also supplied some little coke under time contracts at a fixed rate, and, in the case of one time contract, at market rates, under which deliveries were made at \$1.10 and \$1.25. But apparently it made no other sales. Except for the sales, or rather the deliveries, under time contracts of the H. C. Frick Company, and these transactions of the McClure Company, the testimony as to sales and prices during the period in question relates to so-called spot or emergency sales. So large is the plant of the H. C. Frick that, despite the great reduction in its output, its deliveries during that period exceeded those of all other producers put together. This circumstance, however, would not justify the request to charge which the circuit judge refused, viz. that the jury cannot adopt any higher rate than that at which the H. C. Frick Company sold to its customers during said period. Other considerations than such as usually fix the price of a commodity, viz. the supply and the demand, may well have operated to induce the continuance of deliveries under these contracts at less than general market price, just as they undoubtedly did induce the favoring of some of its customers by letting them have coke when none was delivered to others. Upon all the evidence as to market price, the court charged most favorably to defendant, as will be seen from the following excerpts:

“Now, looking at this contract as a whole, what was the apparent intention of the parties? Mr. Rainey had the right at any time to cease supplying coke, in the event of a strike; but certainly it can hardly be believed that it was the intention to permit Mr. Rainey, instead of availing himself of that condition, to produce a market price himself, and compel the defendants

to accede to it. It was intended—and the words used are significant—that, if there was any ‘general advance’ in the market price, then that should be the basis of the further price to be paid by the defendants. Not a special advance made by Mr. Rainey, or by any combination, if you please, who, by reason of exceptional circumstances, might temporarily create a corner in the market, or take advantage of the necessities of a limited class of customers; but it was to be a general advance in the market, according to the trade acceptance and the general understanding of buyers and sellers. The first question for you to determine in this case is whether there was this advance. The plaintiff insists that there was a general advance, commencing on the 10th of May; and upon that theory he insists that he is entitled to recover \$3 a ton for the coke during the months of May and June, and \$1.50 for the coke in July and the rest of the time through which the deliveries were continued. It is incumbent upon the plaintiff to establish by a fair preponderance of evidence—the burden of proof being upon him—that there was a general advance in the market price of coke, within the meaning of the contract, as I have explained that meaning to you. That is the fundamental proposition which it is incumbent upon him to establish. The first issue, therefore, for you to determine, is whether there was a general advance,—not an advance created merely by Mr. Rainey, or created by a limited number of dealers, neither an advance in which all sellers and buyers participated, but a general advance, in the acceptance and understanding of dealers in coke. I shall not advert in any detail to the evidence on that question. Mr. Rainey has given evidence as to many transactions of his own, some of which were with large consumers, and has produced the evidence of other persons in support of the theory that this advance took place. On the other hand, the defendants have produced their witnesses. Perhaps I ought to refer to the testimony of Mr. Magee, as he represented the largest coke producer in the country [the H. C. Frick Company] during the life of this contract. Mr. Magee testified that there was no advance. In June, according to his testimony, the production of his concern increased considerably, and it increased more in July, but the concern could not fill its contracts. It was not under obligation to fill its contracts, because, as seems to be the case with all these contracts, there was a strike clause inserted in them. But nevertheless, according to his testimony, his company did go on distributing coke as best it could among its customers, and renewing contracts made several months before, some of which expired in June and some in July,—renewing these contracts on the basis of a dollar per ton for coke. I shall not refer to the other testimony on the part of the defendants. I leave it to you, as a question of fact, to say whether, within the meaning of the contract as I have explained it to you, there was a general advance in the market price of coke during the life of the contract between the parties. If there was, then you reach the second question in the case. If there was a general advance in the market price, then under this contract the defendants were obligated to pay the plaintiff the lowest rates paid by the larger and better consumers. That does not mean absolutely the lowest rates paid by any consumer, but it means the lowest rates prevailing among such consumers in general.”

The defendant assigns it as error that the court charged as above:

“That in determining the market price the jury must consider what consumers were willing to pay in the regular course of business. A general advance in price means a state of demand and supply which leads the larger and better consumers in general to pay the advance.”

It is contended that this clear and ordinarily accurate statement of what constitutes a “market price” was improper in this case, because it did not exclude all spot sales from the consideration of the jury. Upon the theory that spot sales were to be wholly disregarded, defendants asked the court to instruct the jury that there was no general advance, or that the “lowest rate,” under the contract could not exceed one dollar per ton, which was the rate at which the

Frick Company sold to its customers. Defendant also requested the court to charge:

"That, in considering this question as to whether there was or was not a general advance in the market price of coke, the jury are not to adopt as a criterion of market price the high prices obtained by the plaintiff at spot sales or emergency sales of coke, nor the increased cost to the plaintiff or others of producing coke."

The court modified this request, and instructed the jury:

"That, in considering the question whether there was or was not a general advance in the market price, the jury are not necessarily to adopt as a criterion of market price the high prices obtained by the plaintiff at spot sales or emergency sales, or the increased cost of producing the coke, but the jury are to take into consideration all the facts which have been recited."

To which defendant excepted. Defendant's theory was further advanced in a request which the court refused to charge:

"That the jury are to bear in mind that the contract in this case is a contract running for nine months, and they must look especially to see whether there was any advance in prices in like contracts, and, if so, how much."

We find nothing in the contract which will warrant the construction defendant seeks to put upon it. It refers to "a general advance in the market price of coke," not an advance exclusively in one-year coke, or in nine-months coke, or in six-months, or in three or two or one, or in spot. Proper consideration may be given to all the different ways in which coke is bought and sold, and the determination what the general market price is at any particular time cannot be properly arrived at without considering all. If at one time all the purchasers buy under time contracts only, and there are no spot sales at all, naturally the price under time contracts would be the only one to consider. If at some other time the purchasers cease to procure any coke under time contracts, and buy what they need at spot sales, the price of spot coke would be the only one to consider, for on such sales only would buyers and sellers come together to make a market. Evidently the jury in this case reached the conclusion that this was exactly the situation; that the deliveries under old contracts to a favored few were not transactions of a kind to make a general market, and that the real price was to be found where persons unsupplied with coke, and wishing to purchase, encountered those who had coke and were willing to sell. The evidence in the case would fairly warrant such a conclusion. Defendant refers to authorities holding that the retail price is not to be taken by a jury as the market price, in settling transactions between litigants concerning wholesale quantities. But if the supply of any particular commodity should be so greatly reduced that buyers generally who were accustomed to purchase it by the thousand could only procure it by the ten, the market price would be that produced by their demand, although, relatively to their former transactions, the quantity bought by each purchaser might be insignificant. The charge correctly defined the phrase "a general advance in the market price," and the exceptions to refusal to charge as requested are unsound.

Defendant further requested the court to charge:

"That the price for which Frick & Co., the largest producers of coke in the Connellsville region, and who supplied more coke to the market than any other producer during the period from May 3, 1894, to August 4, 1894, sold their coke, should have great, if not controlling, weight with the jury in determining whether or not there was a general advance in the market price of coke."

The court had sufficiently instructed the jury as to this evidence in the clause above quoted from the charge, referring to the testimony of Magee. For the reasons already stated, we do not think it was entitled to any great weight in determining whether or not there was a general advance in the market price, in view of the statement of the witness that they sold only to their regular customers under contract, trying to strain a point so as to oblige any person who had been a customer for any length of time, and whose situation was such that he was in great distress, and that the Frick Company chose to sell only to such customers, and at one dollar a ton, the price already agreed upon, when, as the witness conceded, if they had offered coke on the market they could have got more for it than their old customers paid them.

We find no harmful error in the admission of evidence of actual sales, which was excepted to, in view of the fact that when the case was finally closed on both sides the jury had been furnished with the facts as to substantially all sales of Connellsville coke to the larger and better consumers during the entire period in question. The judgment of the circuit court is affirmed.

MURPHY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 309.

1. GOVERNMENT EMPLOYEES—FOREMAN AT NAVY YARD—SUSPENSION—COMPENSATION.

One who is employed as foreman mason at a navy yard at a per diem compensation is not entitled to compensation except for the time during which he actually renders services; and the fact that, after being suspended by the commandant, he holds himself ready to perform such services, gives him no claim against the government.

2. SAME—INVESTIGATION OF CHARGES.

The suspension of such an employé by the commandant is, in effect, his discharge; and the fact that after his suspension a board is appointed to investigate charges against him is no recognition of his status as an employé, and gives him no right to compensation, nor to a recovery of sums expended in traveling to attend before the board.

In Error to the Circuit Court of the United States for the Northern District of California.

H. B. M. Miller, for plaintiff in error.

Samuel Knight, Asst. U. S. Atty.

Before ROSS, Circuit Judge, and HAWLEY and MORROW, District Judges.

ROSS, Circuit Judge. This was an action by the plaintiff in error, as plaintiff in the court below, under and by virtue of the act of congress entitled "An act to provide for the bringing of suits against the government of the United States," approved March 3, 1887 (24 Stat. 505). To the third amended petition the government's demurrer was sustained, and, the plaintiff declining to further amend, his petition was dismissed. The writ of error brings up for review the ruling of the court below in the respect stated.

The petition contains two counts. In the first the plaintiff alleged, in substance, that on or about July 23, 1885, he was regularly appointed, by the commandant of the United States navy yard at Mare Island, Cal., foreman mason of the yard and dock department thereof, "at the understood and agreed compensation of six dollars per day"; that under and by virtue of that appointment the plaintiff entered upon the performance of his duties as such foreman mason, and continued in the performance thereof to and including September 29, 1885, when he was, by the commandant, suspended from his position by reason of certain charges preferred against him by the civil engineer of the yard; that thereafter, and on November 19, 1885, the acting secretary of the navy appointed a board to investigate the charges, and ordered that it meet at the yard at Mare Island, November 30, 1885, for that purpose, and report to the department at Washington all the facts deemed to be established by the evidence taken; that the board of investigation met in accordance with the order of the secretary, and, after various sessions, at which witnesses were examined, made its report to the department, recommending the dismissal of the plaintiff from his position of foreman mason. "But," proceeded the petition, "said recommendation was never carried into effect, and said plaintiff has never been discharged from his said position, but has been, and still is, deprived from fulfilling the duties thereof." It will be thus seen that the petition itself showed that at no time after September 29, 1885, did the plaintiff render any service to the United States as foreman mason of the Mare Island navy yard. The allegation, also contained in the petition, that he has, ever since his suspension, held himself in readiness to perform the duties of the position, is of no force or effect, so far as concerns the first count of his petition, by which he seeks to recover "compensation as such foreman mason" from October 1, 1885, to the time of the bringing of the suit, September 28, 1891. As he never rendered the defendant any service during that period, it is plain that he is not entitled to any compensation. Compensation for such services only follows services rendered. Such, too, is the declaration of the statute applicable to and controlling such positions as foreman mason of a navy yard. Section 1545 of the Revised Statutes reads: "Salaries shall not be paid to any of the employes of the navy yards except those who are designated in the estimates. . All other persons shall receive a per diem compensation for the time during which they may be actually employed." The plaintiff not being an officer or a salaried employé, but, as shown by the petition itself, a person engaged at a per diem compensation, he was, under the express provision of the second clause of the section of the statute quoted, entitled to such

compensation for the time during which he was actually employed, but to that only. Moreover, his suspension by the commandant of the navy yard was, as was held by the court below, in effect his discharge from the employment in which he was engaged. It is not pretended that he was employed for any definite time, but, on the contrary, according to the express allegations of the petition he was engaged at the agreed compensation of six dollars per diem, which was, in legal effect, an employment by the day. The fact that subsequent to his suspension the secretary of the navy appointed a board to investigate and report upon the charges against him was no recognition of his status as a then employé of the government, and certainly could not operate to confer upon him the right to compensation for the time during which he was not actually employed.

The second count of the petition embodied the averments already considered, and therefore also showed that the plaintiff was, in effect, discharged from his employment as foreman mason of the navy yard in question September 29, 1885. That being so, the further allegation contained in the second count that the plaintiff, "while such foreman mason as aforesaid, and while acting under the orders of the acting secretary of the navy of the United States, was ordered by said acting secretary of the navy to, and did, travel from the city of Washington, D. C., to the said Mare Island navy yard, in California, for the purpose of being in attendance upon said so-called 'board of investigation,' and that he was thereby compelled to, and did, expend in obeying said order the sum of \$240 as traveling expenses," is ineffectual to create a valid demand for such expenses against the government. As the specific allegations embodied in the second as well as in the first count of the petition showed that the plaintiff was suspended, and, in effect, discharged, from his position, the allegation last quoted is far from showing that there was any order of the secretary to the plaintiff in his capacity of employé of the government, or that the plaintiff was then under any obligation to obey any order, or that he expended any money in the service of the United States. The judgment is affirmed.

ST. LOUIS & S. F. RY. CO. et al. v. MILES.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

1. RAILROADS—NEGLIGENCE—INJURIES TO PERSONS ON TRACK.

B. was an employé of a lumber company, engaged in handling lumber at its sheds, situated on both sides of a spur track leading from defendant's line of railroad. The spur was built on land of the lumber company for the purpose of enabling the defendant railroad company to reach the lumber company's mill, and take away lumber. It was the custom of the lumber company's employés, including B., to place a tramway across the track from one shed to the other, when the track was not in use, and to remove it by getting down on the track, and pushing it out of the way, when a train entered the spur. The railroad company's switching crew, who moved trains in and out of the spur, knew of this custom of the lumber company's employés. *Held*, that B. and his fellow employés, while on the spur track, engaged in moving the tramway out of the way of a train entering the spur, were not trespassers, and the railroad company was under an obliga-

tion to them to exercise ordinary care in moving its engines and cars so as to avoid injuring them.

2. SAME.

A switching engine entered the spur from the main track to remove some cars of lumber, and the switching crew left the switch open behind it, though they knew a fast train would be due at the switch in a few minutes. While the switching engine stood on the spur, and B. and his fellow employees, who were ignorant of the condition of the switch, were moving the tramway out of its way, the fast train ran into the open switch, collided with the switching engine, and drove it upon B., killing him. Held, that the gross negligence of the switching crew in leaving the switch open, was the sole cause of the accident, which could not have been prevented by any precaution B. was bound to take with reference to the presence of the switching engine, and there was no question of contributory negligence in the case.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

L. F. Parker and B. R. Davidson, for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is the second appearance of this case in this court on a writ of error, which was sued out on each occasion by the St. Louis & San Francisco Railway Company et al., the plaintiffs in error, who were the defendants in the trial court. A. F. Miles, as administrator of the estate of James W. Brown, deceased, sued the defendant railroad company and its receivers for negligently causing the death of his intestate at Van Buren, Ark., on November 21, 1893. On the former hearing the case was submitted in connection with two other cases of the same character, which grew out of the same accident. *Railway Co. v. Bennett's Adm'r*, 32 U. S. App. 621, 16 C. C. A. 300, and 69 Fed. 525; *Railway Co. v. Brown's Adm'r*, 32 U. S. App. 632, 16 C. C. A. 682, and 69 Fed. 530; *Railway Co. v. Spoon's Adm'r*, 32 U. S. App. 633, 16 C. C. A. 680, and 69 Fed. 531. The judgment in the case at bar against the defendant railway company was reversed on the former hearing for reasons which are fully stated in *Railway Co. v. Bennett's Adm'r*, 32 U. S. App. 621, 16 C. C. A. 300, and 69 Fed. 525. We quote from the statement in the Bennett Case certain facts disclosed by the present record, which will serve to explain the circumstances under which the injuries resulting in the death of the plaintiff's intestate were sustained:

"The scene of the accident was a spur track of the railway company, which extended from its main track at Van Buren, in the state of Arkansas, between two long lumber sheds that belonged to the Long-Bell Lumber Company. The platforms of these lumber sheds were about four feet high, and the space between them in which the cars ran upon this spur track was about sixteen feet wide. It was about 4 o'clock in the afternoon of a November day in 1893. A switching engine, with its crew, had entered the spur from the main track for the purpose of moving cars on the former, and the switch had been left open. There were about fourteen freight cars upon the spur track, and between the two sheds there was an opening between two of these cars which had been made before the switching engine came upon the track. This space was about twenty feet wide. In it the employees of the lumber company had placed a tramway, one end of which rested upon timbers under the platform upon one

side of the track, and the other upon the platform upon the other side. When the railway company was not using the spur track, this tramway was used by the lumber company to enable its employes to transfer lumber across the track from one of its sheds to the other. Whenever a switching engine came upon this spur track to move cars, it had been the custom for those employes of the lumber company who happened to be nearest to the tramway to immediately jump down upon the railroad track in the space between the cars and push the tramway back under one of the platforms. At the time of this accident there were some box cars between the engine and the space where the tramway was, and about a dozen of them beyond that space. * * * The deceased was an employe of the lumber company. When the switching engine came in upon the spur track, he and five other employes of that company jumped down upon the track between the cars, and began to push the tramway back under the platform of the shed. From this hole between the lumber sheds and the platform they could not see a train or engine approaching on the railroad tracks, nor could those approaching upon the tracks see them. * * * While they were in this dangerous situation, a freight train came along the main track at a dangerous rate of speed, ran into the open switch, drove the switching engine and cars in upon the spur track, and the deceased and three of his co-laborers were caught between the cars, and killed."

On the former hearing it did not appear that any of the officers or employes of the defendant company had any knowledge that the Long-Bell Lumber Company, or its employes, had been in the habit of laying the tramway across the spur track between the lumber sheds for the purpose of moving lumber to and fro. Neither did it appear that on the occasion of the accident the presence of the deceased and his fellow laborers on the spur track between the cars was known to the defendant's employes, or that, while in the situation aforesaid, they could be seen by the servants of the railway company, who were engaged at the time in handling its engines and cars. In view of this state of facts, we held, in the Bennett Case, that, inasmuch as the victims of the accident had voluntarily placed themselves in a position of great danger, where they had no apparent right to be, and that, inasmuch as their presence on the spur track between the cars was unknown to the employes of the railway company, and the latter persons had no reasonable grounds to anticipate their presence at that place, the case disclosed no breach of duty which the defendant railway company owed to the persons who were engaged in removing the tramway, for which it could be held responsible. The record in the case at bar presents a different state of facts. It now appears that the spur track in question was constructed on land belonging to the Long-Bell Lumber Company several years before the accident occurred, and that it was so constructed by agreement between said lumber company and the defendant railway company for the purpose of enabling the latter company to reach the lumber company's mill and sheds with its cars, and to remove lumber therefrom. The testimony shows that for some years prior to the accident the tramway had been used by the lumber company for the purpose of moving lumber across the spur track, and that this fact was well known to the switching crew who did the switching at that place. Some of the witnesses say, in substance, that the regular switching crew would come to the lumber company's mill, if not every day, at least several days each week, either to set empty cars on the

spur track or to remove loaded cars therefrom, and that on such occasions they would notify the employés of the lumber company to remove the tramway whenever they found it obstructing the track. Such, it seems, had been the uniform practice for several years prior to the accident, and no officer or employé of the railway company had ever questioned the right of the lumber company to lay the tramway across the track when it was not being used for switching purposes. In short, it is conceded on both sides that the regular switching crew of the defendant company, whose business it was to set empty cars on the spur track and to remove loaded cars therefrom, were well acquainted for a long time prior to the accident with the practice of the lumber company in this respect.

One of the principal contentions on the part of the railway company is that, even on the state of facts disclosed by the present record, the deceased and his fellow employés were trespassers on the spur track while they were engaged in the customary way in removing the tramway, and that the railroad company owed them no duty for the breach of which it can be held responsible. We are not able to assent to this view. The spur track was evidently laid for the mutual accommodation of the lumber company and the railway company, and it was not used for the benefit of the public generally. It passed between and in close proximity to two sheds or storehouses forming a part of the lumber company's milling plant, which was in itself notice to the railway company that in the transaction of its business the employés of the lumber company would frequently be compelled to carry lumber across the track from one storehouse to the other. Besides, we think that the knowledge acquired by the switching crew, while in the discharge of their ordinary duties at that place, that the lumber company was in the habit of laying the tramway across the track, should be imputed to the railway company. The fact that such practice had continued for two or three years, that it was well known to all of the employés of the railway company who had duties to perform on the spur track in question, and that no one had ever objected to such use of the track by the lumber company, should be taken as equivalent to an agreement between the lumber company and the railway company that the tramway might be laid across the track when it was not actually in use by the railway company for hauling its cars.

It results from this view that the servants of the lumber company who were engaged in removing the tramway on the occasion of the accident were in no sense trespassers on the defendant's track. They were where they had a lawful right to be, and in the performance of their ordinary duties. The lumber company and the railway company were in the joint occupancy of the track where the tramway was laid, and the latter company was under an obligation to the employés of the lumber company to exercise ordinary care in moving its engines and cars so as to avoid injuring them. In view of all the circumstances of the case, as above detailed, we are unable to say that the duty which the defendant company owed to the servants of the lumber company who were engaged in the dis-

charge of their duties at the point in question differs in kind from the duty which a railroad company owes to persons at railroad crossings. If there was any difference, it was in the degree or amount of care that ought to have been exercised. That it was bound to take reasonable precautions to avoid injuring them is a proposition, we think, which admits of no controversy.

Counsel for the defendant have indulged in some criticism of the instructions given by the trial court touching the question of contributory negligence, and in some criticism of the manner in which that issue was submitted to the jury; but, from the standpoint from which we view the case, that subject may be eliminated from the discussion. It is manifest that the efficient cause of the death of the men who were removing the tramway—the single act of negligence—consisted in the fact that the switch opening into the main track some distance north of the place where the accident occurred was left open when the switch engine backed into the spur track. The switch was left open by the switching crew, although they well knew that a freight train was approaching rapidly from the north, and would be due at the switch in a few moments. Under the circumstances, the conduct of the switching crew in leaving the switch open was grossly negligent, and it must be regarded as the sole cause of the death of the plaintiff's intestate. None of the men who were at the time engaged in removing the tramway, and who were subsequently killed, were aware that the switch had been left open, and they cannot be charged with negligence for failing to take precautions to guard against a peril which was unknown to them, and which they had no reason to apprehend. In their exposed situation between the two cars, where they could not be seen, it was doubtless their duty to make their situation known to the driver of the switch engine, if it was not known to him, so as to prevent his moving down upon them of his own volition before the tramway was removed. But such precaution, if it had been taken, would not have prevented the accident in question, as they were not hurt by the voluntary action of the engineer in charge of the switch engine, but solely in consequence of the open switch, which permitted the coming freight train to leave the main track and enter the spur track. We think, therefore, that there was no evidence in the case tending to show contributory negligence, and that this issue might well have been eliminated from the charge. At all events, the defendant company is not entitled to complain of what was said by the trial court on that subject.

Some other errors have been assigned upon the record, and noticed in the brief, but they are without merit, and, in our judgment, do not deserve special notice. An inspection of the entire record has served to convince us that the verdict was for the right party, and that no errors were committed which can be regarded as prejudicial to the defendant company. Indeed, considering the undisputed fact that the switch was negligently left open in advance of the approaching train, and that this was the sole cause of the disaster, we do not see how the trial could have resulted differently. The judgment of the circuit court is therefore affirmed.

ST. LOUIS & S. F. RY. CO. et al. v. HICKS (two cases).

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

Nos. 793, 794.

DEATH BY WRONGFUL ACT—EVIDENCE—INSTRUCTIONS.

In an action brought under the Arkansas statute, by an administrator, to recover the damages sustained by the next of kin by the killing of the intestate through defendant's negligence, it is not error to permit the plaintiff to prove the nature of the injuries causing the intestate's death, when the court specifically charges the jury that nothing can be allowed for the pain and suffering of the deceased, nor for the grief or distress of any one.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

L. F. Parker and B. R. Davidson, for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. These cases were submitted in connection with the case of *Railway Co. v. Miles*, 79 Fed. 257, and upon the same printed record, inasmuch as the cases grew out of the same accident, and involve the same questions. In case No. 793, *Harrison Hicks*, as administrator of *William Spoon*, deceased, sued for compensation for pain and suffering sustained by his intestate, as the laws of Arkansas permitted him to do; while in case No. 794 the action was brought by the same administrator for damages sustained by the next of kin. In the latter case a single question is raised, which did not arise in the case of *Railway Co. v. Miles*, and was not considered in that case. In the course of the trial, counsel for the defendant company took an exception to the admission of certain testimony showing the nature of the injuries received by *William Spoon* which had resulted in his death. This proof was objected to on the ground that it was unnecessary to show the nature of the injuries received, inasmuch as the next of kin, for whose benefit the action was brought, could not recover in that suit for any pain or suffering which the deceased had endured as a result of the injuries. The exception thus taken has been argued in this court. The trial court permitted the plaintiff to prove the nature of the injuries sustained by the plaintiff's intestate, and that they had occasioned his death; but it charged the jury specifically that "nothing can be allowed for the pain and suffering of deceased, nor can anything be allowed for the grief or distress of any one." We think that such action on the part of the trial court was not erroneous, and will not justify a reversal of the case. The plaintiff had a right to show that the deceased had received injuries which resulted in his death. The most that can be said in support of the exception is that the court permitted a material fact to be proven in greater detail than was perhaps necessary. But, whatever possible harm was done in allowing the precise nature of the injuries to be shown, was remedied, we think, by the instruction above quoted. It must be presumed that the jury obeyed the instruction of the court,

and that the defendant was not prejudiced, although it was unnecessary to show the exact nature of the injuries. The judgment of the circuit court in each of the cases must be affirmed.

BUNKER HILL & S. MINING & CONCENTRATING CO. v. SCHMELLING.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

1. MASTER AND SERVANT—UNSAFE PREMISES—FELLOW SERVANTS—INSTRUCTIONS TO JURY.

In an action against a mining company for personal injuries, caused by the fall upon the plaintiff of a mass of ore, which it was alleged had not been properly shored up by the shift boss in charge of the gang with which plaintiff was working, whom the defendant claimed to be a fellow servant of the plaintiff, the court charged the jury that it was the duty of the defendant to provide the plaintiff with a reasonably safe place to work in, and that this duty could not be devolved upon an agent. In another part of the charge the court expressly and fully instructed the jury that the carelessness of fellow servants was one of the risks assumed by the plaintiff, and that, if the accident could be traced to the negligence of a fellow servant of the plaintiff, the defendant was not liable. *Held*, that the doctrine applicable to fellow servants was not withdrawn from the jury.

2. ADMISSIBILITY OF EVIDENCE—DIAGRAM OF PLACE.

It is not error to admit, in connection with the testimony of a witness, a diagram of the place where facts testified to by him occurred, which diagram has been made from the witness' direction, and which he swears is correct.

3. TRIAL IN CIVIL CASES—SEALED VERDICT.

In civil cases the court may, in its discretion, without regard to the consent or objection of the parties, authorize a jury to agree upon, seal, and bring in and present to the court a sealed verdict.

In Error to the Circuit Court of the United States for the District of Idaho.

W. B. Heyburn and John Garber, for plaintiff in error.

Albert Allen, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action for damages growing out of personal injuries sustained by the defendant in error, who was plaintiff in the court below, alleged to have been sustained by him by reason of the negligence of the plaintiff in error, who was defendant below. The plaintiff was employed as a laborer in the defendant's Bunker Hill Mine, and at the time of the accident was engaged in shoveling ore in the Williams stope of that mine, alleged in the complaint to consist of a large chamber about 200 feet in length, about 100 feet in width, and from a few feet to 30 or 40 feet in height. The complaint alleged that on the 16th day of February, 1894, the defendant had a large number of men, including the plaintiff, employed in extracting ore from the Williams stope, by reason of which it was the duty of the defendant to keep and maintain the stope in good and safe condition; that on and prior to

February 16, 1894, the defendant carelessly and negligently mined out the ores and rock from the stope in question, carelessly and negligently leaving great masses of overhanging rocks and ore with scarcely any support, and in such condition that they were liable to fall at any moment, and that by reason thereof the stope became and was a dangerous place for persons to work, which fact, by the use of reasonable care and prudence on the part of the defendant, ought to have been known to it, and in fact was so known; that on February 16, 1894, the defendant, through its officers and agents having charge of the works, well knowing that the Williams stope was an unsafe and dangerous place for persons to work, and well knowing that the overhanging rocks and ore were not well supported, and were liable to fall at any moment, carelessly and negligently required and directed the plaintiff to work therein at shoveling rock and ore; and that while so engaged, without any fault or negligence on the part of the plaintiff, and without any knowledge on his part that the place was dangerous, a large quantity of the rock and ore from the roof of the stope fell upon the plaintiff, seriously injuring him.

The answer of the defendant admitted the employment of the plaintiff as alleged by him, denied the extent of the Williams stope as alleged, but admitted that it was about 200 feet in length, about 58 feet in width, and from 7 to 10 feet in height, and had been made by the defendant in extracting ores therefrom. It admitted that on the 16th day of February, 1894, it was engaged in mining and extracting ore from the Williams stope, and had engaged and employed therein a large number of men, including the plaintiff; and that by reason thereof it became and was the duty of the defendant to keep and maintain that stope in as good and safe a condition as it was possible to keep and maintain the same, so that such persons so employed would not be subject to danger. And the defendant alleged that on the said 16th day of February, 1894, and at all the times mentioned in the complaint, the defendant exercised great care in examining and in inspecting the mine for the purpose of keeping and maintaining the same, and every part thereof, including the Williams stope, in safe condition, in order to avoid all possible danger to its employes; that such examination and inspection was made by competent and skillful miners employed by the defendant for the purpose, and that the miners so employed determined that the stope in question was safe, and free from danger, and that there was nothing in or about it from which the most skillful and careful miner or workman, including the plaintiff, could reasonably expect or anticipate any danger. The answer denied all the allegations of negligence charged in the complaint, and alleged that the ore in the Bunker Hill Mine is in the ledge in large masses or ore bodies, in extracting which it is necessary to excavate large chambers; that, after blasting for the purpose of breaking down the ore in the chambers, the defendant at all times, acting through skillful and competent men, made careful and thorough examinations and inspections of the rock and ore surrounding the excavations, and at all times, including the 16th day of February, 1894, took every

care and precaution to protect its employés, and to prevent injury to them, and that the fall of the rock which caused the accident to the plaintiff could not be foreseen or provided against by the most skillful and careful inspection, and was not the result of any fault or negligence on the part of the defendant. The answer further alleged that at the time of the accident to the plaintiff the stope in question was in as safe a condition as it was possible under the most skillful supervision of competent miners to keep it; that the plaintiff was accustomed to working in mines of a similar character to that of the defendant, and was competent to judge of the safety of the stope where he was working; that the risk of working therein was assumed by him as a part of his employment, with the full knowledge of the condition thereof; that the walls of the stope in question were sound, solid, and well supported at all times, and that no rock or other substance at any time fell from either the roof or walls of the stope; that whatever rock did fall in the mine consisted of ore, and fell from the breast of the stope, and not elsewhere, and did not amount altogether to over 10 or 15 tons in quantity; that the persons whose immediate duty it was, and upon whom the responsibility rested, to keep the mine in a safe and proper condition at the point wherein the plaintiff was working at the time of his injuries, were all fellow servants of the plaintiff.

The trial of the case resulted in a verdict for the plaintiff. The record shows that the night before the accident one of the witnesses for the plaintiff called the attention of the night-shift boss to the cracks in the ore and rocks in the roof of the chamber where the accident occurred; and the principal point made at the oral argument in behalf of the plaintiff in error was that the neglect of the shift boss to properly support the roof, after his attention had been thus called to the cracks in it, was the neglect of a fellow servant of the plaintiff, which neglect was, in effect, withdrawn from the consideration of the jury by the instructions of the court below to the effect that the duty devolved upon the defendant company to provide the plaintiff with a reasonably safe place in which to work, and that that duty could not be devolved upon an agent so as to exonerate the defendant from liability for neglect in that regard. In a subsequent portion of its charge the court instructed the jury as follows:

"In employment such as stoping ore from mines in large stopes, such as are shown to exist in the mines of the defendant where the injury is alleged to have occurred, it is to be expected that the danger to the workmen will be greater at some times than at others. From the very nature of the work, the obligation of the employer to provide a reasonably safe place for his employés to work upon and in does not oblige him to keep the place where they are employed in such occupation as stoping ore from the mines, in a safe condition at every moment of their work, so far as its safety depends upon a due performance of their work by them or their fellow servants. That is a request which the defendant asks. I give it, with this explanation: To illustrate: You have seen by the testimony here that this work is carried on by cutting off slabs of ore from the roof of the stope. It is cut down in benches or in blocks. They start and stope along, and here is a block of ore standing square, I presume like that; here is the floor running along in this direction; up above here is the ore. Now, you must see that there are times when everything cannot be absolutely safe, cannot be kept as safe at one time as at another. For

instance, when that block of ore is being cut off, it is more or less without supports under it; for the time being there is more risk there than there would be at other times. Now, that is what that instruction means,—simply that there are times when the danger must be greater than at other times, because it necessarily must follow that in mining you cannot keep timber so thick under it that it would be absolutely safe at all times, because that ore must be taken down. It is one of the natural risks that men must incur in mining, that these blocks of ore must be left at some times so they can get them down. That is as far as I mean that instruction to go."

No issue was made in the case in respect to the duty of the defendant to furnish the plaintiff with a safe place in which to work. The complaint alleged that duty on the part of the defendant, and the answer of the defendant conceded it. The defense made by the answer was that the defendant performed that duty, but that the rock that fell upon the plaintiff and injured him consisted of ore that fell from the breast of the stope, and that the persons whose duty it was, and upon whom the responsibility rested, to keep the mine at that point in a safe condition were fellow servants of the plaintiff, for whose neglect in that regard the defendant was not responsible; and that the risk of working where he was injured was assumed by the plaintiff as a part of his employment, with full knowledge of all of the surrounding conditions. The record does not contain the evidence in the case. But the court below stated in the portion of its charge above quoted that the testimony showed that the mining was carried on by cutting off slabs of ore from the roof of the stope, and the court proceeded to explain to the jury that when such a block was being cut down it was, of necessity, more or less without supports under it, and that, as a consequence, there was at such times necessarily more risk to the miners than at other times, which risks the miners assumed as one of the incidents of their employment. To this, as far as it goes, the counsel for the plaintiff in error do not object; but they insist that, as the real defense was the neglect of the shift boss to properly support or remove the ore that fell and injured the plaintiff, after having had his attention called to the cracks in it, the defendant was entitled to the benefit of the doctrine applicable to fellow servants, and that that doctrine was, in effect, withdrawn from the consideration of the jury by the instruction that the duty of the defendant to furnish the plaintiff with a safe place in which to work could not be delegated to an agent. It does not appear from the record what the duties of the shift boss were. He may or may not have been the fellow servant of the plaintiff, depending, not upon his grade and control over the other members of his shift, but upon the character of the acts he was required to perform. *Railroad Co. v. Peterson*, 162 U. S. 346, 353, 16 Sup. Ct. 843; *Mining Co. v. Whelan*, 12 C. C. A. 225, 64 Fed. 462, 465, and authorities there cited. If he was such fellow servant, and the accident to the plaintiff happened through his negligence, the defendant was not answerable therefor. And so the court below told the jury; not, it is true, with specific and direct reference to the shift boss, but no such request appears to have been made of the court by the plaintiff in error, nor was the court requested to instruct the jury as to

what constituted a fellow servant of the plaintiff. But the court, in its charge to the jury, did in express terms instruct the jury that among the risks assumed by the servant is the risk of carelessness on the part of fellow servants. "The master is not responsible," said the court, "in any instance, for the accidents to a laborer which occurred from the carelessness of another fellow servant. He is responsible for those acts of some other employé who is a vice principal of a master, or who is his direct agent; but he is not responsible for the accidents that result to him from the carelessness of a co-laborer. So that in this case, if this accident could be traced to the direct carelessness, not of an agent or superior servant, but to some fellow servant and co-laborer, then the plaintiff would have to assume that himself. Those, now, are among the risks that a laborer assumes in entering into employment,—that is, unforeseen accidents that cannot be guarded against, cannot be provided for; and, as I said, the accidents that may result from carelessness of a co-laborer. If this accident resulted from any such causes as I have stated, the plaintiff cannot recover, etc." It cannot be properly held, therefore, that the doctrine applicable to fellow servants was withdrawn from the consideration of the jury by the instruction that the duty of the defendant, admitted in his answer, to furnish the plaintiff with a safe place in which to work, could not be delegated to an agent.

It is also contended that the court below erred in admitting expert testimony in respect to the condition of the roof of the mine. The record, however, does not contain any such objection and exception as presents the question.

Another point made on behalf of the plaintiff in error is that the court, against the objection and exception of the plaintiff in error, admitted in evidence a diagram of the stope where the accident occurred, made by one Easton upon the representations of the witness Powers and others as to its appearance after the accident. Powers testified that it was a fair representation of the workings in the stope immediately after the accident, and the court admitted it, in connection with his testimony only as his version of the workings, which the jury might consider for what it was worth. In this we see no error.

The only other point which need be specially noticed is the action of the court below in authorizing the jury, upon agreeing upon a verdict during the night, to thereupon seal it, and return it to the court upon its opening the following morning; the jury meanwhile separating. To that course the defendant not only did not consent, but objected, and to the action of the court in the respect stated reserved an exception and objected to the receiving of the verdict so agreed upon, sealed, and brought into court; the jury having meanwhile separated. The cases holding that this may be done by consent of the parties are very numerous. Many of them will be found cited in the notes to pages 414-416, 28 Am. & Eng. Enc. Law. And, as will be there seen, it has been held by some courts that, in the absence of statutory prohibition, the practice is admissible in the discretion of the presiding judge, with-

out regard to the consent of the parties, even in criminal cases. This is contrary to the general rule, but the tendency of modern decisions undoubtedly has been, as said in *Com. v. Carrington*, 116 Mass. 37, "to relax the strictness of the ancient practice which required jurors to be kept together from the time they were impaneled until they returned their verdict, or were finally discharged by the court." Whatever the proper rule may be in criminal cases, we think it may, in civil cases, be safely left to the sound discretion of the court, without regard to the consent or objections of the parties, to authorize a jury to agree upon, seal, and bring in and present to the court a sealed verdict. In such a case the verdict is to be put in writing before the jury separate, is thereupon sealed, and, when brought into court, is affirmed by the jury before it is received by the court. The judgment is affirmed.

NORTHERN PAC. R. CO. v. LYNCH.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

1. REVIEW ON ERROR—INSTRUCTIONS—NEGLIGENCE.

While, in a simple case, involving only the issues of negligence of the defendant and contributory negligence of the plaintiff, it is better for the court to give a few terse and pointed instructions upon what constitutes the one and the other, yet if the instructions given are unnecessarily voluminous, and unnecessarily and improperly multiplied upon the same points, it is not permissible to select particular clauses, and consider them apart from their context, but the instructions must be taken as a whole, and if, so taken, the jury have been fairly instructed, no error can be justly affirmed.

2. NEGLIGENCE—INSTRUCTIONS.

The instructions given in this case upon the questions of negligence and contributory negligence considered, and found unobjectionable.

In Error to the Circuit Court of the United States for the District of Montana.

Cullen & Toole, for plaintiff in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action for damages for personal injuries sustained by the defendant in error by reason of a collision with one of the railroad company's trains in Montana at a point where the railroad track was crossed by a public highway. The case was here once before, and is reported in 16 C. C. A. 151, 69 Fed. 86. It is conceded that the facts as now presented are substantially the same as those presented on the former hearing. The defendant in error, who was the plaintiff in the court below, lived near the place of the accident, and was familiar with the crossing and with the running of the trains. The country was open and flat, and the accident occurred upon a clear and quiet day. The plaintiff had been to a blacksmith shop, going by the public road, and had crossed the railroad track in doing so. He returned by the same road, which for some distance ran parallel to the railroad track, and, when he

reached a point where the public road curves towards the railroad track to cross it, he saw a freight train approaching upon the main track of the railroad. There was a side track on the side from which the plaintiff was approaching, a distance of eight feet from the main track. Upon seeing the train the plaintiff pulled up his horses, which were trotting along at a 5 or 6 mile gait. He was at this time about 36 feet from the main track. He succeeded in getting the team stopped for an instant very close to the track, but the horses, becoming frightened, dashed upon the track, and the wagon was struck by the engine, from which the injuries complained of resulted. There were but two controverted questions in the case,—one, the negligence of the railroad company alleged by the plaintiff; and the other, the contributory negligence on the part of the plaintiff alleged by the defendant. On the former hearing of the case this court held that the question of the plaintiff's contributory negligence was a question for the jury to determine, under, of course, appropriate instructions. That ruling has become the law of the case, and is not here open to argument. The only questions properly presented upon the present hearing relate to the giving and refusal to give by the court certain instructions to the jury. The case was a very simple one, requiring very few instructions; and yet a large number were requested by both plaintiff and defendant, many of which were given by the court, and some of which were refused. It would have been in this, as in all similar cases, far better for the court to have given a few terse and pointed instructions upon the subject of what constituted negligence upon the part of the defendant and contributory negligence upon the part of the plaintiff, with instructions as to the proper consequences to flow from the findings of the jury upon those questions. Still, where instructions are unnecessarily voluminous, and are unnecessarily and improperly multiplied upon the same points, it is not permissible to select any particular clause or particular clauses, and consider them, unconnected with their context. In every case the instructions must be taken as a whole, and if, so taken, the jury have been fairly instructed in the law governing the particular case, no error in such instructions can be justly affirmed. A careful consideration of the instructions given by the court below in the present case leads to the conclusion that the law properly applicable to the case was clearly enough given, and that the defendant in error could not have been prejudiced by them, or by the refusal to give others. The court below instructed the jury that under the statute of Montana it was the duty of the defendant company, in approaching the crossing in question, to sound the whistle and ring the bell within not less than 50 nor more than 80 rods from the crossing, and that a failure on the part of the employes of the defendant company in charge of the train that inflicted the injury to the plaintiff to do so would constitute negligence on the company's part for which the company would be liable, in the absence of contributory negligence on the part of the plaintiff, and that it was for the jury to say whether the evidence showed that the defendant was guilty of negligence in not giving proper notice of the approach of its train to the crossing, or in letting off steam from the boiler, or in not exerting

proper efforts to stop the train upon discovering the imminent peril of the plaintiff. And, concerning the question of contributory negligence, the court instructed the jury, among other things, that if they should find from the evidence that the plaintiff was familiar with the crossing in question and its dangers (the evidence showing that he lived within a few hundred feet of it, and had so resided for many years), and that, under the circumstances appearing, he knew, or, as an ordinarily prudent man, ought to have known, the time when the train that did the damage was due, or that he knew, or, as an ordinarily prudent man, ought to have known, that trains were frequently passing over the crossing in question, and that in approaching the crossing on the occasion of the accident he failed to act as a prudent and cautious man should have acted, or that he omitted precautions that a prudent man ought to have taken, whereby he was injured, he could not recover from the defendant company; that it was incumbent upon the plaintiff to use all his faculties of seeing and hearing, and to listen, and also to look both ways to see if a train was approaching, and that it was his duty to approach the crossing cautiously and carefully, and to do everything that a reasonable man would do before he attempted to cross the railroad track. The jury were further instructed to—

"Note the character of the crossing; the fact that there was no difficulty of observation along the line of the railroad track; the time of day, and the probable danger from passing trains; the character of the weather; the fact that other persons, situated at a greater distance from the approaching train than the plaintiff, heard the whistle blow, and heard the rumble of the train as it approached,—and every fact and circumstance bearing on the case to clearly influence the plaintiff's conduct then and there, under those circumstances, and say, upon your fair and impartial judgment, whether he acted as a man of ordinary prudence should have acted, and with the due care and caution demanded by the exigencies of the occasion. If he did not so act, the railroad company is entitled to your verdict, whether it was negligent or not."

The court, in another place, told the jury that to constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. We are of opinion that the plaintiff in error has no valid ground to complain that the jury was not sufficiently instructed upon the question of contributory negligence.

In the course of its charge the court below said:

"The defendant railroad company presents two theories as to how this injury occurred: One is that plaintiff, Lynch, was driving his team down to the said crossing, intending to cross the same ahead of the train, and did not calculate accurately the speed of the train, and, on account of this miscalculation, got injured. The other is that plaintiff approached the railroad crossing without having examined the railroad, and for some reason was oblivious of the approach of the train until it was upon him."

Counsel for the plaintiff in error assert that there was "absolutely nothing either in the pleadings or the proof upon which to base" this statement, and they contend that it constitutes reversible error. The record does not sustain counsel's assertions in this respect, for in the defendant's answer it is alleged that:

"The said plaintiff, wholly disregarding his duty as an ordinarily prudent man, recklessly, carelessly, and negligently drove his horses, with a wagon attached

thereto, up to and upon said railroad track, and attempted to make said crossing, and caused the collision which resulted in the accident complained of."

This allegation clearly justifies the statement made by the court that one of the theories of the defendant was that it was the intention of the plaintiff to cross the track ahead of the train, but that he miscalculated its speed, and as a consequence was injured. Further justification for that statement is found in the testimony of the plaintiff himself, and also in that of the witness McGowan, where they give it as their impression that the plaintiff struck one of his horses with the line just before the engine reached the crossing, in order to get across the track ahead of the train. In the cross-examination of the witness Bowling, the defendant brought out this statement from the witness:

"There was nothing to obstruct the view between me and the accident, and nothing to prevent Mr. Lynch from seeing the train. I did not see him turn his head to look for the train, and he did not stop at any point to listen for it until he stopped near the edge of the rail."

And the witness Welsh, upon cross-examination by the defendant, testified:

"If I had been looking for the train, I could have seen it coming for a couple of miles. It was a clear, nice day; no wind blowing, to speak of. After leaving the culvert the team was traveling at about the same speed as when I saw them. They were trotting. Mr. Lynch seemed to be looking straight ahead, at his horses. The horses trotted up to within a short distance of the side track. I think they had their heads close over the rails when they stopped. They stopped merely an instant. Just stopped good when they made a jump."

This testimony brought out by the defendant would seem to justify the court in stating that one of the theories of the defendant was that the plaintiff seemed oblivious to the approach of the train until it was upon him. The judgment is affirmed.

WHITE et al. v. BLUM.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1897.)

1. TRIAL—INSTRUCTIONS—DIRECTING VERDICT.

When the court, in the presence of the jury, has said to counsel that it had expected a request to direct a verdict for the plaintiff, but, if counsel preferred to have the case submitted to the jury under instructions prepared by them, the court would so submit it, but would set aside any other verdict than one for the plaintiff, such action is equivalent to a direction to return a verdict for the plaintiff, and will be so treated by an appellate court.

2. LAND GRANTS—VALIDITY—EXCESSIVE QUANTITY.

In the absence of objection by the proper political authority, a grant of land should not be displaced by a junior grant, nor declared void, simply because, according to the lines of the survey, it contains more land than the state intended to grant.

3. SAME—SURVEYS.

Upon an examination of the evidence as to the boundaries of the grant in question in this case, *held*, that the fact that the lines of the survey, as laid down in the field notes, included more land than the state was authorized to grant for the purpose intended, furnished no reason for reversing the calls of the survey and altering one of the lines, so as to diminish the quan-

tity of land, especially when such change would result in unsettling the titles of many persons who have paid value for the land, and held it for many years.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Suit was brought by the defendant in error (plaintiff in the court below) in the ordinary form of "trespass to try title," to recover four tracts of land situated in Clay county, Tex. W. M. Bowman, B. F. Strange, and others were made defendants in the original petition filed in the circuit court, and the warrantors of title of the defendants were subsequently brought in by the latter. Upon the issues joined between the plaintiff in the court below and the original defendants, and upon those raised between such defendants and the warrantors, the suit proceeded to its final determination. At the conclusion of the evidence the plaintiffs in error requested several special instructions, which were refused by the court, and, in lieu thereof, the court submitted to the jury a general charge prepared by the defendant in error. The bill of exceptions discloses that before reading the charge, and in the presence of the jury, the court, in reply to the argument of counsel for the plaintiffs in error, made the following statement, as copied from the record, but which seems somewhat confused: "The court further said that the undisputed facts show that in constructing the Cherokee county school land by its calls for course and distance alone, that it would contain four leagues of land, but to do so it would be necessary to cut the north line of said school land survey short 1,017 varas. The court told the jury that it was of the opinion that such should be the construction of the survey; but, if constructed according to defendants' contention, that it would contain an excess of about two thousand acres; that the quantity of land in the grant might be an important circumstance to be considered in arriving at the intention of the surveyor who surveyed the land and the intention of the state; that the court regarded the area of the survey in this case of great importance in determining the boundaries of the survey, inasmuch as the constitution of the state of Texas only granted to each county four leagues of land, no more, no less; that Judge McCormick so expressed himself in his opinion on a former appeal; that at the time the charge given by the court to the jury was submitted to him by counsel for the plaintiff, and they asked the court to submit the case to the jury on said charges, to which the court replied that he thought they would ask the court to instruct the jury to find for the plaintiff, but, if they preferred it, he would submit the case to the jury under said charge, but, if the jury found any other verdict than for the plaintiff, he would set it aside. The statement was made in the presence and hearing of the jury, and before said charge was read, as well as the other remarks of the court hereinbefore set out. That, while these are my views, it is for the jury to determine the fact, and render their verdict accordingly. After the argument of counsel, the court expressly and emphatically told the jury (in oral charge as well as in written charge) that they were the sole judges of the weight of the evidence and the credibility of the witnesses, and that they must arrive at their own conclusions as to the facts." A verdict was returned in favor of the defendant in error, and judgment duly rendered thereon. To reverse this judgment, B. F. Strange, an original defendant, C. C. White, Joseph A. Kemp, and A. Newby, warrantors, prosecute error.

S. H. Hodges, for plaintiffs in error.

Henry Sayles, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). We regard the language used by the trial court in the presence of the jury as equivalent to an affirmative direction to return a verdict in favor of the defendant in error, and we shall treat it accordingly. It is not

necessary, for the disposition of this case, to notice all the errors assigned by the plaintiffs in error, nor to critically examine the charges given and refused. While, generally speaking, and abstractly considered, the charge of the court and the special instructions requested by the plaintiffs in error declare correct legal principles, they are nevertheless misleading in some material respects when applied to the facts of the case. The true location of the east boundary line of the Cherokee county school survey is the real question involved in the controversy. And it is evident to us that the court below, in reference to the location of this line, attached undue importance to the mere excess in area of the survey, as located according to the contention of the plaintiffs in error. Under the laws of the state of Texas, Cherokee county was entitled to a grant of four leagues of land, and the excess complained of amounts approximately to 2,000 acres. It is a well-recognized principle that, where the proper political authority is not objecting, and no question of fraud is involved, an elder survey should not be displaced by a junior grant, nor declared void, simply because it contains more land than the state intended to grant. This view of the law is not in conflict with anything said by this court upon the former hearing of the case (*Blum v. Bowman*, 30 U. S. App. 50, 14 C. C. A. 158, and 66 Fed. 883), and is in perfect harmony with the doctrine announced by the supreme court and the highest courts of Texas. The principle is thus stated by Mr. Justice Catron, speaking for the court, in *White v. Burnley*, 20 How. 247:

"The next question appears on the face of the grant. All the steps leading to the grant, with one exception, are regular. The quantity of land that the lines of survey include is equal to two leagues, whereas only one league is called for; and the reason the surveyor gives in his certificate of survey for the excess is that he included in the survey a bay of the ocean, which was not subject to grant,—a quantity equal to a league. This statement was proved to be untrue, almost entirely. The grant contains two leagues and more of fast land, and for this reason it was insisted at the trial that it was fraudulent and void. But the court charged the jury to the contrary, with several qualifications. These we deem to have been useless, as our opinion is that a regular grant (that is, a completed title, made by those exercising the proper political power to grant land) is not open to this objection by an opposing claimant setting up a younger title; and we understand that on this principle the well-considered cases of *Hancock v. McKinney*, 7 Tex. 384, and of *Swift v. Herrera*, 9 Tex. 263, proceed. Such is the settled doctrine elsewhere. *Overton's Lessee v. Campbell*, 5 Hayw. (Tenn.) 165. How far the government of Texas might interfere by 'due course of law' (that is, by a suit in its name and behalf) is a question for that government to decide. *Owens v. Rains' Lessee*, Id. 106, is to the effect that it can only be done by suit. To hold that this grant was void because the surveyor returned an excess in his survey, without any evidence that the grantee participated in the matter, as is the case here, would be an alarming doctrine through a widespread portion of the United States."

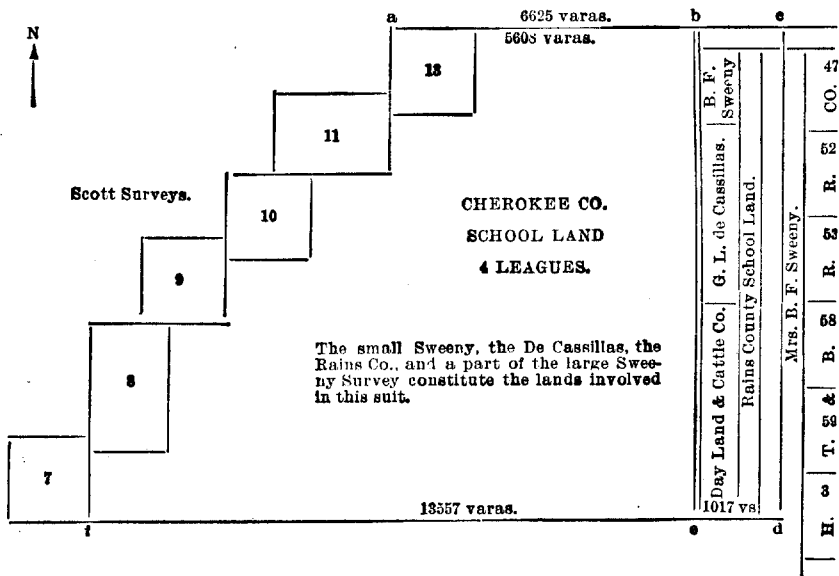
Approving *White v. Burnley*, the supreme court of Texas says:

"These observations apply in their full force to the present case upon the supposition that it was shown that the grant was, in fact, excessive. It was, at most, voidable; not void. The appellant had no interest to be affected by it at the time; nor does he appear to have acquired a right to appropriate any part of the public domain until many years subsequent. If the government is content, he can have no right to complain. If his claim had existed at the time, there was ample scope for its satisfaction out of land not previously appropriated or granted. The grant not being void, the land embraced within it

was not vacant, or subject to location by the plaintiff. This view of the case will necessarily lead to an affirmance of the judgment." *Maxey v. O'Connor*, 23 Tex. 241.

See, also, *Elliot v. Mitchell*, 28 Tex. 111, 112.

The location of the east line of the Cherokee county survey depends upon the length of its north line, extended east from the northeast corner of Scott survey No. 13. These two surveys, together with the four surveys claimed by the defendant in error, to wit, the two Sweeney, the Rains county, and the Cassillas, are delineated upon the following sketch:



In this sketch, a, b, c, represents the north line; c, d, the east line; and d, e, f, the south line,—of the Cherokee county survey, as contended by the plaintiffs in error. The line a, b, represents the north line; b, e, the east line; and e, f, the south line,—of said survey, as claimed by the defendant in error. The survey, as constructed by the plaintiffs in error, includes the four tracts in controversy; but, if constructed according to the contention of the defendant in error, these four tracts are excluded, in which event the verdict and judgment are correct, and should be sustained.

In 1853 the Scott surveys No. 7, 8, 9, 10, 11, and 13 were located, by work on the ground, by the surveyor, William Hudson. In 1855 the same surveyor put in by projection, east of the Scott surveys, the Cherokee county four-league grant. The east lines of the six Scott surveys constitute the west boundary line of the Cherokee county survey, the field notes of the latter calling first for the southeast corner of Scott survey No. 7 as its beginning point, thence running north and east until the northeast corner of Scott survey No. 13 is reached. The original field notes of the Cherokee county survey, prepared by William Hudson in 1855, being found

incorrect in some particulars, were corrected in 1877 by the surveyor Sam Green, and upon the corrected field notes the patent was issued by the state. We do not regard the matter of the correction of the field notes as of much materiality in this controversy, as all parties to the suit concede, as we have already shown, that the east lines of the Scott surveys form the west boundary line of the Cherokee county survey. Upon the first trial of the cause in the circuit court the principal point of difference between the parties seems to have been as to the location on the ground of the northwest corner of Scott survey No. 13; the present plaintiffs in error insisting that a certain marked bearing tree designated such corner, and the defendant in error contending that it was about 1,017 varas further west. This difficulty was removed upon the second trial, and it is now conceded by the defendant in error that the northwest corner of Scott survey No. 13 is located at the point as originally claimed by the plaintiffs in error. It is also admitted by the parties that the southwest corner of Scott survey No. 8 is well identified and marked on the ground. These two corners being thoroughly established and well recognized,—i. e. the northwest corner of Scott survey No. 13 and the southwest corner of Scott survey No. 8,—the northeast corner of No. 13 and the southeast corner of No. 7 may be ascertained with mathematical precision. The northeast corner of No. 13 is 1,900 varas east from its northwest corner, and the southeast corner of No. 7 is 1,400 varas south from the southwest corner of No. 8. The evidence in the record shows that the surveyor Green knew where the corners of Scott survey No. 13 were located on the ground when he made the corrected field notes of the Cherokee county survey, in 1877; and the evidence further tends to show that the exact location on the ground of the southeast corner of the Cherokee county survey was also known to him at that time. Upon this point C. B. Patterson, whose testimony was uncontradicted, testified in behalf of the plaintiffs in error as follows:

"The lines of the Cherokee county school land and Scott surveys were located by Sam Green, county surveyor of Clay county, about 1879, and, so far as I know, the same have been recognized as the true lines and corners of said surveys until this controversy arose. The southeast corner of the Cherokee county school land, so far as I remember, was not pointed out to me by any one; but Sam Green * * * directed me how to find it, and from his description of it I did find it. Sam Green is now dead. * * * He told me that there was a stone at said corner, and I found it to be marked as he described it. Its location corresponded with the Cherokee county school land as claimed by these defendants."

Recurring to the field notes of the Cherokee county survey, which, as above shown, call for the southeast corner of Scott survey No. 7 as its initial point, thence north and east, with the Scott surveys, to the northeast corner of Scott survey No. 13, the calls continue as follows: "Thence east 6,625 varas, a stake, for the N. E. corner of this survey; thence south 9,886 varas, a stake, S. E. corner of this survey; thence west 13,557 varas, to the beginning." The objection of the defendant in error to the south line is that it is too long by 1,017 varas. But the last call of the field notes

runs west from the southeast corner not only 13,557 varas, but to the beginning. The beginning point is the southeast corner of Scott survey No. 7, which is easily and unmistakably ascertainable, and it should therefore be given the dignity of an "artificial object," and held superior to the call for distance. The rule is stated by Mr. Justice Henry in *Maddox v. Fenner*, 79 Tex. 291, 15 S. W. 239:

"When unmarked lines of adjacent surveys are called for, and when from the other calls of such adjacent surveys the position of such unmarked lines can be ascertained with accuracy, and when, in the absence of all evidence as to how the survey was actually made, there arises a controversy as to whether course and distance or the unmarked line of another survey shall prevail, we see no good reason why the survey line should not be given the dignity of an 'artificial object,' and prevail over course and distance."

See, also, *Fordtran v. Ellis*, 58 Tex. 245; *Worsham v. Chisum* (Tex. Civ. App.) 28 S. W. 905; *Worsham v. Morgan* (Tex. Civ. App.) 28 S. W. 918.

Protracting the south line along its course west to the southeast corner of Scott survey No. 7, the survey closes, without conflicting or interfering in any manner with contiguous locations. The only possible objection to such a construction of the grant goes to the question of excessive area,—a plausible objection, but one completely overthrown by adjudged cases. But the defendant in error, although claiming under a junior grant, insists that the calls should be reversed, and the lines run as follows: Beginning at the southeast corner of Scott survey No. 7; thence east 13,557 varas, a stake, for the southeast corner of this survey; thence north 9,886 varas, a stake for the northeast corner; thence west 5,608 varas to the northeast corner of Scott survey No. 13. In thus constructing the survey, the north line would be 5,608 varas in length, instead of 6,625, as called for in the field notes, and the survey would contain about 597 acres less than the quantity of land which the state intended to grant. Not only so, but innocent third parties, who purchased the Cherokee county survey, inclosed it, and took actual possession, several years prior to the locations of the defendant in error, believing themselves to be within the boundaries of the survey, would be deprived of their property, which they had bought in good faith, and for which they had paid a valuable consideration. The reversal of the calls is not warranted when productive of such a result.

The defendant in error is not entitled to recover the lands in controversy, and the trial court should have directed a verdict against him. For the reasons assigned, the judgment of the circuit court should be reversed, and the cause remanded, with directions to grant a new trial, and it is so ordered.

TYLER MIN. CO. v. SWEENEY et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1897.)

No. 318.

1. MINES AND MINING—LOCATION—VEIN CROSSING SIDE LINES—EXTRALATERAL RIGHTS.

When a vein of mineral-bearing rock, in its course lengthwise, after passing under the surface limits of one location, on which it outcrops, crosses nearly at right angles the side lines of another, prior location, on which it also outcrops, the side lines of such prior location becoming, by reason of the course of the vein, its end lines, the right to follow the lode in its downward course, between the vertical planes drawn through such side end lines, belongs to such prior location, and the extralateral rights of the other location cease when the vertical plane so drawn between the two locations is reached.

2. COSTS IN EQUITY—DISCRETION OF TRIAL COURT.

The award of costs in equity cases rests in the sound discretion of the trial court, and will not be disturbed by an appellate court except in cases of manifest abuse of such discretion. Accordingly, *held*, in this case, that no sufficient reason appeared for disturbing the decision of the trial court refusing to award costs against a successful defendant, on the ground that it was the real party in interest behind two other defendants, who were unsuccessful.

3. APPEAL AND ERROR—CLERK'S TAXATION OF COSTS.

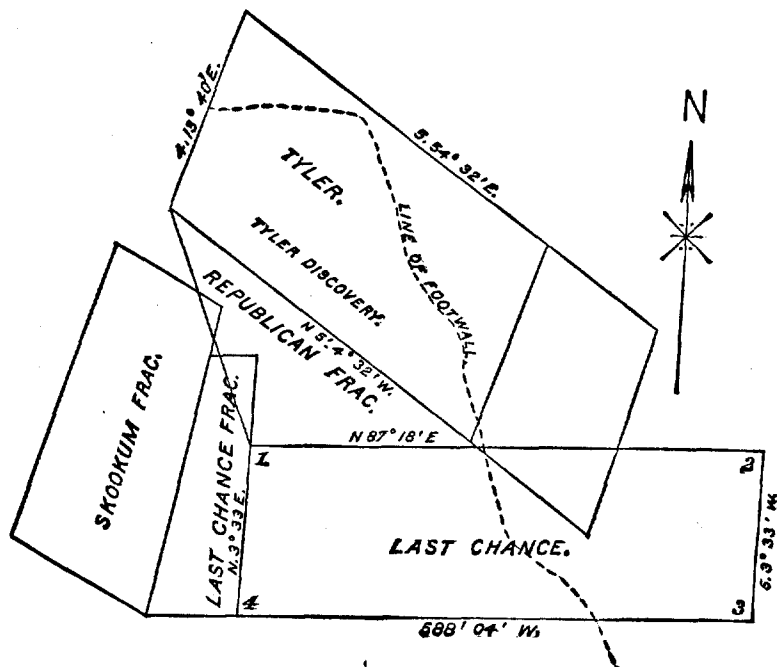
A writ of error or appeal cannot be taken to review the decision of the clerk upon a taxation of costs, though a decision of the court affirming or reversing a decision of the clerk upon an appeal taken pursuant to the rules of the circuit court may in some cases be so reviewed.

In Error to the Circuit Court of the United States for the District of Idaho.

This cause was tried before the circuit court, a jury having been waived by stipulation of the parties, as provided by section 649 of the Revised Statutes, upon an agreed statement of facts, as follows: "First. That the Tyler Mining Company is the owner of the Tyler mining claim, as described in the fourth paragraph of the complaint, and the said Tyler mining claim, of which the ground so described is a part, was located on September 20, 1885, and has been duly conveyed to the plaintiff in this action. Second. That the Last Chance Mining Company is the owner of the Last Chance mining claim, as described in the said defendant's supplemental answer on file in this case, and that the boundaries of both claims are correctly laid out on the diagrams on file in this action. Third. That a vein of mineral-bearing rock and earth is found in both of said mining claims at the point of discovery on each, and had been discovered therein prior to their location; that the course of the vein in each of the claims is as shown in the diagram, its width, approximately, being about three hundred (300) feet, and its dip from the apex, which is found upon each of said claims, is to the southwesterly at an angle of about forty-five (45) degrees from the horizontal. It is further admitted that the line of the vein, as indicated on the diagram and models, is approximately the line of the footwall, and that the said vein passes through the southerly side line of the Tyler claim as originally located, and crosses the northwesterly end line thereof, and said vein, after crossing the said southerly side line of the Tyler claim, as originally located, passes through and crops upon the Last Chance claim, as shown upon said diagram; that the discovery upon each of said claims was upon said vein so outcropping, and the ores and ore bodies in controversy are in and a part of said vein. It is further admitted that the Last Chance claim was located on the 17th day of September, 1885, and the rights of said company run from that date. The legal existence of the two corporations, the Tyler Mining Company and the Last Chance Mining Com-

pany, is admitted. Fourth. It is admitted that the apex of the vein is within the side lines of the Tyler and also of the Last Chance claims, and that the Last Chance has taken no ores which are not found perpendicularly beneath its surface ground. Fifth. It is admitted that in 1887 the Tyler Mining Company applied for a patent upon the Tyler claim, as originally located, and that the then owners of the Last Chance mining claim duly filed an adverse claim to a certain portion thereof, and that the proceedings upon which application was made and said adverse claim was founded are correctly set forth in the verified transcript of such proceedings, which is here made a part of this statement, and to be considered as such. Sixth. It is further agreed that the Last Chance Mining Company made an application for a United States patent for the Last Chance mining claim, and that such patent had issued therefor, the proceedings upon which said application for patent, and the patent issued thereon, as certified by the commissioner of the general land office, are hereby admitted as a part of this statement. Seventh. It is further agreed that the judgment roll and the findings of fact and conclusions of law certified in the case of the Last Chance Mining Company against the Tyler Mining Company, heretofore offered in evidence in this case, and referred to in the decision in the United States supreme court, in considering this case, are made a part of this statement. Eighth. It is further agreed that the map of the plaintiff (Exhibit A) and models may be treated and regarded as a part of this statement for any purpose which the court may deem material, and that the diagram, as found in the report of the case in 54 Fed. 284 [4 C. C. A. 329, and 7 U. S. App. 463], is the diagram which is referred to herein, and is made a part hereof. It is admitted that the defendant the Last Chance Mining Company has taken a large amount of ore out of the vein aforesaid, claiming to be the owner thereof, and if the court shall find that the Tyler Mining Company is entitled to the said vein, under the surface boundary, that the Last Chance Mining Company is liable therefor, and that an accounting of the value of the same may be had hereafter to ascertain such value."

The diagram referred to in the eighth statement of facts is as follows:



John R. McBride, for plaintiff in error.

W. B. Heyburn, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). This is an action in ejectment to recover that portion of the Tyler lode which is alleged to have its apex inside the Tyler location, and to extend on its dip southerly beyond the surface side line of the Tyler claim, and for damages. It was brought against several individual defendants and three different mining corporations, namely, the Last Chance Mining Company, the Idaho Mining Company, and the Republican Mining Company. It has been dismissed as to the individual defendants. At the first trial in the circuit court, judgment was rendered in favor of the Last Chance Company, and against the Republican and Idaho Mining Companies, neither of which sued out any writ of error from that judgment. The Tyler Company sued out a writ of error to this court, and the judgment in favor of the Last Chance Mining Company was reversed. *Mining Co. v. Sweeney*, 4 C. C. A. 329, 54 Fed. 284, and 7 U. S. App. 463. Upon the second trial, judgment was rendered in favor of the Tyler Mining Company against all of the defendants in the action. The Last Chance Company sued out a writ of error to this court, and the judgment of the circuit court was affirmed. *Last Chance Min. Co. v. Tyler Min. Co.*, 9 C. C. A. 613, 61 Fed. 557. Thereafter, on application of the Last Chance Mining Company, the case was taken to the supreme court by writ of certiorari, and the judgments of this court and of the circuit court were reversed, and the cause remanded to the latter court, with instructions to grant a new trial. 157 U. S. 683, 15 Sup. Ct. 733. The judgment of the circuit court of appeals was reversed solely upon the ground that it did not give the proper effect to a former judgment establishing priority in favor of the Last Chance claim location. Upon the third trial in the circuit court, judgment was rendered in favor of the Last Chance Company for its costs. The present writ of error is taken to have this judgment reviewed. The diagram referred to in the agreed statement of facts shows the course of the lode or vein lengthwise through the Tyler and Last Chance claims. The ore body in dispute is on the dip of the lode or vein within the extended vertical planes of the end lines of the Tyler claim. It is also within the side lines of the Last Chance claim, and on the dip of the vein as it passes through that claim. The question as to which claim was first located necessarily determines the rights of the respective parties.

When this case was first before this court, we said:

"From the diagram in this case it appears that the lode, in its course lengthwise, crosses the side lines of the Last Chance location at nearly right angles; and, under the rules laid down in the decisions of the supreme court of the United States, the side lines of the location of the Last Chance, as marked on the surface of the ground, are to be treated at its end lines; and the owners thereof would have the exclusive right of possession and enjoyment of such portion of the lode throughout its entire depth, the top or apex of which is inside of the surface lines of the location, as lies between vertical planes drawn

downward through such end lines. It therefore appears that both locations were made in such form and shape as has been recognized by the adjudicated cases upon these questions to entitle them to certain fixed and definite rights to follow the lode in its downward course, and the rights of the Tyler Company and of the Last Chance Company in this respect depend upon the question of their priority. * * * In cases of controversy, where the right exists under each valid location to follow the lode in its downward course, it necessarily follows that both locations cannot rightfully occupy the same space of ground; and, in all cases where a controversy of this kind arises, the prior locator must prevail, precisely as in cases of like controversy between locations overlapping each other lengthwise on the course of the lode. This is the rule as announced by the court below upon this branch of the case, and it is, in our opinion, sound, logical, and just, and is sustained by authority. Mr. Justice Field, in *Argentine Mining Co. v. Terrible Mining Co.*, supra, in reviewing an instruction given by the circuit court, said: 'If there was an apex or outcropping of the same vein within the surface of the boundaries of the claims of the defendant, that company could not extend its workings under the Adelaide location, that being of earlier date. Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein.'

In *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 687, 15 Sup. Ct. 734, the court said:

"The course of this vein is across the Last Chance claim, instead of in the direction of its length. Under those circumstances the side lines of that location become the end lines, and the end the side lines. *Mining Co. v. Tarbet*, 98 U. S. 463; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356; *King v. Mining Co.*, 152 U. S. 222, 14 Sup. Ct. 510."

Upon the agreed statement of facts, the priority of the Last Chance claim is established. This being true, its extralateral rights to follow the lode in its downward course, between vertical planes drawn through its side end lines, is well settled, and the extralateral rights of the Tyler claim cease when the vertical plane drawn downward through the north side end line of the Last Chance claim is encountered. It follows that the court did not err in rendering judgment in favor of the Last Chance Company for its costs, and it is therefore unnecessary to determine what the extralateral rights of the Tyler Company would have been had the lode, when it crossed the southerly side line of the Tyler claim, extended in an easterly, instead of a southerly, direction, as shown in the diagram, or, in other words, "more along than across the lode."

2. It is claimed that the court erred in not allowing costs in favor of the Tyler Company against the Last Chance Company. The argument in support of this position is that the locations of the Republican Fraction claim, the Skookum Fraction, and the Last Chance Fraction, owned by the defendants the Republican and Idaho Mining Companies, were made simply as outposts for the protection of the Last Chance claim, in order to include ground where it was supposed the lode which had its apex in the Last Chance claim might be found; that the said corporations, the Republican and Idaho Mining Companies, were organized, managed, and controlled by the officers and members of the Last Chance Mining Company; that all the work done and performed on all the claims was directed and paid for by the Last Chance Company, and that it was in the actual possession of all the premises sued for by the Tyler Company; that, the Tyler Company having recovered a judgment against the

Republican and Idaho corporations for a portion of the lode claimed by it, it is entitled to a judgment for costs against the Last Chance Company, as well as against the other defendants, it being the real party in interest in defending the action. The facts concerning this question were all before the trial court, and, in the very nature of the case, that court would be in a better position to determine the question than this court could possibly be. It is apparent from the facts before us that the real contention of the parties was as to the ownership of the ore bodies found in the Last Chance claim, and with reference to this the final judgment was in favor of the Last Chance Company, and entitled it to recover its costs against the Tyler Company. The record shows that a separate defense was made by three distinct corporations, each claiming to be the owner of separate mining claims. The Tyler Company recovered judgment against two corporations, namely, the Republican and Idaho. In equity cases and in other cases where there are no statutory provisions or rules of practice, the award of costs, as well as the taxation thereof, rests in the sound discretion of the trial court, and will not be reviewed in the appellate court, except in cases of a manifest abuse of such discretion. *Kittredge v. Race*, 92 U. S. 116, 121; *Cole v. Logan*, 24 Or. 304, 314, 33 Pac. 568; *Woodward v. Baird*, 43 Neb. 310, 317, 61 N. W. 612; *Wells v. Tolman* (Sup.) 34 N. Y. Supp. 840, 843; *McChesney v. City of Syracuse*, 75 Hun, 503, 508, 27 N. Y. Supp. 508. But "in actions at law it is a general rule that the losing parties, or the parties against whom judgment is rendered, are to pay the costs, and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in the subject-matter of the suit." *Kittredge v. Race*, *supra*. It is unnecessary to determine the question whether there are any circumstances which would change this rule in its application to the taxation of costs in the judgment obtained by the Tyler Company against the Republican and Idaho Mining Companies, as that question is not properly before us for review. We are of opinion that, upon the facts presented in the record, the court did not err in refusing to tax any costs against the Last Chance Company.

3. The last question argued by respective counsel relates to the costs taxed by the clerk in favor of the Last Chance Company. This question is not presented by the record in such a manner as to authorize this court to review the same. Conceding, for the purposes of this opinion, that a writ of error or appeal may be taken in certain cases from the decision of the court affirming or reversing the action of the clerk in taxing costs, yet it is manifest that such writs cannot be taken from the decision of the clerk. The state courts, where the statute permits an appeal to be taken from the taxation of costs, hold that, in order to authorize the appellate court to review the taxation of costs, a motion to retax the costs must first be made in the trial court, and a ruling obtained thereon by that court, to which an exception is duly taken. *Real v. Honey*, 39 Neb. 516, 520, 58 N. W. 136; *Richards v. Borowsky*, 39 Neb. 774, 58 N. W. 277; *Roberts v. Drehmer*, 41 Neb. 306, 310, 59 N. W. 911; *Haskell v. Valley Co.* (Neb.) 59 N. W. 680. But, what-

ever the rule may be in the state courts, the question is settled by the rules adopted for the government of the United States courts. The rules of practice of the circuit courts for this circuit provide for the filing of the cost bill, and for the taxation of costs by the clerk, and specify in what manner objections thereto may be made. Rules 17 and 18. Rule 18, among other things, declares that "the taxation of costs made by the clerk shall be final unless modified on appeal as provided in rule 19." Rule 19 provides that "an appeal from the decision of the clerk, in the taxation of costs, may be taken to the court, or judge, orally, by either party, instantler, or by motion to retax upon written notice of not less than one nor more than two days, given and filed with the clerk, within two days after the costs have been taxed in the clerk's office, but not afterward." The record shows that the clerk taxed the costs in the case, and disallowed the sum of \$6,287.35 in the cost bill of the Last Chance Company; but it is silent upon the subject as to whether any appeal was taken from the decision of the clerk to the judge. This court cannot review the action of the clerk of the circuit court. Under the practice prescribed by the rules, the taxation of the costs as made by the clerk becomes final, unless an appeal is taken therefrom to the court or judge within the time mentioned in rule 19. The law is well settled that an appeal or writ of error does not lie from a judgment or decree as to costs merely. *Canter v. Insurance Co.*, 3 Pet. 307, 319; *Fabrics Co. v. Smith*, 100 U. S. 110; *Wood v. Weimar*, 104 U. S. 786, 792; *Russell v. Farley*, 105 U. S. 433, 437; *Machine Co. v. Nixon*, Id. 766, 772; *Bank v. Hunter*, 152 U. S. 512, 516, 14 Sup. Ct. 675; *Du Bois v. Kirk*, 158 U. S. 58, 67, 15 Sup. Ct. 729; *Clarke v. Warehouse Co.*, 10 C. C. A. 387, 62 Fed. 328, 334. The judgment of the circuit court is affirmed, with costs.

STATE TRUST CO. v. CHEHALIS COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1897.)

No. 292.

1. TAXATION—ASSESSMENT—OWNERSHIP—RECORD TITLE.

In ascertaining the ownership of property for the purposes of taxation, the record title, in the absence of actual knowledge, must control. It is unnecessary for the assessing officer to investigate all matters pertaining to the ownership of the property or the validity of the record, but he has the right to act upon the appearance of title as shown by such record.

2. SAME—PERSONAL PROPERTY—BILL OF SALE—MORTGAGE.

When a bill of sale of personal property, absolute on its face, and apparently conveying the title to such property to the grantee, has been placed on record, and such property has not been listed by the owner to the taxing officer, such officer, acting under a statute requiring him, in the absence of listing by the owner, to make a return from the best information he can obtain, may properly assess such property to the record owner, if he has no actual knowledge of a different ownership; and the validity of the assessment is not affected by proof that the recorded bill of sale was in fact intended as a mortgage, or that the property actually belonged to another person than the grantee.

SAME—PROPERTY IN TRANSITU.

In ascertaining the ownership, for the purposes of taxation, of property actually within a county, but alleged to be merely in transitu, so as to be exempt from taxation within such county, there must be at least an intention and fixed purpose to remove it within a reasonable time; and an intention to remove it at some future time, depending upon certain contingencies which may or may not happen, is wholly insufficient.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

Doolittle & Fogg and C. W. Hodgdon, for plaintiff in error.

J. R. Bridges, for defendants in error Chehalis county and J. C. Lewis.

Ben Sheeks, for defendant in error Book.

Austin E. Griffiths, for defendants in error Wilson and Weatherwax.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This action was brought by the plaintiff in error to recover the value of certain steel rails which it is alleged were wrongfully and unlawfully converted by the defendants in error. The property in question was assessed for taxes in Chehalis county as the property of the plaintiff in error, and was thereafter sold for the nonpayment of the taxes. The defendant Lewis is the treasurer of Chehalis county. The defendants Book, Weatherwax, and Wilson were the purchasers of the property at the tax sale. The court, at the close of the testimony, sustained the motion of defendants to instruct the jury to find a verdict for defendants, by granting a nonsuit.

The record shows that, as the case was presented to the circuit court, the assessment, levy, and sale by the county were virtually conceded to be regular, except upon two points raised by the plaintiff against defendants' motion: (1) That the assessment was not made against the owner of the rails; (2) that the rails were not taxable in Chehalis county. The assessment, levy, and sale were made under the provisions of the statute of Washington of 1893, p. 323 et seq. Under this statute all property, real and personal, is subject to assessment and taxation for state and county purposes on the 1st day of April of each year in which the same shall be listed, unless expressly exempted therefrom. It is made the duty of the owner to list his property and furnish the list to the assessor, and, if he fails to do so, it is the duty of the assessor to ascertain the amount and value of such property, and assess the same at such amount as he believes to be the true value thereof. Section 20 reads as follows:

"The president, secretary or principal accounting officer or agent of any company or association, whether incorporated or unincorporated, except as otherwise provided for in this act, shall make out and deliver to the assessor a sworn statement of its property, setting forth particularly, first, the name and location of the company or association; second, the real property of the company or association, and where situated; third, the nature and value of its personal property. The real and personal property of such company or association shall be assessed the same as other real and personal property. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain."

There are no provisions in the statute which directly declare that he shall assess the property to the true owner. Section 35 provides that:

"All tools, machinery and material for repairs, and all other personal property of any railroad company, except 'rolling stock,' shall be listed and assessed as personal property in the county wherever the same may be on the first day of April of each year."

The facts elicited at the trial were substantially as follows: The rails in question had been a part of the cargo of the steamer Abercorn, which in 1888 was wrecked at North Beach, within the limits of Chehalis county. They were removed from the wreck late in 1891 or early in 1892, and thereafter remained within said county up to the time of their sale for taxes on June 30, 1894. The underwriters bought the rails after the wreck, and in 1891 sold them to A. M. Cannon and Paul Mohr. On November 15, 1892, Cannon and Mohr sold the same to the Columbia Railway & Navigation Company, a corporation organized under the laws of Washington, with its principal office at Tacoma, Pierce county, and having for its principal object (on paper) the building of a railroad on the north side of the Columbia river, and across the interior of Washington. On November 15, 1892, the Columbia Railway & Navigation Company conveyed the same to the State Trust Company, plaintiff in error, by bill of sale therefor, absolute on its face, which was filed for record and duly recorded in the office of the auditor of Chehalis county on the 15th day of June, 1893, in book 10 of Miscellaneous Records. On November 2, 1893, a second bill of sale was executed by the same parties, in terms substantially the same as the first bill of sale, except that the second one had annexed to it the affidavit of A. M. Cannon, president of the Columbia Railway & Navigation Company, to the effect "that this bill of sale was made in good faith, and without any design to hinder, delay, or defraud creditors." This bill of sale was filed for record and recorded in the office of the auditor of Chehalis county on November 25, 1893, in volume 12, Miscellaneous Records. Mr. Bangs, the president of the State Trust Company, testified that "in November, 1892, the State Trust Company was advised by its counsel at Spokane that either the form of the first bill of sale or of the record rendered the execution, delivery, and recording of a new bill of sale desirable." The testimony on the part of the plaintiff was to the effect that the Columbia Railway & Navigation Company was indebted to the State Trust Company for a loan of \$50,000; that a note was given for said amount on November 29, 1892, payable eight months after date; that said bills of sale were executed and delivered as collateral security for the payment of said indebtedness, and were intended as confirming the pledge of the rails to the State Trust Company, "and not as a means of transferring the actual title." The plaintiff offered to show that when the second bill of sale was left in the auditor's office a request was made that it be recorded "in the chattel mortgage records, as it was in fact intended by the parties to operate as a mortgage," which testimony, upon objection, was excluded by the court. With reference to the notice given to Mr. Lewis, the county treasurer

of Chehalis county, concerning the ownership of the property, Mr. Hodgdon, one of the attorneys for the plaintiff, testified as follows:

"I talked with Mr. Lewis several days before the sale took place, and informed him of the ownership by the Columbia Railway & Navigation Company, and that the State Trust Company had simply a mortgage, and on the morning of June 30th [the day of the sale] I gave him an affidavit which had been made and sent to me by Mr. Cannon as to the ownership of those rails."

Mr. Lewis gave his version of the conversation with Mr. Hodgdon as follows:

"I had a conversation with Mr. Hodgdon about the first of June or the last of May in reference to the tax on the rails. * * * I asked him if he was representing the State Trust Company, and he said that he was not, but he was in communication with them, and would notify me whether they would pay the taxes or not."

The following question was then asked by defendants' counsel on cross-examination:

"Q. Mr. Lewis, so far as you know as an officer and as treasurer, who was the owner of these rails in question at the time the tax rolls came into your hands; at the time the levy was made; at the time of the seizure of the property, and the sale of the property?"

To this question plaintiff objected upon the ground that it was incompetent, and the objection was overruled, and the witness answered:

"The State Trust Company of the City of New York."

At the time of the listing of the property for taxation, on April 1, 1893, the State Trust Company was in the possession of the property; was the record owner thereof, by virtue of the first bill of sale, the second not having at that time been executed. Neither Lewis nor any of the county officers had any knowledge as to the ownership otherwise than was obtained from the records.

The following telegram and letters were introduced in evidence:

"New York, 6, 7, 1893.

"To F. D. Arnold, First National Bank, Hoquiam: Take immediate possession of steel rails at So. Aberdeen and Cosmopolis for State Trust Co. of New York (bill of sale executed by Columbia Ry. and Navigation Co. mailed to-day), and draw for expenses. .

The State Trust Company, 36 Wall St., N. Y."

"The State Trust Company.

"No. 36 Wall St., New York, June 7, 1893.

"F. D. Arnold, Esq., Pres. First National Bank, Hoquiam, Wash.—Dear Sir: We telegraphed you to-day to take possession of 1,901 tons of steel rails located at South Aberdeen and Cosmopolis for this company. We inclose herewith bill of sale of the Columbia Railway and Navigation Company to us for the above property. Please keep possession for us, and only deliver or allow the rails to be removed on our order. * * * Please give this matter your immediate attention, as expedition is all-important under the circumstances.

"Yours, very truly,

Andrew Mills, Pt."

In a subsequent letter of July 10, 1893, to Mr. Arnold, by the secretary, the company said:

"We are this morning in receipt of your two favors of July 1st and 3rd; the latter containing the notice as to our ownership of the rails. We agree with you that we do not think it is necessary to keep a man all the time watching the rails. * * * We assure you that we appreciate the kind services ren-

dered by you in this connection, and for what you have done you have our thanks. We hope that you will keep yourself advised of any movements in regard to the moving of the rails, or of their in any way being disturbed."

Thereafter the following notice was posted upon the rails:

"Notice.

"Notice is hereby given that these rails, and all rails taken from the Abercorn wreck, are the property of the State Trust Company of New York.

"State Trust Company,

"F. D. Arnold, Agent."

The bill of exceptions shows that:

"In the opening statement of counsel for plaintiff, he said that the rails in question had not been assessed to their owner, the Columbia Railway & Navigation Company, as required by law, but that they had been erroneously assessed, levied upon, and sold by Chehalis county as the property of the State Trust Company, which was not owner, but only a mortgagee thereof; that said assessment, levy, and sale were void because the property had not been assessed to, levied on, and sold as the property of the owner; for the further reason that the same was not assessable by or in Chehalis county. These were the grounds, and the only grounds, upon which counsel, in his opening statement, predicated the invalidity of said assessment, levy, and sale; and these were the only grounds upon which the invalidity of the assessment, levy, and sale was contended for by plaintiff on the argument on the motion for nonsuit, as well as in his opening statement."

It is therefore affirmatively shown, as before stated, that there were only two points urged at the trial against defendants' motion: (1) That the rails were not assessed to, nor sold as the property of, the owner; that the bills of sale executed to the State Trust Company were mortgages only, and that the property in question still belonged to the Columbia Railway & Navigation Company. (2) That the property was not taxable in Chehalis county, because (a) it was in transitu; (b) it, being the property of the Columbia Railway & Navigation Company, a corporation of the state of Washington, with its principal place of business in Pierce county, was not taxable in Chehalis county.

Did the court err in granting a nonsuit? The law is well settled that the owner of property for the purpose of taxation is the person or corporation having the legal title thereto. *Tracy v. Reed*, 38 Fed. 69, 74; *Miner v. Pingree*, 110 Mass. 47; *Richardson v. City of Boston*, 148 Mass. 508, 20 N. E. 166; *Augusta Bank v. City of Augusta*, 36 Me. 255; *Augusti v. Bank*, 46 La. Ann. 530, 15 South. 74; *Vance v. Corrigan*, 78 Mo. 94. The rails in question were not listed by the owner to the assessor as the law required. He was compelled to act upon the best information obtainable. In ascertaining the ownership of property for the purposes of taxation under such circumstances, the record title, in the absence of actual knowledge, must control. It is unnecessary for the assessing officer to investigate all matters pertaining to the ownership of the property or of the validity of the record. He has the right to act upon the appearances of the title to the property as shown by the records. It does not devolve upon him to test the validity of the title deeds or documents in order to ascertain the name of the owner. The authorities upon this subject clearly show that the appearance of the title, as shown by the record, and the evidence, in the present case, were

sufficient to maintain the validity of the assessment. The North Cape, 6 Biss. 505, 515, Fed. Cas. No. 10,316; Finney v. Boyd, 26 Wis. 366, 371; French v. Spalding, 61 N. H. 395, 402; Mason v. Bemiss, 38 La. Ann. 935, 938; Puget Sound Agricultural Co. v. Pierce Co., 1 Wash. T. 159, 168; Butler v. Stark, 139 Mass. 19, 29 N. E. 213; Jones v. Town of Bridgeport, 36 Conn. 283. As was said by Blodgett, J., in the North Cape, the—

"Officers charged with the assessment and collection of taxes are not required to look into the secret ownership of personal property. They do their duty when they assess the property against the apparent owners as shown by possession or muniment of title."

In Augusti v. Bank, the court, in discussing a similar question, said:

"Titles that are intrinsically null, if permitted to remain unquestioned, may become the basis of an assessment that will result in a valid sale. Any other ruling upon this point would compel the assessor to investigate titles and ascertain as to their conclusive validity. This was never contemplated by the law. The evidence of a prima facie title is the requirement."

Persons who own the property at the time of the assessment are the proper ones upon whom the tax should be imposed, irrespective of any prior or subsequent change of ownership. 25 Am. & Eng. Enc. Law, 121, and authorities there cited.

It is unnecessary to consider the objection urged against the ruling of the court in permitting Lewis to testify that the State Trust Company was the owner of the property, or to the ruling of the court excluding the request to have the second bill of sale recorded in the Book of Chattel Mortgages, for the reason that such rulings, even if erroneous, would not have changed the result. Migeon v. Railway Co., 23 C. C. A. 156, 77 Fed. 249, and authorities there cited; Haley v. Elliott (Colo. Sup.) 38 Pac. 771. The notice given to Lewis by Hodgdon was insufficient to invalidate the assessment. No notice whatever was given to the purchasers of the rails at the tax sale to the effect that the State Trust Company was not the owner of the property. If the assessing officer had the right to act upon the appearances of title as manifested by the conduct of the State Trust Company, and as shown by the records, then it matters not who the real owner was.

The cases cited by plaintiff are so great in number as to render it impracticable to attempt any extended review of them. Many of them have no reference whatever to tax cases. Others relate to street assessments, in which much stricter rules prevail than in the collection of taxes due to the state and county government. Numerous cases are cited where there was a positive statute directing the assessment to be made in the name of the true owner of the property; and in such cases, where it appeared that the name of the true owner could readily have been ascertained by searching the record, or was known to the assessing officer, and the property was assessed to other persons, the assessments have in many instances been declared void.

Other questions have been discussed at great length which have no special application to the facts in this case; for instance, upon

the general principle that parol evidence in certain cases is admissible for the purpose of proving that an absolute bill of sale was given as a chattel mortgage. A treatise is written upon the law of estoppel, and all the authorities upon this subject have been collected and cited in the brief. Every case should be disposed of upon its own merits, with special reference to the questions raised in the court below.

The various authorities cited by plaintiff from the supreme court of Washington are not adverse to the views we have expressed. In *Vestal v. Morris*, 11 Wash. 452, 39 Pac. 960, the land was assessed in the name of one Burns, while one Bartlett was the owner, and the county officers had knowledge at the time of the assessment that Bartlett was the owner of the land; and the court held that under the statute then in force "the failure to assess the property in the name of the known owner was a substantial failure to comply with the law." In *Baer v. Choir*, 7 Wash. 631, 634, 32 Pac. 776, and 36 Pac. 286, certain lands were assessed to one Knight, and sold for the payment of the taxes due thereon. The court held that under certain provisions of the statute, which were quoted, it was clear that it was the intention of the law of 1871 that unusual care should be taken in the matter of assessing real estate to the owners thereof. In the course of the opinion the court said:

"Were there nothing in this case but the recital of the deed that the property had been assessed to Knight as owner, the presumption of the regularity of all former proceedings would carry the presumption that the assessment to him had been properly made by the officer. But the record shows that, although Knight had been the owner, he had conveyed by a recorded deed in 1870; that for the years 1873 and 1874, at least, the lots had been assessed to Mrs. Bonnell; and that Mrs. Bonnell did not convey until 1889; and this showing was sufficient to rebut the presumption which the deed raised."

In *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931, the court held that an attachment could not be levied upon property held by the debtor as mortgagee under a bill of sale absolute on its face, although the officer may have had no notice of the true relation of the debtor to the property. This is an authority only upon the general point that in a certain class of cases it is permissible to allow parol evidence for the purpose of proving that an absolute bill of sale was given as a chattel mortgage. It is enough to say that such a rule has no application to tax cases, especially under statutes similar to the statute of Washington, and upon the particular facts as shown in this case. The taxing power is an incident to sovereignty, the exercise of which belongs exclusively to the government and attaches to all property which comes within its jurisdiction, and the statutes of a state should never be construed in such a manner as to defeat the right of the government "by any subtle device or ingenious sophism whatsoever." *Cooley, Tax'n*, 272-274; *Board v. Anderson*, 15 C. C. A. 471, 68 Fed. 341.

In *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177, the court said:

"The payment of taxes is a duty which property holders owe to the government. If they neglect this duty, they have no right to expect relief from the courts on account of merely technical errors on the part of the public officers, where no substantial right has been lost or impaired."

This was said in a case involving the sale of real estate for taxes.

"Certainly a more stringent rule is not required in case of a tax sale of personal property. Meritorious objections affecting substantial rights, when properly made to appear, should always be heeded, but mere hypertechnical objections should not be countenanced in the administration of justice. Such is the trend of modern legislation, and such should be the aim of judicial decisions." *Haley v. Elliott* (Colo. Sup.) 38 Pac. 771, 773.

The contention of plaintiff's counsel, as set forth in his brief, that:

"These rails had been purchased by the Columbia Railway & Navigation Company, with which to construct its railway around The Dalles, and they were en route to their point of destination; the transit having begun by taking the rails from a ship stranded on the Pacific coast, and transporting them, at a cost of more than \$2,000, across the land to Gray's Harbor, thence across the harbor, and up the Chehalis river to the railroad, by which they were to be ultimately carried another stage on their way to The Dalles. This is fully proven, and not disputed. The cause of their delay at Cosmopolis does not appear, but so long as it remained the owner's intent to carry them forward on a transit already commenced, in legal contemplation, so long as they continue to be in transitu. This intent being once shown, it is presumed to continue until the contrary is made to appear,"

—cannot be sustained. The rails were originally shipped for the purpose of building a railroad outside of Chehalis county. The wrecking of the cargo of the *Abercorn* in 1888 ended their voyage. They were towed from the wreck late in 1891 or early in 1892 to Cosmopolis and South Aberdeen, in Chehalis county, and there remained within the limits of the county until the sale for taxes. The bills of sale of the rails were recorded in that county. A portion of the rails was sold by the plaintiff in error to different parties in 1894, and the proceeds applied to the reduction of the loan made by it to the railway company. In June, 1893, information reached the State Trust Company that creditors of A. M. Cannon, of Spokane, were threatening to attach the rails under claim that Mr. Cannon had an interest in them. Mr. Mohr was consulted, and it was agreed that in order to protect the interest of the railway company and State Trust Company, and prevent removal of the rails by outside parties, Mr. F. D. Arnold, then the president of the First National Bank of Hoquiam, should be asked to take charge of the rails and see that they were not removed. A request to that effect was sent to Mr. Arnold, requesting him not to permit the rails to be removed. He put a watchman in charge. This was before the second bill of sale was recorded. The property was not in transitu. It had not been started upon its journey to any other place. In brief, there was nothing in the conduct of the parties in possession of the rails, or any one else, intimating any intention whatever to remove the same or any part thereof from Chehalis county. From the time the rails were landed from the wreck they were in such a situation as to make them a part of the property within Chehalis county, and it was the duty of the assessing officer of said county to assess the rails therein. In order to constitute property in transitu, there must be at least an intention and fixed purpose to remove it within a reasonable time. An intention to remove the rails at some future time, depending upon certain contingencies which might or might not happen, is wholly insufficient. *C. N. Nelson Lumber Co. v. Town*

of Loraine, 22 Fed. 54; Hill v. Graham, 72 Mich. 659, 667, 40 N. W. 779; Carrier v. Gordon, 21 Ohio St. 605, 609; Winnipiseogee Paper Co. v. Town of Northfield (N. H.) 29 Atl. 453. In Carrier v. Gordon the court said:

"To say that the simple purchase of the property with an intention to remove it would relieve it from liability to taxation would be to make its liability depend upon the mere intention of the owner, and subject to change as often as the owner changed his intention. There would be no safety or certainty in such a rule. The safer and better rule is the one indicated,—to consider the property actually in transit as belonging to the place of its destination, and property not in transit as property in the place of its situs, without regard to the intention of the owner, or his residence in or out of the state."

See, also, Cooley, Tax'n, 98, and authorities there cited; State v. Dalrymple (N. J. Sup.) 28 Atl. 671; Chicago, B. & Q. R. Co. v. Hitchcock Co. (Neb.) 59 N. W. 358; State v. William Deering & Co. (Minn.) 57 N. W. 313.

The court did not err in granting a nonsuit. The judgment of the circuit court is affirmed, with costs.

MORTON v. KIRK et al.

(Circuit Court, E. D. Missouri, N. D. March 23, 1897.)

TAXATION—LEVY BY COUNTY BELOW STATUTORY LIMIT—RIGHTS OF JUDGMENT CREDITOR—MANDAMUS.

A judgment creditor of a county, who, having the statutory right to require the county to make an annual levy of 5 per cent. to pay current expenses and debts, makes no objection to repeated smaller levies, has no right, after the lapse of several years, to mandamus to compel a levy sufficient to make up the deficiency.

F. L. Schofield and W. C. Holliste, for relator.
Charles D. Stewart, for respondents.

WILLIAMS, District Judge. This is a petition for mandamus. The defendants are officials of Knox county, Mo. The petition sets up that on August 9, 1879, the county executed to the relator its warrant for \$4,497.41; that on October 9, 1894, relator brought suit upon it in this court, and on December 7, 1894, recovered judgment for \$8,627.40; that sundry payments have been made upon it out of the special tax of one-twentieth of 1 per cent., required by law to be levied to pay warrants of this description, but that it will take many years to pay the judgment out of this tax; that the county is bound to levy a five-mill tax each year to pay current expenses and debts, but that for the years 1879, 1881, 1884, and 1885 the county only levied four mills. The prayer of the petition is that the county be required to levy, in addition to the five mills lawfully levied already for the current year, the four mills that were omitted during those years. An alternative mandamus has already been issued, and a response has been filed, to two paragraphs of which a demurrer has been interposed.

It is a familiar rule that a demurrer to one pleading reaches back to the substance of all prior pleadings, and judgment upon it will be

rendered against him who is first at fault. *U. S. v. Arthur*, 5 Cranch, 261; *Gorman v. Lennox*, 15 Pet. 117; *Clearwater v. Meredith*, 1 Wall. 26; *Aurora City v. West*, 7 Wall. 94; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 288. It is therefore unnecessary to examine the response, unless the petition sets out a cause of action. The statute requires the county, if necessary, to levy a five-mill tax. If it fails to do so, it can be compelled by mandamus, as was done in *Macon Co. v. Huidekoper*, 134 U. S. 332, 10 Sup. Ct. 491. But the right given by the statute is the right to an annual levy of five mills. Any creditor can require this levy to be made each year. But can a creditor lie by supinely, permit years to elapse without complaint, and then demand at one time the ruinous levy of all taxes that might have been levied in the past? If that were permitted, how could men buy property with safety? Each year the property ought to bear its annual burden; but, if a ruinous accumulation of unlevied taxes can be cast upon it at the mere caprice of a creditor who was silent when he should have spoken, what safety can a man have in his possessions? It is reasonable to suppose that, since the year 1879 (now 18 years ago), a large part, perhaps a majority, of the property of Knox county has changed hands. Upon what just principle can the present owners, who acquired it free of lien, be required to pay the taxes that should have been paid years ago by the former owners? And, if the creditor can lie by for 18 years before seeking to enforce the levy and collection of a tax, what limit is placed upon his rights? Taxes that could have been easily met as they accrued from year to year, if suffered to accumulate in that manner, would fall with a crushing weight, and usually upon the innocent. I therefore conclude that the relator has no right to a mandamus, and that the demurrer to the response should be overruled. As it is apparent that the petition cannot be so amended as to state a cause of action, it will be dismissed, and the defendants discharged, with costs.

DENVER & R. G. R. CO. v. LORENTZEN.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 810.

1. REVIEW ON ERROR—BILL OF EXCEPTIONS.

The circuit court of appeals will not review the action of a trial court in failing to direct a verdict for a plaintiff or defendant on issues of fact or on a mixed issue of law and fact, unless the bill of exceptions affirmatively shows that it contains all the evidence.

2. NEGLIGENCE—PERSONAL INJURIES—INSTRUCTIONS.

It is not error for the court, in an action for personal injuries brought by a woman, to call the jury's attention to the possible bearing of her sex upon the question of contributory negligence, and to permit them to determine, in view of her sex and all the surrounding circumstances, whether she exercised such care as was reasonably to be expected from her.

3. TRIAL—WEIGHT OF EVIDENCE—INSTRUCTIONS.

The giving of an instruction that positive evidence is entitled to more weight than negative always rests largely in the discretion of the court, and it is certainly not error to decline to give such instruction in a case

in which witnesses have testified as positively on the one side that a thing did not occur as on the other side that it did.

4. NEGLIGENCE—PERSONAL INJURIES—LIABILITY FOR MEDICAL ATTENDANCE.

The liability of a defendant, through whose negligence a plaintiff has been injured, for the plaintiff's doctors' and nurses' bills, rests upon the ground that they were rendered necessary by the defendant's neglect of duty, and is not altered, whatever arrangement the plaintiff may have made for the payment of such bills, or whether he ever pays them.

In Error to the Circuit Court of the United States for the District of Colorado.

Henry F. May (Edward O. Wolcott and Joel F. Vaile with him on the brief), for plaintiff in error.

Charles Hartzell, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit to recover damages for injuries sustained at a railroad crossing by Mrs. Anna Marie Lorentzen, the defendant in error, who was the plaintiff below. Mrs. Lorentzen was riding in a public conveyance, termed a "hack," which was in charge of a driver, from the station of the Denver & Rio Grande Railroad Company, in Palmer Lake, Colo., to the station of the Atchison, Topeka & Santa Fé Railroad Company, in the same town or village. The two stations were some distance apart, and, on the route taken, it was necessary to drive across the track of the Denver & Rio Grande Railroad Company at some distance from its depot. While crossing the defendant's track, the vehicle in which she was riding was struck and overturned by an outgoing train of the defendant company, as the plaintiff below alleged, because of the neglect of the engineer on the outgoing train to ring the bell or sound the whistle. There was some controversy in the trial court as to whether the engineer and fireman in charge of the engine did neglect to ring the bell, as to whether the driver of the hack was not solely responsible for the accident, and as to whether the plaintiff herself was not chargeable with contributory negligence. At the conclusion of the evidence, the defendant asked the court to determine each of these questions as a matter of law, by directing a verdict for the defendant. The court declined to so charge, and an exception was saved, which is the first error to which our attention is directed. We are precluded, however, from considering the alleged error, for the reason that the bill of exceptions does not affirmatively show that it contains a report of all the testimony. The rule is well settled, at least in this court, that we will not review the action of a trial court in failing to direct a verdict for a plaintiff or a defendant on issues of fact, or on a mixed issue of law and fact, unless the bill of exceptions affirmatively shows that it contains all the evidence. *Taylor-Craig Corporation v. Hage*, 32 U. S. App. 548, 16 C. C. A. 339, and 69 Fed. 581; *Association v. Robinson*, 36 U. S. App. 690, 20 C. C. A. 262, and 74 Fed. 10.

In the course of its charge, the trial court used the following language:

"Probably we would not exact the same degree of care and diligence from a woman that we would from a man under the same circumstances. I am in-

clined to think that, if this plaintiff were a man suing for a recovery, I should be constrained to advise you that he could be no more relieved from the duty of looking out for the train than the driver of the wagon; but this plaintiff being a woman, a person who is not accustomed, or very much accustomed, to such places, and to going in this fashion from one depot to another, I think it is a matter fairly for your consideration whether she used the care and diligence which should be expected of a person in her situation, in going across this road."

An exception was taken to the aforesaid language, whereupon the court further instructed the jury as follows:

"I do not state that to you, gentlemen, as a matter of law or proposition of law, but simply as a matter for your consideration. I want you to consider whether there is less diligence to be exacted or expected from a woman than would be expected from a man. In fact, I am not considering any of these propositions as matters of law. I am merely explaining them for you to find and pass upon. The facts are with you, gentlemen, and not with the court."

The exception first taken is insisted upon, notwithstanding the explanatory remarks of the court. We think, however, that the exception is not well founded. Considering all that was said, it appears that the jury was left at liberty to determine, as it had an undoubted right to do, whether, in view of the plaintiff's sex and all the surrounding circumstances, she exercised such care and diligence as should reasonably be expected of her. This was the proper test by which to determine if she was guilty of any contributory fault.

The trial court was asked to charge, with reference to the evidence concerning the ringing of the bell, "that positive evidence is entitled to more weight than negative evidence." It declined to do so, and such action on its part is assigned for error. It is doubtless very proper to advise a jury, when such an instruction is asked, and the facts warrant it, that greater weight ought to be attached to statements of witnesses who claim to know or to have observed that on a given occasion a certain thing was done than to the statements of witnesses who are only able to say that they did not observe or have no recollection that the act was done. But in the case at bar the record discloses that two witnesses for the plaintiff below testified no less positively than the witnesses for the defendant that, on the occasion of the accident, the bell on the engine was not sounded as the train approached the crossing. It was wholly unnecessary, therefore, in the case in hand, to give an instruction relative to the comparative weight of positive and negative testimony, and the refusal of such an instruction constitutes no ground for complaint. In any event, the giving of an instruction of that nature is a matter which rests largely in the discretion of the trial judge. It should be made to appear very clearly that, in the particular case, such an instruction was necessary, before the refusal of a request of that kind should be held to be reversible error.

It is finally assigned for error that the trial court, in its charge, permitted the plaintiff to recover for certain doctors' and nurses' bills which she had incurred, although she did not testify that she had herself paid them, and although, at one stage of her testimony, she remarked, incidentally, that her brothers were paying her expenses. Whether they were paying the particular expenses in question, or

whether, if they were paying them, they were doing so in expectation of being reimbursed by the plaintiff, she did not state. It is apparent, we think, that this exception is without merit. The liability of the defendant company for the expenses in question rested upon the ground that they were rendered necessary by its neglect of duty, and that liability was not altered, no matter what arrangement the plaintiff may have made for their payment, or whether she ever pays them. *City of Indianapolis v. Gaston*, 58 Ind. 227; *Klein v. Thompson*, 19 Ohio St. 571; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874. It is not apparent from this record that the doctors' and nurses' bills which the plaintiff incurred are not a legal charge against her, which she may be compelled to pay. The judgment of the circuit court is affirmed.

NEW ENGLAND FURNITURE & CARPET CO. v. CATHOLICON CO.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 814.

1. REVIEW ON ERROR—EXCEPTION TO REFUSAL OF INSTRUCTIONS.

An exception taken in gross to the refusal of a long series of instructions is of no avail in an appellate court, if some of such instructions were clearly erroneous, and ought not to have been given.

2. SAME—EXCEPTIONS TO CHARGE.

Exceptions to a charge to the jury, not taken until after the jury has retired, will not be noticed on appeal, especially where the objections to the charge are of such a nature that they might have been remedied had the court's attention been called to them at the proper time.

In Error to the Circuit Court of the United States for the District of South Dakota.

Louis A. Merrick (Ambrose N. Merrick with him on the brief), for plaintiff in error.

Chambers Kellar (Andrew J. Kellar with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action in replevin, which was brought by the Catholicon Company, the defendant in error, against the New England Furniture & Carpet Company, the plaintiff in error, hereafter called the "Furniture Company," to recover the possession of certain hotel furniture. The property in controversy was originally bought by the Catholicon Hot Springs Company of the furniture company, in February, 1893, and two notes, aggregating \$1,750, made by third parties, were indorsed and delivered to the furniture company in part payment therefor, the understanding being that the residue of the purchase money, about \$1,000, should be paid within 30 days thereafter. In April, 1893, the furniture in controversy was sold and delivered by the Catholicon Hot Springs Company to a new corporation, the Catholicon Company, which is the present defendant in error. In May, 1893, after the last-mentioned sale, the furniture company and the Ca-

tholicon Hot Springs Company entered into a written agreement, which, as it is claimed, embodied the terms of the verbal agreement that was made when the furniture in question was originally sold. The legal effect of this agreement was that the furniture company was to retain the title to the property contracted to be sold until the purchase price was fully paid. It was under the latter contract, made after the property had been sold by the original purchaser to the new company, the present defendant in error, that the furniture company, on the trial of the case, laid claim to the property. The testimony contained in the record tends to show that shortly after the defendant in error bought the property it was advised by the furniture company that the amount due to it on account of the sale to the Catholicon Hot Springs Company was only \$1,057.55; that it paid this sum to the furniture company in October, 1893, and thereby obtained a good title to the property. It appears, however, that the furniture company did not succeed in collecting the notes amounting to \$1,750, which it had originally accepted in part payment for the furniture, and that in December, 1894, it succeeded in obtaining possession of the property, and shortly thereafter made an attempt to remove the same secretly from the state of South Dakota, whereupon the present action was brought by the Catholicon Company. The trial, which was before a jury, resulted in a verdict in its favor. None of the exceptions to the admission and exclusion of evidence which were taken at the trial have been argued in the brief of the plaintiff in error, and apparently they are not relied upon as a ground for the reversal of the judgment. We have examined them, however, in so far as errors of this class are properly assigned and presented, in accordance with the provisions of rules 11 and 24 of this court (21 C. C. A. cxii., xcix., 78 Fed. cxii., xcix.), and we find them to be without merit.

The defendant below requested the court to give 11 instructions, all of which were refused, although the substance of some of the instructions was embraced in the court's charge to the jury. The exception which was saved to the refusal of these instructions was taken in gross to the refusal of all, and, as some were clearly bad, we cannot notice the alleged error. It is well settled that an exception taken to a charge as a whole, or to a long series of instructions, which does not point out the particular error complained of, will not be of any avail in an appellate court, unless the charge as a whole, or the instructions as a whole, were erroneous. The same rule applies to an exception taken in gross to the refusal of a long series of instructions. If some of them were clearly erroneous, and ought not to have been given, the trial court, on an exception to the refusal of all, will not be adjudged to have committed an error. *Price v. Pankhurst*, 10 U. S. App. 497, 3 C. C. A. 551, and 53 Fed. 312; *Association v. Lyman*, 18 U. S. App. 507, 9 C. C. A. 104, and 60 Fed. 498; *Railway Co. v. Spencer*, 36 U. S. App. 229, 18 C. C. A. 114, and 71 Fed. 93.

Exceptions were taken, or at least an attempt was made to take exceptions, to some portions of the charge given by the trial court;

the main objection thereto being, as it seems, that portions thereof were contradictory, and liable to confuse and mislead the jury. The record shows, however, as we understand it, that the objections to the charge were made after the jury had retired from the bar. It has been held by the supreme court and by this court on several occasions that the fact that exceptions are not taken until after the jury has retired is a good and sufficient reason for refusing to notice the same on appeal. *Phelps v. Mayer*, 15 How. 160; *Bracken v. Railroad Co.*, 12 U. S. App. 421, 5 C. C. A. 548, and 56 Fed. 447; *Park v. Bushnell*, 20 U. S. App. 425, 9 C. C. A. 138, and 60 Fed. 533. The case at bar seems to be a proper one in which to apply the rule last stated, as the main objection made to the charge was of such a nature that it might have been remedied had the court's attention been called to it at the proper time. Finding no error in the record that would justify a reversal of the cause, the judgment of the circuit court is affirmed.

**UNITED STATES NAT. BANK v. FIRST NAT. BANK OF LITTLE ROCK
et al.**

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 823.

1. BANKS AND BANKING—REDISCOUNTS.

A rediscount by a bank of its bills receivable, though it indorses the same, and becomes contingently liable for their payment, is not a borrowing of money by the bank, but has more the characteristics of a sale.

2. SAME—POWERS OF PRESIDENT—INDORSEMENT OF PAPER.

It is within the scope of the implied powers of the president of a bank to indorse negotiable paper in the ordinary transaction of the bank's business, and a special authority to that end need not be conferred by the board of directors.

3. SAME—CUSTOM OF REDISCOUNTING.

When a bank has long been in the habit of rediscounting its bills receivable in large amounts, all other banks in the same locality pursuing the same practice, and the president and cashier of such bank propose to its regular correspondent a rediscount of its bills, and there are no circumstances attending such proposal to arouse suspicion, the bank to which it is made may safely act upon it, without further inquiry, on the assumption that the act has either been specially authorized, or that the officers are acting within the purview of their general powers.

4. SAME—KNOWLEDGE OF DIRECTORS—ESTOPPEL.

When the directors of a bank have known for many months that its paper was being rediscounted in large amounts, under the president's direction, and without consulting the board, and that the money so obtained was being used in the business of the bank, and they have made no inquiry as to how the paper was indorsed, the bank is estopped to dispute the authority of the president to indorse such paper for rediscount.

5. WRIT OF ERROR—DISMISSAL—INDORSEMENT OF FILING.

A writ of error, which has been allowed, served, and returned to the appellate court with the transcript of the proceedings in the trial court, will not be dismissed because the clerk of the trial court has inadvertently failed to make an indorsement of its filing on the writ itself. *Insurance Co. v. Phinney*, 22 C. C. A. 425, 76 Fed. 617, disapproved.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

John Fletcher (W. C. Ratcliffe with him on the brief), for plaintiff in error.

Sterling R. Cockrill (Ashley Cockrill with him on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This is the second writ of error which has been sued out in this case by the United States National Bank of New York, the plaintiff in error, hereafter termed the "New York Bank." When the case was here formerly (13 C. C. A. 472, 64 Fed. 985), we decided that the notes on which the suit is brought were in such form, and were so indorsed, when they were tendered to the New York Bank for discount, as to create the presumption that they were the property of the First National Bank of Little Rock, the defendant in error, hereafter termed the "Little Rock Bank," and that they had been acquired by the latter bank in the usual course of business, for value. We further held that this presumption was confirmed by the correspondence between the two banks relative to the discount of the notes, and that an instruction given by the trial court on the first trial was erroneous which told the jury, in substance, that the notes bore upon their face evidence which should have satisfied the New York Bank that they belonged to H. G. Allis, the president of the Little Rock Bank; that he was discounting paper which belonged to himself, and was using the name of the Little Rock Bank as an indorser for his own accommodation.

The facts proven on the second trial do not differ in any material respect from those proven on the first trial, and do not alter the conclusions announced in our former opinion. The New York Bank was the Eastern correspondent of the Little Rock Bank. Between June 21, 1892, when business transactions between the two banks commenced, and December 13, 1892, when the notes in suit were tendered for discount, the New York Bank had discounted, from time to time, for the Little Rock Bank, as the necessities of its business required, paper to the amount of about \$175,000, the proceeds of which the Little Rock Bank had received and used. The application for the discount of the notes in suit was made both by W. C. Denney and H. G. Allis, who were, respectively, the cashier and the president of the Little Rock Bank, in letters which clearly showed that the discount was sought for and in behalf of the bank; and the reasons stated for asking the discount were such as would naturally disarm suspicion, namely, that the bank's customers were not shipping and selling their cotton, but were waiting for higher prices, which compelled the bank to rediscount some of its bills receivable. Besides, the cashier of the Little Rock Bank acknowledged the receipt of the proceeds of the notes in suit when they had been placed to the bank's credit by its Eastern correspondent. It must be held, therefore, that the record made on the last trial discloses no defense which should preclude the New York Bank

from recovering against the Little Rock Bank as an indorser of the notes in suit, notwithstanding the fact that H. G. Allis, the president of the latter bank, did wrongfully appropriate the proceeds of the rediscount, unless it be true, as contended, that the plaintiff bank could not lawfully deal with the officers above named in the matter of rediscounting paper without first ascertaining that they had been authorized by the board of directors to rediscount the notes in controversy, and that the president had been authorized to indorse them.

The second trial of the case was conducted on the theory, which was embodied in the charge of the trial court, that a rediscount by a bank of its bills receivable, where the paper is indorsed, constitutes a borrowing of money by the bank; and that the president of a national bank, by virtue of his office, has no power to indorse its commercial paper, or to rediscount its bills receivable. Proceeding from these postulates, the trial court further instructed the jury, in substance, that there was no evidence that the president of the defendant bank had any actual authority to indorse and rediscount the notes in suit; and that, before there could be a recovery, the plaintiff bank must show affirmatively that the board of directors of the defendant bank either knew that its president had previously exercised the power of indorsing and rediscounting its bills receivable, or that he had been permitted, without their actual knowledge, to exercise such powers, through a series of transactions such as would amount to a custom to do so, or else that the board of directors had negligently permitted him to carry on such a course of dealing with the plaintiff bank as to induce the latter to believe that the board of directors of the defendant bank had conferred upon the president thereof the power to indorse and rediscount its bills receivable. To all of these instructions exceptions were taken, and they constitute the errors to be reviewed.

We are of opinion that that part of the aforesaid charge which declared that a rediscount by a bank of its bills receivable, if it indorses the same, is a borrowing of money, and that part which declared, in substance, that the president of a national bank has no implied power to indorse its commercial paper, were erroneous. There is an obvious difference between a transaction where a bank goes into the market as a borrower, giving its own notes, bills, or other obligations for the money borrowed, and a transaction where it disposes of the notes and bills of third parties which it has previously discounted. In the former case it becomes primarily bound; it is the principal debtor; while in the latter, even if it indorses the paper, it only incurs a contingent liability, which may never ripen into an absolute obligation to pay. The latter transaction has more, if not all, of the characteristics of a sale, and it is generally regarded as a sale whereby assets of a certain kind are converted into cash. It may be said that a bank or an individual borrows money when they execute their own notes or bills, and receive the money thereon from a third party, even though the interest to accrue is deducted in advance, in the form of a discount. But we can see no propriety in characterizing the transaction as

a borrowing of money, when a person or a corporation sells commercial paper made by third parties, which they happen to own. There are some authorities, it is true, which maintain that the president of a bank has no implied power to bind the bank by an indorsement of commercial paper, and that, when an indorsement by the president is relied upon as transferring a title thereto, a special authority to indorse must be shown. *Smith v. Lawson*, 18 W. Va. 212, 228; *Bank v. Hamlin*, 14 Mass. 178, 180; *Gibson v. Goldthwaite*, 7 Ala. 281, 293. But we think the weight of reason and authority is in favor of the view that it is within the scope of the implied powers of the president of a bank to indorse negotiable paper in the ordinary transaction of the bank's business, and that a special authority to that end need not be conferred by the board of directors. Such implied power is generally conceded to bank cashiers, and we know of no sufficient reason why the implied powers of the chief executive officer of a bank should be more limited in this respect than those of its cashier. *Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129, 135; *Fleckner v. Bank*, 8 Wheat. 338, 360; *Wild v. Bank*, 3 Mason, 505, Fed. Cas. No. 17,646; *Bank v. Perkins*, 29 N. Y. 554, 569; *Cooke v. Bank*, 52 N. Y. 96, 114, 115; *Bank v. Wheeler*, 21 Ind. 90; *Merchants' Bank v. State Bank*, 10 Wall. 604, 650. It can hardly be expected that the cashier of a bank will be in attendance on all occasions when it becomes necessary for the bank to indorse notes and bills, draw drafts and checks, certify checks, or issue certificates of deposit. Such transactions as these are of hourly occurrence in all banks located in large business centers, and the exigencies of business demand that the power to perform such acts should be vested in some other officer as well as in the cashier. Our observation teaches us that such power is very generally exercised by bank presidents; and in ordinary transactions, no layman, we think, would hesitate to accept negotiable paper which had passed through a bank, because it was indorsed by the president, rather than by the cashier. In its practical operation the rule that a bank president has no implied power to indorse commercial paper for and in behalf of his bank would seriously interfere with the transaction of business, and put the public to great inconvenience, while it would have no marked tendency to prevent fraud or breaches of trust on the part of bank officers. The public interest requires that the same presumptions should attend an indorsement made by the president of a bank which exist in favor of an indorsement made by a cashier, and that banks should be held bound by acts of that nature when done by either of such officers in the ordinary course of business. Aside from these considerations, we think that it has been settled, so far as the federal courts are concerned, by the decision in *People's Bank v. National Bank*, 101 U. S. 181, that the president of a national bank, by virtue of his office, does possess the power to bind his bank by a contract of indorsement or guaranty, made in the usual course of business. It was held in that case, where the vice president of a national bank, contemporaneously with a sale of certain notes to another bank, guarantied their payment, that the latter bank could rightfully pre-

sume, without inquiry, that the vice president had authority to execute the guaranty. And the same doctrine has been approved by some of the state courts. *Thomas v. Bank* (Neb.) 58 N. W. 943; *Palmer v. Bank*, 78 Ill. 380; *Thomp. Comm. Law Corp.* § 4621.

We turn at this point to consider one of the most important questions in the case, and that is whether the transaction in controversy, to wit, the rediscounting of the notes in suit, was an act so far outside the sphere of ordinary banking as to impose upon the New York Bank the duty of ascertaining that the president and cashier of the Little Rock Bank had been duly authorized by its board of directors to rediscount the paper in question. That the power to rediscount its bills receivable was vested in the defendant bank admits of no controversy. The act, therefore, was not *ultra vires*. *Bank v. Sharp*, 6 How. 301, 322, 323; *Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129, 135; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Marvine v. Hymers*, 12 N. Y. 223; *Houghton v. Bank*, 26 Wis. 663; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557, 559; *Cooper v. Curtis*, 30 Me. 488, 490; *Davenport v. Stone* (Mich.) 62 N. W. 722. In *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, it was decided that the borrowing of money by a national bank is such an unusual proceeding that when persons or corporations are solicited by a bank president to loan money to his bank they "must see to it" that the requisite authority to borrow money has been conferred by the board of directors. But the decision referred to did not go beyond that point, and, as we have already held that the conversion of bills receivable into cash by rediscounting them differs essentially from borrowing money, it is not a controlling authority in the case at bar. We are not left in doubt by the present record as to the practice of the defendant bank in the matter of rediscounting negotiable paper. The evidence shows, without contradiction, that it had long been in the habit of rediscounting its bills receivable in large amounts; that all other banks doing business in the same locality pursued the same practice, and that the demand for money at certain seasons of the year, usually in the summer and fall, made it necessary to convert a portion of their bills receivable into cash by selling them in the East. The plaintiff bank offered to prove by the official report of the comptroller of the currency that the amount of rediscounted paper held by national banks at various times between March 1, 1892, and January 1, 1893, ranged from \$8,500,000 to \$17,132,497, the largest amount being held in September, 1892, but the trial court rejected such proof. We think, however, that, notwithstanding the rejection of this proof, we must presume that the practice which was shown to exist among the banks located in Little Rock and in that vicinity prevails in other sections of the country, inasmuch as the defendant bank offered no testimony tending to show that banking operations are conducted differently in that region than they are elsewhere, or that the practice of rediscounting paper is confined to that locality. The laws of trade are generally uniform in their operation, and the same causes which at certain seasons of the year occasion a greater demand for money and a dearth of currency in one section of the country, doubt-

less produce the same results, at certain seasons, in other sections. It is the duty of banks to make all reasonable efforts to supply their customers with money for all legitimate business purposes. To that end it is their right to exercise all of their corporate powers, including the power to rediscount. On some occasions, if this latter power was not freely and speedily exercised, a bank would be derelict in the discharge of its obligations to the public. One of the most useful functions which banks perform is to equalize the distribution of money, and make the supply in their respective localities satisfy, as far as possible, the demands of trade and commerce, by withdrawing money, as the occasion requires, from those financial centers where it has a tendency to accumulate. It is obvious that this function can be best performed by banks by selling or rediscounting a portion of their bills receivable in those places where money is most abundant and cheap; and we have no doubt that it is usually so performed, and that many banks throughout the country are in the habit, at certain seasons of the year, of replenishing their stock of money by such means. It results from these considerations that we are unable to assent to the proposition that the rediscounting by a bank of its negotiable paper is a transaction so far outside the scope of ordinary banking transactions as to impose upon the bank buying such paper the duty of ascertaining that the act has been specially authorized by the board of directors. If, as in the present case, the proposal to rediscount emanates from the president and cashier of a bank, and is made to its regular correspondent, and there are no circumstances attending the transaction which are calculated to arouse suspicion, we think that the bank to which the proposal is addressed may safely act on the proposition without further inquiry, on the assumption that the act has either been specially authorized, or that the officers from whom the proposition emanates are acting within the purview of their general powers.

But, whether the conclusion last announced be sound or unsound, we are satisfied, in either event, that in the present case the defendant bank is estopped from asserting, as against the plaintiff bank, that its president had no authority to indorse and rediscount its negotiable paper. It is a fact which admits of no controversy that for many months prior to the transaction in question the president of the Little Rock Bank had been in the habit of rediscounting its bills receivable, as the exigencies of business demanded. Reference has already been made to the fact that during the six months preceding the rediscount of the notes in suit, rediscounts had been obtained from the New York Bank to the amount of about \$175,000, the proceeds of which the Little Rock Bank had received and used. This power, it seems, had been exercised with the knowledge and concurrence of the cashier of the Little Rock Bank, but without any formal action having been taken by its board of directors. All of the directors, however, who testified at the trial, admitted, in substance, that they were aware that the bank had been in the habit of obtaining rediscounts. Indeed, a report made to the controller of the currency on July 12, 1892, which was read in evidence,

and was sworn to by three of the directors, showed the amount of rediscounted notes and bills then outstanding and held by other banks to be \$81,748.80. Under these circumstances, it is quite immaterial that three of the directors testified that they were not aware that the president had ever been authorized to indorse and rediscount its bills receivable. They did know that paper was being rediscounted in large amounts under the president's direction without consulting the board, and that the bank was using in its daily business transactions the money so obtained. Knowing this fact, it was their duty to inquire and to ascertain in what way paper was being rediscounted, whether by the indorsement of the cashier or by the president, if they considered the mode of indorsement of any importance. By their silence and acquiescence they ratified the practice of obtaining rediscounts which the president had seen fit to adopt, and remitted the whole matter to his judgment and discretion. The president was, in effect, held out to the world, or at least to those banks with which he dealt, as having the powers which he assumed to exercise; and in a controversy between one of such banks, with which he had large dealings, and the defendant bank, the latter will not be heard to deny such authority. *Merchants' Bank v. State Bank*, 10 Wall. 604, 645, 646; *Butler v. Cockrill*, 36 U. S. App. 702, 712, 20 C. C. A. 122, and 73 Fed. 945, and cases there cited; *Farmers' & Mechanics' Bank of Kent Co. v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 134, 135.

But one other point remains to be noticed, and that is the contention of counsel for the defendant bank that the writ of error should, in any event, be dismissed, for the reason that the writ itself does not bear an indorsement by the clerk of the trial court to the effect that it was filed in that court. The writ of error, as contained in the record, shows that it was allowed by the trial judge, and that service thereof was acknowledged by counsel for the defendants in error on June 20, 1896, the judgment having been rendered on May 28th of that year. The writ of error is returned to this court by the clerk of the trial court as a part of the transcript of the proceedings in that court. It is obvious, therefore, that the writ of error was lodged with the clerk of the trial court as the law requires, and that he has treated it as filed, and obeyed the order therein contained. Under these circumstances, the plaintiff in error has done all that the law requires him to do to obtain a review of the proceedings of the trial court, and its rights should not be sacrificed because the clerk has failed, inadvertently, to note the filing of the writ of error by an indorsement made on the writ itself. It is very likely that the filing of the writ of error is shown by the journal of the proceedings of the trial court on the day the writ was lodged with the clerk, and under the circumstances we may well presume that the fact does thus appear. We have examined the decision in the case of *Insurance Co. v. Phinney*, 22 C. C. A. 425, 76 Fed. 617, to which our attention has been directed, but we are not able to concur in the view that seems to have been entertained by the majority of the judges in that case. We think it is altogether the more reasonable view that the substan-

tial requirements of the law are satisfied when the record shows that the writ of error was actually lodged with the clerk, and that it is the lodgment of the writ with that officer, rather than the notation of the filing, which renders it operative.

It results from what has been said that in several important respects, as heretofore indicated, the jury were misdirected, to the prejudice of the plaintiff in error. In view of the undisputed facts which the record discloses, we think that the plaintiff bank was entitled to a judgment in its favor, and that at the conclusion of the evidence the trial court should have so declared. The judgment of the circuit court is accordingly reversed, and the cause is remanded for a new trial.

UNITED STATES v. HANSEE.

(Circuit Court, S. D. New York. March 18, 1897.)

CRIMINAL LAW—PENSION—FALSE AFFIDAVIT—REV. ST. §§ 5421, 4746—INTENT TO DEFRAUD—INDICTMENT SUSTAINED—CONVICTION FOR A LESS OFFENSE INCLUDED.

An indictment charging the defendant with procuring a false affidavit to be presented to the pension office in a pension case with intent to defraud the United States alleges but a single offense, viz., an offense under Rev. St. § 5421, and the indictment is not double, but is good under that section. If the intent to defraud the United States is not proved, conviction on proof of the other facts may be had under section 4746, as a less offense included within the offense charged, under section 1035.

Arthur C. Butts, for the motion.
Jason Hinman, opposed.

BROWN, District Judge. I have given the above motion the same consideration as if it were in form a demurrer to the indictment, or a motion in arrest of judgment after conviction.

The objection raised against each count of the indictment is that it charges two separate offenses, viz., one under Rev. St. § 5421, and another offense under section 4746. The indictment alleges that Ostrander did feloniously cause and procure to be transmitted to the commissioner of pensions, and to be presented at his office, a false affidavit in support of Hedges' claim to a pension, with the intent to defraud the United States, and to induce the United States to pay Hedges large sums of money; and that the defendant Hansee did unlawfully, willfully, and with like intent, aid, abet, counsel and procure said Ostrander to commit said offense, the said Hansee well knowing the said writing to be false, and with the intent on his part to injure and defraud the United States.

Section 5421 is of broad application, covering false papers made or caused to be made, transmitted or presented, in support of any claim, with intent to defraud the United States, knowing it to be false. Section 4746, on the other hand, is limited to pension cases alone; and the part of it here applicable is confined to a false affidavit.

There is no doubt that the acts charged in the indictment, if committed with the intent to defraud the United States, constitute

an offense under section 5421. The same acts, if not done with that intent, would certainly not constitute that offense, because that intent is made an essential element by the language of the statute itself. Under section 4746, on the other hand, no such intent is required by the statute. The latter offense would be committed if a person should knowingly and willfully procure the presentment of a false or fraudulent affidavit in support even of a just claim. It is evident, therefore, that for procuring the presentment of a false affidavit, pertaining to a pension claim, the case may fall under section 5421, or under section 4746, according as the intent exists, or does not exist, to defraud the United States within the meaning of those words in section 5421. If that element exists, then the offense is under section 5421; upon the same facts without that intent, the offense would fall under section 4746. In pension cases, so far as section 4746 is applicable, this court held in the case of *U. S. v. Kuentsler*, 74 Fed. 220, that it supersedes section 5421, but no further; and this seems to be sustained by the recent case of *Edgington v. U. S.*, 164 U. S. 361, 363, 17 Sup. Ct. 72.

Section 5421, therefore, includes the offense in pension cases described in section 4746, with the additional element of an intent to defraud the United States; and that element makes the offense one of a higher grade and subject to the higher punishment of section 5421.

A careful reading of the indictment satisfies me that the offense here charged is an offense under section 5421 alone; because the intent to defraud the United States is specifically alleged both against Ostrander and against Hansee; and in addition to this the specific charge is made of transmitting or causing to be transmitted a false paper; and "transmitting" is not included in section 4746. The indictment, from the nature of the acts charged, necessarily includes what would be an offense under section 4746, because the greater must include the less. That cannot constitute a valid objection to this indictment; because if such an objection were good, no count for a higher offense could ever stand when the acts charged also embraced a lower offense.

I have carefully examined the authorities cited, and do not find them applicable to a case like the present. On the contrary, the cases of *People v. Palmer*, 43 Hun, 397; *Dedieu v. People*, 22 N. Y. 178; *Keefe v. People*, 40 N. Y. 348, seem to me to sustain the present indictment; for while the acts charged bring the case under either section, the intent alleged in the indictment brings the case under section 5421 alone.

Section 1035 provides as follows:

"In all criminal causes the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment."

This provision is somewhat broader and clearer than that of the New York Criminal Code (section 444), which seems to refer to the peculiar phraseology of the New York Criminal Statutes. Section 1035 recognizes the fact that a charge and indictment for one offense may include a less offense; and it expressly authorizes a ver-

dict of guilty for the less offense, whenever the latter is included in the offense charged in the indictment. The general subject is discussed at length by Denio, J., in *Dedieu v. People*, 22 N. Y. 178. In conclusion he says:

"In all these cases the indictment includes a true description of the act done, and all the circumstances defining the meaning of the offense, and it adds to these the further circumstance, which, if proven, would raise the offense to the higher grade. Now, if the latter are not proved, there is yet no variance. As far as the proof goes, it conforms to the allegations. Simply, the whole indictment is not proved; but the principle applies that it is enough to prove so much of the indictment as shows that the defendant has committed a substantial crime therein specified." Page 184.

It seems to me that these observations precisely apply to the present case. The indictment is framed for the larger offense under section 5421 alone, in which the intent to defraud the United States is an essential ingredient. Without proof of that intent, but with the other allegations proved, the defendant, under the provisions of section 1035, though not guilty under section 5421, might be convicted under section 4746, because it is a less offense of the same character, and is included within the higher offense under section 5421, described in the indictment.

Motion denied.

In re HUSE.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

No. 338.

1. HABEAS CORPUS—FEDERAL COURTS—CONFINEMENT OF INSANE PERSONS.

It is within the province of the state legislatures to determine the method of procedure for procuring the confinement of insane persons, and, if the steps provided have not been followed, the redress of persons improperly confined is by application to the state courts. The federal courts ought not, except in extreme cases, if at all, to interfere with the administration of such state laws by the issue of the writ of habeas corpus on the ground that an alleged insane person is restrained of his liberty in violation of the constitution of the United States.

2. SAME—PERSONS CONFINED UNDER STATE AUTHORITY.

It is only in exceptional and urgent cases that the federal courts will interpose by the writ of habeas corpus to discharge prisoners held in custody under state authority.

The petition of Charles E. Huse for the issuance of a writ of habeas corpus avers:

That "he is unlawfully and forcibly imprisoned, and against his will detained, restrained of his liberty and lawful rights, * * * in the Southern California State Insane Asylum for the Insane and Inebriates, at Highland, county of San Bernardino, state of California." That the facts upon which this charge is made are set forth upon information and belief, and are substantially as follows: On November 21, 1885, at Santa Barbara, Cal., the petitioner was "forcibly, maliciously, and unlawfully arrested without a warrant of arrest, * * * on malicious and false pretenses, such as that your petitioner was dangerously insane, and dangerous to life and property." That it was "willfully, falsely, maliciously, collusively, and unlawfully, as this petitioner believes, pretended that this affiant was insane in such a high grade of madness of insanity that, * * * if allowed to remain unarrested and free, he would be in danger of destroying his own life or property, or the lives or property of others." That

his arrest "was procured by collusion of one D. P. Hatch, then the only judge of the superior court of the county of Santa Barbara, state of California, secretly associated with persons combined for the purposes of maligning with guile, out of envy for fame's sake, and avarice, your petitioner, and to deprive him of his lawful rights." That he was never examined "by any physicians authorized by the provisions of section 2214 of the Political Code, nor at all." That he was not examined before any magistrate of a court of record in any place, nor at any time, nor at all, in pursuance of the law of the land. That he was in February, 1886, discharged from the Napa Asylum. That on March 23, 1887, he was again unlawfully arrested, without any warrant of arrest, and re-imprisoned in the Napa Asylum, contrary to law. That he was not examined by any physician, as provided by law. That in 1894 he was transferred to the Southern California State Insane Asylum for the Insane and Inebriates, at Highland, county of San Bernardino, without lawful authority. "That his civil rights have been unlawfully denied to him." That no legal complaint was made to authorize the warrant of arrest. That he "has been and is deprived of his lawful and constitutional rights * * * by said state of California." That his examination was in open violation of both the federal and state constitutions, as well as the laws. "That he cannot enforce his lawful rights in the courts of the state of California after due efforts." That the document in possession of the medical director of the Highland Asylum, by virtue of which the petitioner is held, "is a forgery and counterfeited, in pursuance of the said collusion, in order to prevent this affiant to retrieve his liberty."

F. F. Gallardo, for the petitioner.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). The facts set forth in the petition are not of such a character as to authorize this court to issue the writ. It is within the province of the state legislature to determine the method of procedure that should be followed in procuring the confinement of persons who have become insane to such an extent as to render them dangerous to the community, or to themselves, to be at large. If the steps provided for by the statute of the state have not been followed, the redress of persons who have been improperly confined without warrant or authority of law is by application to the courts of the state. The federal courts ought not, except in extreme cases, if at all, be called upon to interfere. Nearly all the averments in the petition are merely conclusions of law, and the petition might properly be denied because it does not state any facts which would authorize the issuance of the writ. It was never intended by congress that the courts of the United States should, by writs of habeas corpus, obstruct the ordinary administration of the criminal laws, or laws relating to the confinement of insane persons, through its own tribunals. In *Ex parte Royall*, 117 U. S. 241, 251, 6 Sup. Ct. 734, 740, the court, in considering the character of cases that would justify the courts of the United States by virtue of writs of habeas corpus to wrest the petitioner from the custody of the state officers, said:

"We are of opinion that, while the circuit court has the power to do so, and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the national constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal

prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the constitution of the United States. The injunction to hear the case summarily, and thereupon to dispose of the party as law and justice require, does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states; and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution."

The principles as thus announced have been followed by the supreme court in a great number of cases. *Ex parte Fonda*, 117 U. S. 516, 6 Sup. Ct. 848; *In re Duncan*, 139 U. S. 449, 11 Sup. Ct. 573; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *In re Jugiro*, 140 U. S. 291, 11 Sup. Ct. 770; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40; *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793; *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30; *Pepke v. Cronan*, 155 U. S. 100, 15 Sup. Ct. 34; *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. 727; *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297. In the case last cited the court reviewed at length many of the authorities upon this subject, and it was there held that, as a general rule, the United States courts should not assume in advance that the petitioner could not obtain all the protection to which he might be entitled in the state courts. In that case the petitioner, a citizen of Massachusetts, was arrested and extradited from the state of Massachusetts upon a warrant issued by the governor of that state on application of the governor of Connecticut, upon the ground that the petitioner had been indicted for murder in the state of Connecticut; and the petition, among other things, alleged that no indictment was ever found against him by any grand jury sitting at any time within the state of Connecticut, and that the pretended indictment was found by mistake or misconception of the grand jury, and was not their true finding, and that petitioner was not, at the time of his extradition from Massachusetts, a fugitive from justice from the state of Connecticut. The court, in passing upon these questions, said:

"Such matters are proper subjects of inquiry in the courts of the state, but afford no ground for interposition by the courts of the United States by writ of habeas corpus. *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870. * * * A warrant of extradition of the governor of a state, issued upon the requisition of the governor of another state, accompanied by a copy of an indictment, is prima facie evidence, at least, that the accused had been indicted, and was a fugitive from justice, and, when the court in which the indictment was found has jurisdiction of the offense (which there is nothing in this case to impugn), is sufficient to make it the duty of the courts of the United States to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the detention of the prisoner in the state in which he was indicted, to be inquired into and determined, in the first instance, by the courts of the state, which are empowered and obliged, equally with the courts of the United States, to recognize and uphold the supremacy of the constitution and laws of the United States. *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40; *Pearce v. Texas*, 155 U. S. 311, 15 Sup. Ct. 116."

In the present case only questions of fact are presented: (1) Whether the petitioner was examined by physicians, as required by law; (2)

whether the commitment, by virtue of which the petitioner is held, regular upon its face, is a forgery, and was procured by fraud and collusion; (3) whether petitioner is now sane, and for that reason entitled to his discharge. The determination of these questions is exclusively within the jurisdiction of the state courts. A brief reference to some of the exceptional and urgent cases where the courts of the United States have interposed by writs of habeas corpus and discharged prisoners who were held in custody under the state authority will clearly show that this case does not fall within the exceptional class. In *Re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, a person arrested by order of a magistrate of the state, for perjury in testimony given in the case of a contested congressional election, was discharged on habeas corpus because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in the national tribunals. In *Re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, a deputy marshal of the United States, charged, under the constitution and laws of the United States, with the duty of guarding and protecting a judge of a court of the United States, was discharged on habeas corpus by the circuit court on the charge of homicide for the reason that the offense was committed in the performance of those duties. And in *Ex parte Royall* and *New York v. Eno*, supra, it was recognized that in cases of urgency, such as those of prisoners in custody by authority of a state for any act done, or omitted to be done, in pursuance of a law of the United States, or other process of the courts of the United States, or otherwise, involving the authority and operations of the general government, or its relations with foreign nations, the courts of the United States could interpose by writ of habeas corpus. The distinction between such cases and the one under consideration is too clear to require any further discussion. Writ denied.

In re KRUG.

(Circuit Court, D. Washington, N. D. March 10, 1897.)

1. HABEAS CORPUS.

Where it appears plainly as matter of law, on the facts alleged, that issuance of the writ would be an unwarranted interference by the federal court with the execution of the state laws, the court will not issue the writ. And, before issuing a writ to interfere with the execution of state laws, the court should properly inquire into the facts, or require them to be set forth in the application, so that the court can see that there is a proper case to be investigated in this manner.

2. SAME.

After a conviction by a state court of competent jurisdiction, the federal court has the power, and it is its duty, to interfere by writ of habeas corpus when the petitioner shows that he is being deprived of his liberty in violation of the constitution and laws of the United States.

3. SAME—DUE PROCESS OF LAW.

The constitution of the United States does not attempt in any way to say how the state shall regulate its procedure in criminal cases in enforcing its own laws. There is therefore no deprivation of liberty without due process of law by a proceeding that is in conformity with the state law,

no matter how the state has seen fit to legislate as to procedure; and one who has been convicted in a state court cannot complain in a federal court that the conviction by which he has been deprived of liberty was not founded upon a good indictment.

4. SAME—EQUAL PROTECTION OF THE LAWS.

A statute which prescribes a particular form of indictment as to a particular offense does not deprive one who commits that offense of the equal protection of the laws, the statute being equal and uniform in its operations as to all who come within its scope.

5. INDICTMENT—DECISION OF STATE COURT AS TO SUFFICIENCY.

Whether a state legislature has power to enact a statute prescribing an indictment or information charging in general terms a particular offense is a question that the supreme court of the state has power to determine, and its decision is controlling upon the federal courts.

It is shown by the petition in this case that the petitioner was prosecuted under the laws of the state of Washington for the crime of embezzlement of public moneys received by him in the capacity of city treasurer of the city of Seattle; that he was convicted and sentenced to serve a term in the state penitentiary; that the judgment against him has been affirmed by the supreme court of the state of Washington (41 Pac. 126); that he sued out a writ of error from the supreme court of the United States for the purpose of having his case reviewed in that court, but the case was dismissed without a hearing upon the merits. The application for a writ of habeas corpus is based upon the ground that the indictment upon which he was tried is invalid, because it does not set forth facts sufficient to constitute a crime, and does not apprise him of the particular accusation against him; and, because the indictment is insufficient, he alleges that he is being deprived of his liberty without due process of law, and deprived of the equal protection of the laws, contrary to the provisions of the constitution of the United States.

James Hamilton Lewis, for petitioner.

HANFORD, District Judge (orally). If this petition tendered an issue of fact upon which the right of the petitioner depended, I would be bound to grant the writ, and allow an issue to be joined, and to hear the testimony, and determine the question of fact in the usual manner. But where it appears plainly, as a matter of law, on the facts alleged in the petition, that issuance of a writ of habeas corpus would be an unwarranted interference on the part of this court with the execution of the laws of the state, I cannot conceive that it is the duty of the court to issue the writ. This application is something more than an application to the court to issue a summons or a notice to bring in the opposite party to join issue here. It is an application to this court to issue a writ by which to take the defendant out of the custody of the sheriff of the county, who has him in custody, pursuant to a final adjudication of a court of competent jurisdiction; and, before issuing a writ to interfere with the execution of the laws of the state, the court should properly inquire into the facts, or require the facts to be set forth in the application, so that the court can see that there is a proper case to be investigated in this manner. There are cases wherein individuals complain of being deprived of their liberty in violation of the constitution or a law of the United States, where it is

shown that the state authorities are attempting to punish a man for an act which is right under the constitution and laws of the United States, sometimes for performing a duty pursuant to a law of the United States. Such a case is the *Neagle Case*, 39 Fed. 833. In every such case as that the federal court will not require the petitioner to go through the form of a trial in the state court, but will at once issue its process to afford him the protection of the constitution and laws of the United States, without any hesitation, without any delay, and without requiring him to submit himself to the jurisdiction of the state court. There are other instances in which individuals seek the process of a federal court by writ of habeas corpus to protect them against infringement of rights claimed under the constitution and laws of the United States, where they do not pretend that the act for which the authorities are proceeding to punish them or deprive them of their liberty is a lawful act, but they complain that the manner in which the officers are proceeding is in violation of the constitution and laws of the United States. Such an instance as that is the *Friedrich Case*, 51 Fed. 747, where Mr. Friedrich, by his petition to this court, set forth that he was convicted of the crime of murder, and had been sentenced to be imprisoned in the penitentiary for a period of 20 years; and he complained that the manner in which the authorities had arrived at this judgment was contrary to the provisions of the constitution and laws of the United States, and therefore he was entitled to be protected by the federal court. Now, in cases of that kind the supreme court has laid down the rule in the *Royall Case*, 6 Sup. Ct. 734, and adhered to it in the *Frederich Case*, 13 Sup. Ct. 793, that the court to which the application is made has a right to exercise its discretion whether to grant the writ in the first instance, or wait until the party has been arraigned in the state tribunal, and been tried, and then, after a conviction, to wait until he has exercised his right to a review in the appellate court by a writ of error. The reason why the court is authorized to exercise this discretion is that in the one case, no matter what the determination of the state court may be, the act itself cannot be punished without coming in conflict with the constitution and laws of the United States, while in the other case the mere form and manner of procedure can be as well determined, and the rights of the parties presumably will be as well protected and guarded, by proceedings according to the state laws, in the state courts, as in the federal court. But after a decision of a court of competent jurisdiction, when it is still contended that the federal constitution has been violated, the federal court has the power, and it is the duty of the federal court, to interfere for the protection of rights of this nature, when it is shown that they have been violated. It is a matter of transcending importance, however, that the federal court shall not issue its writ to interfere with the execution of the laws, unless there is a plain case requiring it. Before I issue this writ, I must look to the facts which Mr. Krug sets forth in support of his general claim that he is being deprived of liberty in violation of the constitution and laws of the United States. Now, what is his claim? He claims that he has not been proceeded against by indictment, as provided in the sixth amendment to the constitution of the

United States. Well, the constitution gives him the right to insist that he cannot be tried for violating a law of the state except upon an indictment.

Interruption by Col. Lewis: We are not making that contention.

Judge HANFORD: You stated in arguing here that this is not a good indictment, and therefore no indictment, and therefore he has not been indicted, and therefore this provision of the constitution is violated, because he is being deprived of liberty upon a conviction that was not founded upon an indictment. I say that it is not true that the petitioner has any right to insist that the federal constitution is violated by a procedure against him without a good indictment,—without an indictment that informs him fully of the facts alleged to be criminal. There is nothing in the constitution that reaches that point of his case. Now, there is no statute of the United States that has been violated by this proceeding. The use of public money by an officer of this state or of a municipality of this state in a manner to make a profit for himself is not an act that comes under the protection of any clause of the constitution or any statute. We are relegated, then, to the proposition that, under the fifth amendment and the fourteenth amendment, he is entitled to due process of law before he can be deprived of liberty, and it is a violation of the constitution to deprive him of the equal protection of the laws because he is a citizen. Now, let us see about that. The supreme court has determined the matter, and puts it certainly beyond any question of power in this court to inquire, further, that in criminal cases, the manner in which a defendant may be arraigned and accused by state laws, is a matter entirely of state regulation. The constitution of the United States does not attempt in any way to say how the state shall regulate its procedure in enforcing its own laws. There is therefore no deprivation of liberty without due process of law by a proceeding that is in conformity with the state law, no matter how the state has seen fit to legislate as to procedure.

Then comes the question whether Mr. Krug has been deprived of the equal protection of the laws. It is said that this indictment would not be a good indictment,—the supreme court would not have held it to be a good indictment,—on account of its insufficiency of details in regard to the facts charged had it been any other crime than the crime of using money unlawfully by a public officer. The supreme court of the state of Washington held in Mr. Krug's Case that, as a general proposition of law, under the ordinary rules and under the common-law requirements, the indictment would not be sufficient, but that this case is governed by section 58 of the Penal Code, which provides that:

"In prosecutions for the offenses named in the next preceding section [the section under which this indictment was brought], it shall be sufficient to allege generally, in the information or indictment, that any such officer * * * has made profit out of the public money in his possession or under his control, or has used the same for any purpose not authorized by law, to a certain value or amount, without specifying any further particulars in regard thereto; and on the trial evidence may be given of all the facts constituting the offense and defense thereto." State v. Krug, 12 Wash. 288-309, 41 Pac. 126.

Now, that is a statute relating wholly to offenses committed by officials, but it bears equally and alike upon all, whether taking office before or since Mr. Krug's conviction. It is equal and uniform in its operations as to all who come within its scope, just the same as a statute punishing larceny; it could only apply to persons accused of committing larceny, but it would operate equally and uniformly as to all who are brought under it. Mr. Krug cannot truthfully say that he has been singled out as a victim, and convicted by a method of procedure not applicable in other cases of the same kind. And, further than that, I do not concede that the legislature of the state is limited in its power to legislate as regards purely statutory offenses, as this one is. The law may prescribe that an indictment by a grand jury shall be essential in some kind of cases, or require an information to be filed setting forth in plain and unmistakable terms, fully and minutely, all the facts constituting a particular offense. In other cases, as in misdemeanors, it may authorize an accused person to be proceeded against in a police court, upon a simple affidavit of the arresting officer or any citizen, charging an offense in general terms. Now, the supreme court of the state of Washington is practically the court of final resort for the determination of questions of state law. Whether in the interpretation or construction or application of the constitution of the state, or the statutes of the state, this court and the supreme court of the United States are bound to follow the decisions of the supreme court of the state. As to whether the legislature had power to make such a statute as this, is a question that the supreme court has the power to decide, and its decision is controlling.

Now, it is shown upon the face of Mr. Krug's petition that the supreme court of the state of Washington has adjudged that this information is valid and sufficient, as tested by the constitution and laws of the state of Washington. Whether that decision is right or wrong, it establishes the law in his case clearly, in any tribunal into which the case may be carried. I would be very reluctant to make a ruling here which would deprive Mr. Krug of his right to appeal from my decision, but counsel is wrong in supposing that a refusal to grant this writ will deprive Mr. Krug of his right to appeal. It will deprive him of a right to be in the custody of the United States marshal, or to be admitted to bail pending the hearing of his appeal, but his appeal can go.

The right of an appeal that is based upon a constitutional question goes directly from this court to the supreme court of the United States, as in the Friedrich Case. The procedure in habeas corpus cases is not the same as in criminal cases. The change of the law in taking away the jurisdiction of criminal cases from the supreme court, except in capital cases, applies to cases that are prosecuted as criminal cases in the federal court; and it does not diminish or take from the supreme court its jurisdiction over constitutional questions, whether in civil or criminal cases. If the petitioner is not seeking, or does not intend to take, an appeal on the constitutional question, but purely upon a question of federal law, this case will go to the circuit court of appeals. In refusing to grant the writ, I am doing no more than depriving Mr. Krug of the right to be admitted to

bail, or of being held in the custody of the marshal pending his appeal; and, however unjustly he may be subjected to this hardship, I am not authorized to relieve him, because it appears to be plain upon the face of his entire showing, that he is not entitled to the writ of habeas corpus. The application is denied.

UNITED STATES v. ROESSLER & HASSLACHER CHEMICAL CO.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. CUSTOMS DUTIES—CLASSIFICATION—ACETANILID.

Acetanilid, a chemical compound prepared from coal tar, not a color or dye, and principally used in the arts, in the manufacture of dyestuffs, though also used in medicine, is dutiable under paragraph 19 of the tariff act of 1890, as a preparation of coal tar, and not under paragraph 75, as a medicinal preparation, or paragraph 76, as a chemical compound, not specially provided for. 71 Fed. 957, affirmed.

2. CONSTRUCTION OF TARIFF LAWS—MEANING OF WORDS, ETC.

When words used in a tariff act have some peculiar trade meaning, congress must be assumed to have used them with the meaning they had when inserted in the act; but when a descriptive phrase is used, having no peculiar trade meaning, such as "medicinal preparations," the articles designated by such phrase will be such as from time to time come within its meaning, and not solely those meant by it at the time of the passage of the act.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers which affirmed the classification of certain imported merchandise for customs duties by the collector of the port of New York. 71 Fed. 957. The facts are set forth in the opinion. The importations were entered in 1893, under the McKinley tariff act of October 1, 1890.

Jas. T. Van Rensselaer, for the United States.

Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The article in question is a chemical compound, known as "acetanilid." It is prepared from aniline oil, a product of coal tar, by treatment with carbolic acid, and derives its characteristics purely from coal tar, the acetic acid being merely a medium for its manufacture. It contains no alcohol. Some of the entries were classified for duty under paragraph 75, others under paragraph 76, while the importers claimed that all of their importations should have been classified under paragraph 19. These three paragraphs read as follows:

"(75) All medicinal preparations, including medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, twenty-five per centum ad valorem; calomel and other mercurial preparations, thirty-five per centum ad valorem.

"(76) Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty-five per centum ad valorem."

"(19) All preparations of coal tar, not colors or dyes, not specially provided for in this act, twenty per centum ad valorem."

From the description of acetanilid above set forth, it is manifest that it is a chemical compound, and also a preparation of coal tar, while both sides concede that it is not a color or dye. It is therefore within the description of both paragraphs 76 and 19. If acetanilid be covered by the provisions of the third paragraph above quoted, this would settle the question, since manifestly the designation "all preparations of coal tar not colors or dyes" is more specific than the general descriptions "all chemical compounds" or "all chemical salts." *U. S. v. Roessler & Hasslacher Co.*, 1 U. S. App. 305, 4 C. C. A. 1, and 56 Fed. 481; *U. S. v. Matheson*, 1 U. S. App. 308, 4 C. C. A. 3, and 56 Fed. 482.

The first question to be determined, then, is whether the article in question is a "medicinal preparation," within the meaning of paragraph 75; and, if that question be answered in the negative, further inquiry will be unnecessary. The board of general appraisers, in their decision as to some of the entries, found that acetanilid "is manufactured and used exclusively as a medicinal preparation"; and they refer, in both their decisions touching these importations, to an earlier decision of May 4, 1891, in which they find that "acetanilid is known as a medicinal preparation, and is, we believe, exclusively used as a medicine." None of the evidence on which these findings are based has been returned, but, when this case was in the circuit court, testimony bearing upon that point was taken. From that testimony it appears that acetanilid, at the time of importation, was very extensively used in the formation of para-nitraniline, which is a body employed extensively in the development of scarlet, crimson, and orange colors in cotton fiber. It was also formerly used very extensively in the production of what is known as flavaniline, a yellow dyestuff, which has recently been superseded by other colors possessed of more desirable characteristics. It is also used as a medicine, when reduced to a dry crystalline powder. It comes in larger and smaller crystals, and it is, of course, more convenient to obtain the powder from the smaller crystals. That the chief or predominant use of acetanilid is in the arts, and not in medicine, is quite clear upon the proof; and, under familiar principles of construction, such use is controlling of its classification. It is contended, however, that we are not to consider its chief use at the time of importation, but its chief use at and immediately prior to the date of the passage of the act. The proof shows that for a year or two prior to October, 1890, the manufacture of flavaniline had fallen off, while the manufacture of para-nitraniline had not developed to its more recent extent. There was therefore a brief period immediately prior to the passage of the act when the use of acetanilid in medicine was more extensive relatively to its use in the arts than it is to-day. When we remember the small quantities in which it is dispensed by the physician, and the comparatively large quantities in which it must be used, when used at all, by the dyer, this testimony, which is largely inferential, is not entirely satisfactory; but conceding the fact to be that, when the act was passed, the chief use of acetanilid was medicinal, that fact does not settle its dutiable status for all time. There is no question here of commercial designation. It is not disputed that the words "medicinal preparations" have,

and always have had, the same meaning in trade and commerce as in common speech. They are descriptive, and refer to substances used in medicine, and prepared for the use of the apothecary or physician, to be administered as a remedy in disease. When words used in a tariff act have some peculiar trade meaning, it must, of course, be assumed that congress used them with the meaning they had when they were inserted in the act, not with some new meaning acquired afterwards; and therefore in such cases the only competent testimony is such as tends to prove what that meaning was when congress used the words. But this principle does not apply when an article of importation is to be classified according to its use, when the question is whether it shall be included within a descriptive phrase, which differentiates what it describes from all other articles, not by a commercial or a common name or by component materials, but by the use to which the article is put. When congress provided, in October, 1890, that "medicinal preparations" should pay 25 per cent., it certainly did not mean that an article which was not then used in medicine should continue to be classified as not within this paragraph, although, two years after the act was passed, its sole use had come to be medicinal; nor that an article used solely as a medicine when the act was passed should continue within this paragraph after all such use might cease. What the paragraph does cover is all articles not otherwise specially provided for whose chief use (if not their sole one) is medicinal, and this question of use is to be determined as of the time of importation. Since we are satisfied that the chief use of acetanilid is in the arts, and not in medicine, the decision of the circuit court is affirmed. This decision, however, does not apply to the variety of acetanilid which is known as "antifebrine," and, in the form of powder, seems to be put up specially as a proprietary remedy.

GRACE et al. v. COLLECTOR OF CUSTOMS OF PORT AND DISTRICT
OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 321.

CUSTOMS DUTIES—CLASSIFICATION—HOCK BOTTLES.

Empty pint wine bottles, commercially known as "hock bottles," are dutiable under the final clause of paragraph 88 of the tariff act of 1894, at 40 per cent. ad valorem, and not under the second clause, at 1¼ cents per pound, as vials holding not more than one pint, and not less than one-quarter of a pint.

Appeal from the Circuit Court of the United States for the Northern District of California.

The only question before the court upon this appeal involves the interpretation of paragraph 88 of the Wilson tariff act of August 28, 1894. It appears from the record that in the month of May, 1895, appellants imported into the port of San Francisco 50 cases, containing in all 14,400 bottles, invoiced as "empty pint wine bottles," which on June 28, 1895, the local appraisers returned as "colored glass bottles holding not more than one pint and not less than one-quarter of a pint." On July 9, 1895, the collector liquidated the duty thereon at the rate of 1¼ cents per pound, being the rate provided for under the subdivisions of paragraph 88, Schedule B, of the tariff act of August 28, 1894, "for

vials holding not more than one pint and not less than one-quarter of a pint." The duty so levied was paid by appellants, who thereafter protested against said classification and liquidation, as follows: "The grounds of our objection are that paragraph 88 levies a duty of one and one-eighth cents per pound only on vials holding not more than one pint and not less than one-quarter of a pint, other than vials which are a particular kind of glass bottle used by druggists and chemists. We therefore claim that the bottles under protest are dutiable under paragraph 88 * * * as 'other * * * colored glassware, at the rate of forty per cent. ad valorem,' or as 'other * * * colored * * * bottle glassware not specially provided for in said act, at the rate of three-quarters of one cent per pound." On September 5, 1895, the board of United States general appraisers rendered its decision denying said protest, from which decision an appeal was duly taken to the circuit court for this circuit. On June 18, 1896, the circuit court affirmed the decision of the board of general appraisers. Among other things, the court found that "said glassware consists of what is known commercially as 'hock bottles.' The articles are known as 'bottles,' and not as 'vials,' and the term 'bottle' is a general name applied to glass vessels, while the term 'vial' is more generally understood to be a kind of bottle—a small bottle—used principally by druggists and chemists." And from this finding of fact the court found, as a conclusion of law, that "the merchandise in question was dutiable upon its importation at the rate of one and one-eighth cents per pound, under paragraph 88 of the act of August 28, 1894." In the arguments of counsel, the attention of the court is directed to the similarity, or want of similarity, between paragraphs 103 and 104 of the McKinley tariff act of October 1, 1890, and paragraph 88 of the Wilson tariff act. For convenient reference, these acts are here placed in parallel columns:

McKinley Act.

"Glass and Glassware:

"103. Green and colored, molded or pressed, and flint and lime glass bottles holding more than one pint, and demijohns and carboys (covered or uncovered), and other molded or pressed green and colored and flint or lime bottle glassware, not specially provided for in this act, one cent per pound. Green and colored, molded or pressed, and flint and lime glass bottles, and vials holding not more than one pint and not less than one-quarter of a pint, one and one-half cents per pound; if holding less than one-fourth of a pint, fifty cents per gross.

"104. All articles enumerated in the preceding paragraph if filled, and not otherwise provided for in this act and the contents are subject to an ad valorem rate of duty, or to a rate of duty based upon the value, the value of such bottles, vials or other vessels shall be added to the value of the contents for the ascertainment of the dutiable value of the latter; but if filled and not otherwise provided for in this act, and the contents are not subject to an ad valorem rate of duty, or to rate of duty based on the value, or are free of duty, such bottles, vials or other vessels shall pay, in addition to the duty, if any, on their contents, the rates of duty prescribed in the preceding paragraph: provided, that no article manufactured from glass described in the preceding paragraph shall pay a less rate of duty than forty per centum ad valorem."

(26 Stat. 571.)

Wilson Act.

"Glass and Glassware:

"88. Green and colored, molded or pressed, and flint and lime glass bottles holding more than one pint, and demijohns and carboys, covered or uncovered, whether filled or unfilled, and whether their contents be dutiable or free, and other molded or pressed green and colored and flint or lime bottle glassware, not specially provided for in this act, three-fourths of one cent per pound; and vials holding not more than one pint and not less than one-quarter of a pint, one and one-eighth cents per pound; if holding less than one-fourth of a pint, forty cents per gross; all other plain, green and colored, molded or pressed, and flint lime and glassware, forty per centum ad valorem."

(28 Stat. 513.)

Charles A. Garter and J. F. Evans, for appellants.
Samuel Knight, Asst. U. S. Atty., for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). Paragraph 88 of the Wilson tariff act, considered as a whole, without reference to paragraphs 103 and 104 in the McKinley tariff act, is susceptible of but one construction. It will be observed that it is divided into three distinct and separate subdivisions, each of which, in the language used, is plain, clear, and definite, and entirely free from ambiguity, doubt, or uncertainty. To interpret it, independent of other acts, would simply be to copy it. It would be construed to mean just what it says. The duty on bottle glassware mentioned in the first subdivision is "three-fourths of one cent per pound." The duty, in the second subdivision, on vials "holding not more than one pint and not less than one-fourth of a pint," is "one and one-eighth cents per pound," and, if holding less than one-fourth of a pint, "forty cents per gross." The third subdivision provides that all other articles of glassware, viz. "all other plain, green and colored, molded or pressed, and flint, lime and glassware," shall pay a duty of "forty per centum ad valorem." The articles of glassware upon which the duties were levied were invoiced as empty pint wine bottles, and consisted of what are commercially known as "hock bottles." It is evident that duties thereon could not be levied under either the first or second subdivision, and should be levied under the "catch-all" clause in the third subdivision. This is the interpretation that should be given to paragraph 88 of the Wilson tariff act, considered independently of the provisions of paragraphs 103 and 104 of the McKinley tariff act.

But it is contended by appellee that paragraph 88 of the Wilson act is practically a condensation and re-enactment of paragraphs 103 and 104 of the McKinley act, with a reduction of duties and a slight change of verbiage. Viewed in this light, it is claimed that paragraph 88 of the Wilson act provides for the same kind of glass bottles, holding more than a pint, which, with other glassware, as set forth in paragraph 103, are dutiable at three-fourths of a cent a pound; that the foregoing kinds of glass bottles and other glassware, with vials of the capacity mentioned, are, under the Wilson act, dutiable at $1\frac{1}{8}$ cents a pound; that the term "vials," in paragraph 88, should be taken in connection with the glass bottles and other bottle glassware of the preceding clause (viz. the first subdivision); that it would then read identically the same as the corresponding part of paragraph 103, except as to the rate of duty imposed; that the province of the conjunction "and," preceding the term "vials," in paragraph 88, is to connect the two clauses together as one. We are of opinion that paragraph 88, if it is to be construed with reference to the former act, is not fairly susceptible of this interpretation. By a reference to the McKinley tariff act, it will be observed that paragraph 103 is divided into two subdivi-

sions only; that the first subdivision ends with providing for the same articles of glassware as the first subdivision in paragraph 88; that the second subdivision of paragraph 103 commences with the words "green and colored, molded or pressed, and flint and lime glass bottles" (which are at the commencement of the first subdivision), and then proceeds "and vials," etc., thus making its construction clear and plain, viz.: Glass bottles holding more than one pint are dutiable at one cent per pound; glass bottles and vials holding not more than one pint, and not less than one-fourth of a pint, "one and one-half cents per pound," and, if holding less than one-quarter of a pint, "fifty cents per gross." To give to paragraph 88 the construction claimed for it by appellee, we would have to insert into the second subdivision of paragraph 88, before the words "and vials," the words omitted from it, and found in paragraph 103, namely, "green and colored, molded or pressed, and lime glass bottles," or, at least, the words "glass bottles." This we are not authorized to do. It is our duty to interpret, not to make, the law. Words should not be interpreted into a statute, in order that it may include a case which has been omitted, merely because there seems to be no good reason why it should have been omitted. *Denn v. Reid*, 10 Pet. 524, 527. As was said by Mr. Justice Story in *Smith v. Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100: "It is not for courts of justice, *proprio marte*, to provide for all the defects or mischiefs of imperfect legislation." See also, *U. S. v. Breed*, 1 Sumn. 159, Fed. Cas. No. 14,638; *Hobbs v. McLean*, 117 U. S. 579, 6 Sup. Ct. 870.

The argument that, because the second subdivision is connected with the first by the conjunction "and," would bring them together, so that it should be read as one clause or subdivision, does not commend itself to our favor. While it is true that the McKinley act and the Wilson act are similar in many respects, it is also true that they are essentially different in others, which will readily be seen upon a comparison of both acts, and need not here be pointed out. The omission in paragraph 88 of the words used in paragraph 103 of the McKinley act demands that a different interpretation should be given to the Wilson act. The words omitted were not useless. It is not to be presumed that congress intended to class demijohns and carboys with vials; hence, the McKinley act properly repeated the character of bottles mentioned in the first subdivision which were to be classed with vials if holding less than one pint, which made the paragraph, as an entirety, sensible and clear. It is, of course, the duty of courts to search for light in whatever legal direction it may be found, which in its nature and character is trustworthy and capable of conveying to the judicial mind a clear and satisfactory answer. The rule of construction which requires courts to look into former acts upon the same subject, in order to ascertain the meaning of doubtful phrases or provisions, is a wise and salutary one. In this manner, courts often ascertain the words used in a statute to be analogous to the use of the same words in previous statutes, and, when so used in such connection and surroundings as to limit their meaning beyond question to a certain inter-

pretation, that interpretation should be followed. This rule of construction often requires gaps left in the act, not amounting to *casus omissi*, to be filled from the materials supplied by other statutes upon the same subject, and in harmony with them. But this general rule necessarily carries with it certain limitations. This is made manifest from the obvious considerations which lie at the bottom of the rule itself. Where the words and terms of the statute under consideration are different from those in which they are used in other acts upon the same subject, the general rule is not applicable. In other words, where the language of the statute to be construed is clear, plain, and explicit, it should not be controlled by the rule in *pari materia*.

In *Goodrich v. Russell*, 42 N. Y. 177, 184, the court said:

"It is true that statutes relating to the same subject are to be construed together; but this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous ones."

It is also true that, where the words of the statute to be construed differ from the words of a former act on the same subject, it is an intimation, at least, that they are to have a different construction.

It is argued on behalf of appellee that congress intended to fix a higher rate of duty upon small bottles than upon large ones, and that inasmuch as small bottles holding not more than one pint, and not less than one-quarter of a pint, are not otherwise specifically provided for, it must have been the intention of congress to class them with vials. If such was the intention of congress, it is fair to presume that words would have been inserted in an appropriate place to accomplish that result. If the term "vial" could be construed to mean glass bottle, the contention of the appellee should be sustained. The circuit court found as a fact that the articles are known as "bottles," and not as "vials," and that the term "bottle" is the general name applied to a glass vessel, while the term "vial" is more generally understood to be a kind of bottle used principally by druggists and chemists. This being true, the rule of law steps in, and declares that in such cases the commercial designation must be given controlling effect. *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. 559; *U. S. v. Breed*, 1 Sumn. 159, Fed. Cas. No. 14,638; *Nichols v. Beard*, 15 Fed. 436, 437; *Morrison v. Arthur*, 13 Blatchf. 194, Fed. Cas. No. 9,842; *In re H. B. Claffin Co.*, 2 C. C. A. 647, 52 Fed. 121; *U. S. v. Herrman*, 5 C. C. A. 582, 56 Fed. 477; *Lawrence v. Allen*, 7 How. 785, 797; *Arthur v. Morrison*, 96 U. S. 108; *Arthur v. Lahey*, Id. 112; *Worthington v. Abbott*, 124 U. S. 434, 8 Sup. Ct. 562; *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55; *Lutz v. Magone*, 153 U. S. 105, 108, 14 Sup. Ct. 777.

In *Worthington v. Abbott*, the merchandise in controversy was rolled iron in straight flat pieces about twelve feet long, three-eighths of an inch wide, and three-sixteenths of an inch thick, slightly curved on their edges, and were made for the special purpose of making nails, known in commerce as "nail rods." The duties thereon were liquidated under section 2504, Rev. St., which imposed a duty of one cent and one-half on "bar iron rolled or hammered, com-

prising flats less than three-eighths of an inch or more than two inches thick, or less than one inch or more than six inches wide." The contention of the importers was that the duties should have been liquidated under the "catch-all" clause: "All other descriptions of rolled or hammered iron not otherwise provided for, one cent and one-fourth per pound." The court said:

"Although the article in the present case was in straight, flat pieces, less than one inch in width, and less than three-eighths of an inch in thickness, yet it is distinctly found that it had not been bought or sold as 'bar iron,' and was not known in a commercial sense as 'bar iron.' Therefore, although in one sense it might properly have been called 'iron in bars,' it was not 'bar iron,' although it was rolled iron. It was known in commerce as 'nail rods,' and it is found that in a commercial sense 'nail rods' were not known as 'bar iron.' The article therefore was a description of rolled iron 'not otherwise provided for.' The commercial understanding as to the description of the article by congress must prevail."

It is suggested that the debates in congress when paragraph 88 was adopted sustain the construction given by the circuit court. A reference to the congressional record of May 20, 1894 (page 5976), simply shows that Senator Aldrich was of opinion that, if it was intended to have the like effect as the McKinley act, it was necessary to insert certain words before the words "and vials," so that it would appear that it was the intention of congress to make "a connection between the two classes of glassware." Senator Jones, of Arkansas, thought there ought to be no difficulty about the construction, and said the intention was "to connect the two branches of the paragraph." In construing any act of congress, the court may recur to the history of the times when it was passed, in order to ascertain the reason for, as well as the meaning of, particular provisions in it; but the views of individual members in debate, or the motive which induced them to vote for or against the passage, cannot be considered. *Aldridge v. Williams*, 3 How. 9, 24; *U. S. v. Union Pac. R. Co.*, 91 U. S. 72; *District of Columbia v. Washington Market Co.*, 108 U. S. 243, 254, 2 Sup. Ct. 543; *County of Cumberland v. Boyd*, 113 Pa. St. 52, 57, 4 Atl. 346; *Leese v. Clark*, 20 Cal. 389, 425; *Taylor v. Taylor*, 10 Minn. 108, 126 (Gil. 81); *Keyport & M. Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13, 24.

In *Aldridge v. Williams*, the court, in interpreting a provision of the tariff act of March 2, 1833, which was not free from doubt, said:

"In expounding this law, the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law, as it passed, is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself, and we must gather their intention from the language there used, comparing it when any ambiguity exists with the laws on the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *Leese v. Clark*, Field, J., in delivering the opinion of the court, said:

"It is evident that the opinions expressed by individual legislators upon the object and effect of particular provisions of an act under discussion are entitled to very little weight in the construction of the act. The intention of the legis-

lature must be sought in the language of the act, and the object expressed or apparent on its face, and not by the uncertain light of a legislative discussion."

The contention of the appellee cannot be sustained. The judgment of the circuit court is reversed, and cause remanded for further proceedings in accordance with the views expressed in this opinion.

FALK v. CITY ITEM PRINTING CO.

(Circuit Court, E. D. Louisiana. March 10, 1897.)

1. COPYRIGHT OF PHOTOGRAPH—INFRINGEMENT SUITS—PLEADING.

In a suit for alleged copyright in a photograph, it is necessary, it seems, for complainant to allege, for the purpose of showing his right of copyright, the existence of facts of originality, intellectual production, thought, and conception.

2. SAME—INFRINGEMENTS.

Infringement in respect to copyrighted photographs of a stage dancer cannot be sustained merely upon exhibits, cut from a daily paper, showing a crude illustration or woodcut of certain poses which the dancer assumes, but which do not appear to be copies of, or have any connection with, the petitioner's photographs.

This was a suit by Benjamin J. Falk against the City Item Printing Company for alleged infringement of a copyright in certain photographs of Mme. Loie Fuller. The cause was heard on exceptions to the petition.

Dinkelspiel & Hart, for plaintiff.

J. R. Beckwith, for defendant.

PARDEE, Circuit Judge. In *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, the supreme court held that the constitution is broad enough to cover an act authorizing copyright photographs, so far as they are representatives of original intellectual conceptions of the author, and that, when a supposed author sues for a violation of his copyright, the existence of facts of originality, of intellectual production, of thought and conception, on the part of the author, should be proved. If, in order for the petitioner to recover, he must prove the above-mentioned facts, it is necessary, under our practice, that he should aver them; and an averment that the petitioner is "the author, inventor, designer, and proprietor of a photograph" of a person, which photograph is alleged to be copyrighted, is not sufficient. To be the author, inventor, and designer of a map, book, or statue, one must necessarily have injected some intellectual effort into the production; but one may be the author of a photograph of a person or natural object without intellectual effort involving invention or originality. If it is admitted that the petitioner has the copyright of the two photographs attached to and made part of the petition, and that the petition sufficiently shows that the petitioner is the author, inventor, and designer of said photographs, still the petition fails to make a case for recovery, because no sufficient infringement of the petitioner's copyright is set forth, the petition and exhibits being

taken as a whole. Attached to and made part of the petition is a copy of the City Item of October 11, 1896, which is alleged to be the infringing copy which the said paper in its said issue "did engrave, etch, work, copy, print, publish, and import, in whole and in part, copies of the said copyright photographs." An inspection of the alleged infringing copy, in connection with the publication accompanying, shows that what the paper did print and publish is a crude illustration or woodcut of certain poses which Mme. Loie Fuller assumes on the stage in her dancing exhibitions; but in no way does it appear, or can it be inferred from the exhibit, that the said illustrations are copies of, or in anywise connected with, the petitioner's photographs. Unless petitioner has a copyright upon the poses assumed by Mme. Loie Fuller upon the stage in her dancing exhibitions, he ought not to complain that others, by wood sketches or other artistic means,—even by photographic process,—shall make and publish illustrations of such poses. If petitioner's action for infringement is solely based upon the exhibit filed in his petition, I am unable to see that he has a cause of action. The exception is sustained, with leave to petitioner to amend, as counsel may advise.

KRAATZ et al. v. TIEMAN.

(Circuit Court, E. D. Missouri, E. D. March 25, 1897.)

1. PATENTS—NOVELTY AND INVENTION—ORAL EVIDENCE OF PRIOR CONSTRUCTIONS.

Oral testimony as to prior constructions alleged to have been similar to that of the patent is insufficient to overcome the prima facie case made by the patent, when such evidence is merely from memory, and concerns events and matters of routine occurring from 8 to 15 years before, and which were not at the time considered of any special importance.

2. SAME—PUBLIC USE—EVIDENCE.

The defense of public use more than two years prior to the application is not sustained by indefinite and unsatisfactory oral evidence, mostly of interested witnesses, as to the fact of the public use and the identity of the construction.

3. SAME—IMPLIED LICENSE—ADMINISTRATIVE SALE.

An implied license to make and use does not pass by an administrator's sale of the licensee's place of business, including a few articles covered by the patent.

4. SAME—EXHIBITING CASES.

The Kraatz patent, No. 392,038, for an improved case for exhibiting decorative art, *held* valid and infringed.

This was a suit in equity by Henry W. Kraatz and others against Fritz Tieman for alleged infringement of a patent for an improved case for exhibiting decorative art.

E. J. O'Brien, for complainants.

F. & E. L. Gottschalk, for defendant.

ADAMS, District Judge. This is a suit to restrain the alleged infringement of letters patent of the United States, No. 392,038, for an improved case for exhibiting decorative art, granted to complainants October 30, 1888. The defenses are (1) that the patent

is void for want of novelty and patentable invention; (2) that complainants' device was in public use and on sale for more than two years prior to their application for a patent; (3) that complainants' conduct conferred upon defendant an implied license to make and use the patented device; (4) that complainants are barred from equitable relief in this case by reason of laches.

The letters patent are prima facie evidence of novelty and patentable invention. *Smith v. Vulcanite Co.*, 93 U. S. 486; *Lehnbeuter v. Holthaus*, 105 U. S. 94. Every reasonable doubt must be resolved in favor of the validity of the patent. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970. The answer of the defendant contains no notice of any anticipatory patents, and none are offered in evidence to illustrate the prior state of the art. Defendant, in support of his first defense, relies exclusively upon oral testimony to the effect that cases like the complainants' device had been constructed and sold by one August Stiefel prior to the application for the patent sued on. He offers the testimony of several witnesses, most of whom were in the employ of Stiefel prior to 1895, the date of his death, and some of whom thereafter entered and now are in the employ of the defendant. These witnesses all testify, without any apparent aids to their memory, concerning events which occurred from 8 to 15 years ago, and which at that time were matters of routine, and not considered of any special importance. Most of these witnesses are indefinite and uncertain in regard to the time when Stiefel manufactured these cases, and equally so as to the exact character of his manufacture. Neither the defendant nor any of his witnesses produce any specimen of the case proved to have been constructed by Stiefel prior to complainants' invention. If their evidence is true, it would seem that some one of such cases properly identified as in existence before 1887, the date of complainants' invention, could readily have been produced. The evidence of the witnesses, such as it is, uncorroborated by the production of any specimen of the alleged anticipating device, antedating the complainants' invention, is not sufficient to overcome the prima facie evidence found in the letters patent, of their own validity. *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Deering v. Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118; *Haughey v. Meyer*, 48 Fed. 679; *Roll-Paper Co. v. Weston*, 8 C. C. A. 56, 59 Fed. 147.

Concerning the second defense, I am not satisfied from the evidence that the complainants allowed their invention to be in public use or on sale for more than two years before their application for a patent. The defendant's evidence on this issue is so confused with the evidence of the alleged pre-existing invention of Stiefel that it is difficult to find any evidence distinctively supporting this second defense. Besides this, the defendant has not identified or produced any specimen of the invented article as sold or used two years prior to complainants' application for a patent; and the court is left, as in the first defense, to the unsatisfactory oral evidence, mostly of interested witnesses, both as to the fact of abandon-

ment to public use, and as to the identity of the thing so abandoned with the thing invented. This defense is therefore not sustained.

The third defense is that Stiefel had during his lifetime an implied license to manufacture and sell the patented article. If there were any satisfactory evidence sustaining this defense, it is not apparent how such license can be availed of by defendant Tieman. Stiefel died in 1895, and defendant Tieman thereafter became the purchaser at administrator's sale of the property in Stiefel's place of business, including a few of the infringing cases. There is no pretense that this supposed license was assigned to defendant, and there is no claim that the defendant has limited his use and sale of the patented device to such cases as he purchased from Stiefel's administrator. If Stiefel could be held to have had an implied license to make and use the invented article, such license was limited exclusively to him, and did not pass by the administrator's sale to the defendant as his assignee. *Hapgood v. Hewitt*, 119 U. S. 226, 234, 7 Sup. Ct. 193; *Oliver v. Chemical Works*, 109 U. S. 75, 82, 3 Sup. Ct. 61.

Concerning the defense of laches, it may be said that the evidence disclosed no infringement of complainants' rights, except by Stiefel, prior to his death, in 1895, and by defendant since then. Upon complainants' first receiving notice that Stiefel was infringing their rights, negotiations were had between complainants and Stiefel relative to the latter's use of the patented device, but no final contract was concluded. Afterwards Stiefel's use appears to have been clandestine in character and limited in extent; so that it is altogether likely that even Stiefel could not claim that complainants' failure to assert their rights against him during his lifetime constituted, under the circumstances, any such laches as would render it inequitable for them to have prosecuted their claims against him. And this is much more true as to defendant Tieman. As already seen, he did not acquire any of Stiefel's rights (whatever they may have been) to the use of the patented device, except, possibly, so far as the few cases purchased by him at the administrator's sale is concerned. His dealings brought him into relations with complainants' invention in the summer of 1895. This suit was brought in March, 1896. The proof, in my opinion, shows due diligence on the part of the complainants in instituting proceedings to protect their patent against the defendant, and certainly there do not appear to be any circumstances connected with the delay prejudicially affecting the defendant. There will be a decree for an injunction and accounting, and counsel may prepare the same and submit it to me.

GIBBON v. LOEWER SOLE-ROUNDER CO.

(Circuit Court of Appeals, Third Circuit. February 15, 1897.)

1. PATENTS—INVENTION—CUTTING IRREGULAR FORMS.

The production of a sole-cutting machine, consisting of the combination of a rotary cutter and its shaft on a fixed frame, with revolving clamps to hold the rough material mounted on a shaft on a movable carriage, and a revolving form operating to vary the relative positions of the cutter and the material, involves no invention, being a mere carrying forward of the Blanchard invention, for turning or cutting irregular forms.

2. SAME—INFRINGEMENT—SOLE-CUTTING MACHINES.

In the Loewer and Blair patent, No. 407,735, for an improved sole-cutting machine, the main idea is a mere application of the Blanchard invention for turning or cutting irregular forms, and the only novelty resides in the double drive gear applied to the three-part shaft; hence the patent is not infringed by a machine which omits this feature. 74 Fed. 555, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by the Loewer Sole-Rounder Company against Charles S. Gibbon for alleged infringement of a patent for an improved sole-cutting machine. In the circuit court the patent was adjudged valid and infringed as to claims 1, 4, 5, 6, 9, and 14 (74 Fed. 555), and the defendant has appealed.

Edmund Wetmore and E. E. Wood, for appellant.

George B. Selden, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

ACHESON, Circuit Judge. The bill in this case charges the defendant, Charles S. Gibbon, with the infringement of letters patent No. 407,735, issued on July 23, 1889, to Henry Loewer and Barton L. Blair, for "an improved sole-cutting machine." The claims of the patent alleged to be infringed by the defendant are the 1st, 4th, 5th, 6th, 9th, and 14th. These claims are as follows:

"(1) In a sole-cutting machine, the combination, with the revolving cutter, C, and its shaft, of the revolving sole clamps, E, E', their supporting shafts, the movable carriage, and a revolving form operating to vary the relative position of the cutter and the sole clamps, substantially as described."

"(4) In a sole-cutting machine, the combination, with the revolving cutter, C, and its shaft, and guide, s, of the revolving sole clamps, E, E', clamp-plates, z, z', removable form, f, and suitable supporting shafts, substantially as described."

"(5) In a sole-cutting machine, the combination, with the revolving cutter, C, and its shaft, and guide, s, of the revolving and traveling sole clamps, E, E', form f, suitable supporting shafts, and movable blank guide, T, substantially as described."

"(6) In a sole-clamping machine, the combination, with the revolving cutter, C, and its shaft, and guide, s, of the revolving and traveling sole clamps, E, E', suitable supporting shafts, and movable blank guide, T, provided with adjustable plate, y', substantially as described."

"(9) In a sole-cutting machine, the combination, with the main frame, A, A', supporting the revolving cutter, C, and its shaft, and the guide, s, of the movable frame, D, carrying the revolving sole clamps, E, E', and form, F, and mechanism adapted to secure the simultaneous revolution of the sole clamps and the form, substantially as described."

"(14) In a sole-cutting machine, the combination, with the revolving cutter, C, and its shaft, provided with the spring guard, S, of the guide, s, and the revolving sole clamps, E, E', form, F, and suitable supporting shafts, substantially as described."

In considering this case, it is first to be noted that the art of cutting shoe soles by machinery was practiced long before Loewer and Blair entered this field of invention. The prior patents to Thompson, Addy, Smith, and Hartford show machines, operated by hand or power-driven, for trimming or cutting shoe soles to pattern, on and off the shoe, by a rotary cutter in some instances, and by a straight knife in other instances, and the employment of flat-faced clamps to hold the leather blanks; and the prior patents to Joyce, King & Strong and others show heel-trimming machines comprising a rotary cutter and a guide, a pattern plate, and a movable frame containing clamping members, between which the heel is held when turned by the hand of the operator against the cutter.

We find in the testimony of the complainant's principal expert (Mr. Osgood) a general description of the machine of the Loewer and Blair patent in the words following, namely:

"It consists of a machine in which a pile of leather blanks is placed between clamps, and moved up so as to bring their edges in contact with a rapidly revolving cutter head, which, as the blanks are slowly turned, trims off the surplus leather. The clamps are attached to a swinging frame, and the cutter head to a stationary frame. A pattern of the same outline as the soles to be produced is attached to the swinging frame, and rides against the edge of a guide wheel on the stationary frame. The contact of the pattern with the guide wheel throws the swinging frame forward and back, giving corresponding motion to the blanks held by the clamps, and causing the cutter head to cut the soles exactly to the form of the pattern."

This description enumerates the essential members and qualities of the complainant's machine (the Loewer and Blair machine), the features not here mentioned being the mere details of construction.

Now, it is quite evident that, in combination of essential parts, in principle and in mode of operation, the complainant's machine is identical with the ingenious machine invented and patented by Thomas Blanchard,—but by reason of the expiration of the patent now open to public use,—for turning or cutting irregular forms by using a model in conjunction with a blank, the outline of the model guiding the cutting tool to produce a duplicate from the blank. The Blanchard machine, as described in his specification and as long practically employed in the art to which it belongs, comprises a rotary cutter mounted on bearings on a stationary frame, and a guide wheel in alignment therewith, and a swinging frame carrying a model or pattern, and the rough material to be trimmed or turned, in such relations that, when power is applied to rotate the shafts, the swinging frame is yieldingly pressed towards the cutter and guide wheel, the pattern by its engagement with the guide wheel limiting the movement of the material towards the cutter, so that as the pattern and material are rotated the cutter trims off the periphery of the material so as to conform it exactly to the shape of the pattern. This machine is designated in Blanchard's patent as "Blanchard's Self-Directing Machine," and is declared to be available "for turning or cutting irregular forms out of wood, iron,

brass, or other material or substance which can be cut by ordinary tools."

In reproducing such irregular forms as shoe lasts, which vary in cross-sectional shape from point to point throughout their length, the cutter and guide wheel are required to travel lengthwise of the material and pattern, and this lateral movement Blanchard provided for by a longitudinal feed mechanism; but when the particular work to be done does not require such lateral movement, then, obviously, this feed mechanism may be disused or omitted altogether from the machine. As the feed mechanism is not needed in the work contemplated by Loewer and Blair, we find that it is left out of their machine. That omission, however, does not change the principle or the character of the machine.

In his patent Blanchard illustrates his machine as engaged in such work as the cutting of a shoe last, and appropriate devices for securely holding the material and model are described. The specification, however, discloses that the machine has the capacity of cutting and reproducing an "infinite variety of forms" out of any material or substance which can be cut by ordinary tools. The scope of the invention, then, is such that changes in the subordinate devices for holding the material while under the action of the cutter, to suit the particular work, are necessarily involved in the varying use of the Blanchard machine, and are within the intendment of the patent. *Howe Mach. Co. v. National Needle Co.*, 134 U. S. 388, 397, 10 Sup. Ct. 570. Such mechanical adaptations involve merely the substitution of equivalents, and generally would call into exercise nothing beyond the commonest mechanical skill.

Clearly, leather is a material or substance within the scope of Blanchard's specification, and it cannot be doubted that the cutting of leather blanks, separately or in a bunch of many thicknesses, is but the application of the Blanchard machine to one of its legitimate uses. "The inventor of a machine is entitled to all the uses to which it can be put, no matter whether he had conceived the idea of the use or not." *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 18, 12 Sup. Ct. 601. Here, the patent having expired, all the uses to which the machine can be put are free to the public. Of course, the use of the machine in sole cutting involves the employment of a clamping device suitable to hold flat leather blanks, and for that purpose the natural selection—the one which, we think, would occur to any mechanic possessing the ordinary skill of his calling—would be the common flat-faced clamps which Loewer and Blair employ. In thus adapting the machine to the work of cutting sole leathers to patterns there was no inventive achievement. It is well settled that "a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means with better results," is not invention in a patentable sense. *Smith v. Nichols*, 21 Wall. 112, 119; *Trimmer Co. v. Stevens*, 137 U. S. 432, 11 Sup. Ct. 150; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, *supra*.

From what has been said, it follows that the court below gave to the

Loewer and Blair patent a broader construction than is allowable in view of the prior state of the art. That construction practically invests the complainant, as the owner of the patent, with the exclusive right to use a machine of the Blanchard type in the cutting or trimming of shoe soles. We think, however, that at the date of Loewer and Blair's improvement in sole-cutting machines, no patent could rightfully issue for the broad combination in such machine of a revolving cutter and its shaft on a fixed frame, with revolving clamps to hold the rough material mounted on a shaft on a movable carriage, and a revolving form operating to vary the relative positions of the cutter and sole clamps. If, then, there is patentable novelty in Loewer and Blair's machine, it is to be found in the peculiar features of organization specified by them, and the claims must be limited accordingly. The specification of the Loewer and Blair patent describes, and the drawings illustrate, a three-part shaft, the pattern and the clamped sole leathers being held between the sections of the shaft in the manner specified, and a simultaneous and positive rotary movement is imparted to the two end parts of this shaft by actuating mechanism effecting a double drive. In the first claim of the patent the term "supporting shafts" must, we think, be construed to mean the described three-part shaft, and the phrase, "revolving sole clamps, E, E', * * * substantially as described," must be taken as including the mechanism for producing the double drive. The double drive gear applied to the three-part shaft seems to us to be the novelty of this claim. This feature is not found in the machine of the appellant (the defendant below). His machine does not contain a three-part shaft nor the double-driving mechanism. The working organization of his machine conforms to that of the old King heel-trimming machine, and the hand of the operator turns the shaft to present the stock to the cutter. Upon our construction of this claim, the appellant's machine does not infringe the Loewer and Blair patent. The first is the broadest claim, and, as that claim is not infringed, there is no infringement of any of the other claims here in question.

These views require a reversal of the decree. Accordingly the decree of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a decree dismissing the bill of complaint, with costs.

BUZZELL v. WALKER.

(Circuit Court, D. Massachusetts. March 19, 1894.)

PATENTS—INVENTION AND INFRINGEMENT—ABRADING DISKS.

The Buzzell patent, No. 317,622, *held* valid and infringed as to claim 3, which is for an abrading disk, with a cushioned peripheral face oblique to its axis, and with a circumferential guard to sustain the abrading band, to be used in smoothing the breast of boot and shoe heels.

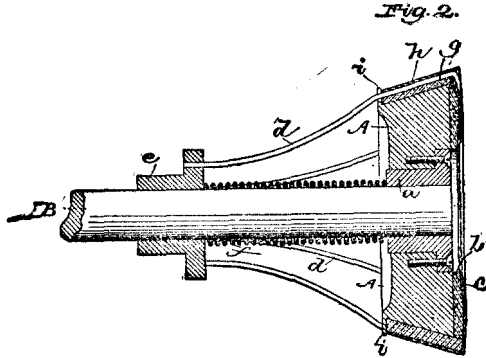
This was a suit in equity by John G. Buzzell against John Walker for the alleged infringement of a patent for an abrading disk for polishing the breast of the heels of boots and shoes.

Charles A. Taber, for complainant.

E. K. Philips, for defendant.

ALDRICH, District Judge. The plaintiff's letters patent are dated May 12, 1885, and numbered 317,622, and claim 3, on which he relies as covering his device, and the only one material, is in the following words:

"An abrading disk, formed with a cushioned peripheral face oblique to its axis, and with a circumferential guard, i, adapted to sustain the abrading band, h, and secure it in position upon the disk, substantially as specified."



An abrading disk manufactured in accordance with this claim is intended for use in evening and smoothing the breast of boot and shoe heels, and it is claimed that its combination and structure are such that it will operate rapidly and satisfactorily upon a concaved heel front. This work was previously done by sandpaper held in the hand, and, to be done satisfactorily, required considerable time. I think the mechanism involved in plaintiff's device produces a combination not anticipated by prior art, and, when carried forward to a machine attached to a revolving shaft, becomes a practical and useful piece of machinery for use in the manufacture of boots and shoes. The invention or wheel in question has a beveled surface on its face, calculated to adjust itself to the concaved surface of the front of the heel, and to work down close to the sole of the boot. It has a circumferential guard, which prevents the paper from sliding off the roll when in use. The defendant has sold wheels made in accordance with claim 3, and therefore has infringed the plaintiff's right. Let an injunction issue in accordance with these views, and, as an accounting is waived, the decree for plaintiff should be for nominal damages only.

BUZZELL v. NORRIS.

(Circuit Court, D. Massachusetts. February 18, 1897.)

PATENTS—INVENTION—ANTICIPATION—ABRADING DISKS.

The Buzzell patent, No. 317,622, for an abrading disk for polishing the breast of boot and shoe heels, discloses a patentable combination, and was not anticipated by the Rogers patent, No. 227,839, or the Andr n patent, No. 238,201.

This was a suit in equity by John G. Buzzell against Thomas A. Norris for alleged infringement of the Buzzell patent, No. 317,622, for a device for smoothing the breast of boot and shoe heels.

Charles A. Taber, for complainant.

James E. Maynadier, for defendant.

ALDRICH, District Judge. The patent in question was before me in *Buzzell v. Walker* (79 Fed. 328), in March, 1894, and was sustained upon the evidence presented in that case. The evidence there did not include the Rogers patent, No. 227,839, or the Andrén, No. 238,201. These patents are older, and are now presented for the first time, and urged as anticipatory devices. The defendant, however, does not place much stress upon the Andrén patent, and its apparent lack of design to do the work intended to be accomplished by the plaintiff's device renders it unnecessary for me to refer to that at any great length. The Rogers device is urged with earnestness, and the defendant relies upon it as involving all the substantial and essential elements of the patent in suit. An examination of the Rogers invention persuades me that it does not contain the substantial elements of the Buzzell device. It did not contemplate work upon the breast of the heel. Its intended function was to operate on the flat or bottom surfaces, and ended at the junction of the sole and heel; it had no provision or design for carrying the abrasive or scouring material to the beveled peripheral face, so as to be operated on the surface oblique to the axis; and it had no practical means for accomplishing this result. Indeed, the particular means described for holding the emery cloth, or other abrasive material, on the bottom of the tool where a union is to be made at the base thereof, by sewing the abrasive material to an annular shaped piece of leather or skin, which latter material is to be carried forward or over the periphery to the conic frustum by which it was to be secured and the abrasive material thereby held in place at the bottom, shows that the inventor understood that the abrasive material and its work was limited to the base, or, in other words, to the large end, of the conic form. This view is stated even stronger than this at line 78 of the Rogers specification, where the abrasive material is referred to in the following words, viz.: "A circular bottom piece, f, made of emery-cloth or other abrasive material"; thus clearly showing that the inventor limited his abrasive material to the bottom, or large end, of the tool, and understood that it was to cover nothing more. It may at first seem that the Rogers device provided means for abrasive work on the peripheral surface, in this: that the abrasive material might be carried over the periphery and under the conic frustum, and there secured or held in place; but this was not designed, and would not be practical, for the reason that, as the material is drawn in under the frustum, at the small end of the form (needed to secure the bevel shape necessary to work upon the concave surface of the breast of the heel), the abrasive material would pucker, and present an uneven surface, thereby rendering it unsuitable for smooth-

ing purposes. The evidence clearly shows the necessity for a tool propelled by machinery, which should successfully operate upon the concave surface of the breast of the heel, and also shows the entire absence of anything in the trade which would do that work, although repeated efforts had been made to that end. As was said in Buzzell v. Walker:

"This work was previously done by sandpaper held in the hand, and, to be done satisfactorily, required considerable time. I think the mechanism involved in the plaintiff's device produces a combination not anticipated by prior art, and, when carried forward to a machine attached to a revolving shaft, becomes a practical and useful piece of machinery * * * in the manufacture of boots and shoes."

An abrading disk manufactured in accordance with the Buzzell claim with a cushioned peripheral face oblique to its axis is manifestly a tool of considerable utility, and is so understood by the trade. The concaved surface of the breast of the heel adjusts itself readily to the beveled revolving surface of the abrading disk, and the work of smoothing and polishing is rapidly and satisfactorily accomplished. The hinge and fastening involved in the Buzzell tool, though not accepted as amounting to novelty, is a convenient and useful part of the mechanism involved in the combination, and the circumferential guard of the Buzzell is a decided improvement upon the conic frustum of the Rogers, when considered in connection with abrasive material to be held on a beveled revolving surface. Taken altogether, I think the plaintiff's combination involves sufficient novelty and invention to entitle it to protection, and I further find that the defendant has infringed plaintiff's rights. Let an injunction issue in accordance with these views, and, unless an accounting is waived, let there be a decree for an accounting.

COWLES ELECTRIC SMELTING & ALUMINUM CO. et al. v. LOWREY.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1897.)

1. CONSTRUCTION OF CONTRACTS—GRAMMATICAL RULES.

A contract is to be construed in strict accordance with grammatical rules, unless there are circumstances requiring a departure therefrom. But the grammatical rule raises only a prima facie presumption, and does not preclude the settling of the meaning by detracting somewhat from the exactness of the language, to give effect to more cogent reasons of a different kind. Thus, plural language may be held to include the singular also.

2. PATENTS—CONSTRUCTION OF TERMS—"ELECTRIC SMELTING."

The word "smelting," as used in the phrase "electric smelting," to designate a process of reducing ores by the use of electric current, is not necessarily confined to its more technical meaning of melting ores in the presence of some reagent, as carbon, which operates to separate the metallic element by combining with the nonmetallic element, but may include a reduction effected by the electric current in the absence of a reagent, the current effecting the same purpose as the reagent.

3. CONSTRUCTION OF CONTRACTS—UNDERSTANDING OF THE PARTIES.

A party must be deemed to have assented to a contract in the sense which he knew the other party intended it to signify, if the language employed is capable of that meaning.

4. SAME—ASSIGNMENTS.

Certain inventors who had pending certain applications, etc., for patents relating to "electric smelting processes and furnaces," procured from other alleged inventors of similar processes an assignment of all their discoveries and inventions, patents, pending applications, and caveats on file, "relating to electric smelting processes and furnaces, which do or may interfere with" any pending applications of the assignees. *Held*, that the word "interfere" was not used in the strict technical sense in which it is used in the patent office, and that the contract showed a purpose to remove all obstructions, so that the applications filed by the assignees might proceed without any contest by the assignors.

5. SAME.

An assignment by two inventors of all their discoveries, applications, and patents relating to "electric smelting processes and furnaces," construed, and *held* to pass title to a pending individual application of one of the assignors for a process of reducing ores by "electrolysis," where the essential idea set forth in the applications of both assignor and assignees was the reduction of ores and metallic compounds by depositing the material to be treated between the electrodes of a dynamo-electrical machine, and passing therethrough the electric current, electrolysis being merely an incident of that operation. 68 Fed. 354, reversed.

6. CONSTRUCTION OF CONTRACTS—SUBSEQUENT CONDUCT OF PARTIES.

The subsequent conduct of the parties may sometimes be resorted to, to aid in the construction of their contract, but can only be considered when the contract, read in the light of surrounding facts, leaves its meaning in doubt; and, if the subsequent action of the parties gives nearly equal ground for opposite conclusions, no aid is to be derived therefrom.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

The bill in this case was filed in the court below by Grosvenor P. Lowrey, of the city of New York, against the Cowles Electric Smelting & Aluminum Company, an Ohio corporation doing business at Cleveland, and Alanson T. Osborn, the treasurer of the company, for the purpose of removing a cloud upon the title of the complainant in two patents assigned to him by one Charles S. Bradley, the patentee therein, and to quiet the title of the complainant in said patents. The bill, after setting up the obtaining of the patents by Bradley and the transfer thereof to the complainant, alleged that the defendant, the Cowles Electric Smelting & Aluminum Company, had set up and asserted title to the same patents, under a certain contract made on the 18th day of May, 1885, between the said Cowles Electric Smelting & Aluminum Company of the one part and the said Charles S. Bradley and one Francis B. Crocker of the other part, whereby, as the defendants claimed, all the right, title, and interest of the said Bradley in the invention covered by the patents so assigned to the complainant had been assigned by the said Bradley to the said company; and that the company had executed an instrument of assignment of the said patents to Alanson T. Osborn, its treasurer, and caused the same to be placed upon the record of assignments in the patent office. It is claimed in the bill that this instrument of assignment to Osborn was false and fraudulent, and had no foundation in the contract upon which the company claimed title, and that putting the same on record and the assertion of claim to the Bradley patents, under a claim founded upon the contract above mentioned, operated to create a cloud upon the complainant's title. The contract made specific mention of an application of Bradley and Crocker, No. 158,805, then on file in the patent office. The bill sets out this contract in an exhibit, which will be presently copied, and alleges: "That while the language in said agreement between Crocker and Bradley and said Cowles Electric Smelting & Aluminum Company is broad enough in its general terms to cover other inventions of said Crocker and Bradley than that embraced in said application No. 158,805, it was not intended to and did not in fact embrace any other inventions;" and that the application of Bradley, upon which the patents were issued to him as above mentioned, "was not by any act, understanding, or contract of the parties included in said agreement of May 18, 1885." The defendants appeared and pleaded to

the bill, the substance of the plea being a statement of the facts and circumstances under which the contract of May 18, 1885, was executed, and a claim of title to the Bradley invention; and an answer, setting up substantially the same facts, was filed in support of the bill. The case having been brought on for hearing upon the defendants' plea, the same was overruled by the court, and the defendants, under leave of the court, then filed a further answer to the bill, and they also filed a cross bill, praying that the assignment to the said Grosvenor P. Lowrey might be decreed to be null and void, and that he might be perpetually enjoined from claiming any right, title, or interest in the said Bradley patents or either of them. Thereupon, a replication to the answer having been filed, and the pleadings upon the cross bill having been perfected, proofs were taken, and the cause again came on for final hearing. The case having been heard and considered, the court below decreed in favor of the complainant, holding, in its opinion, that Bradley's invention did not pass to the Cowles Electric Smelting & Aluminum Company by the contract of May 18, 1885. The opinion of the court upon the overruling of the plea is found in 56 Fed. 488, and the opinion on the final hearing in 68 Fed. 354. On the 8th of April, 1885, one Colgate Hoyt, acting in behalf of the Cowles Electric Smelting & Aluminum Company, procured from C. S. Bradley, who resided at Yonkers, N. Y., an option for the purchase of an interest in Bradley's inventions in the art, and took from him a writing witnessing it, as follows:

"New York, April 8, 1885.

"By and between Charles S. Bradley and Colgate Hoyt, both of Yonkers, in the state of New York, it is agreed as follows: Said Bradley shall, upon demand of said Hoyt, made at any time within ninety days from the date hereof, assign to said Hoyt, or his order, for the consideration of ten thousand dollars cash, an undivided one-quarter interest in all inventions which he has hitherto made in electric furnaces, and in the reduction of ores by electricity, and of all patents to be granted therefor, whether applications for such patents have already been filed or shall hereafter be filed, in the patent office of the United States; and, in consideration of the option being granted, said Hoyt, or the party to whom he may have assigned the same, shall pay to said Bradley, at the date hereof, the sum of five hundred dollars.

"Charles S. Bradley."

"New York, April 8, 1885.

"Received of Colgate Hoyt five hundred dollars.

"Charles S. Bradley."

This appears to have been in duplicate, for upon the making of the contract next to be mentioned such a writing was delivered up by each of the parties to the other.

Not long thereafter a correspondence was opened by the company with Bradley and Crocker for the purpose of purchasing their inventions, the immediately moving causes of which were an interference which had been declared in the patent office between one of the Cowles applications and that of Bradley and Crocker, and an interference of a caveat of Bradley and Crocker with another of the Cowles applications. The result of this correspondence was that Bradley and Crocker came to Cleveland a day or two before the 18th of May, and, after further negotiations, reached an agreement. The contract upon which the controversy turns was made on the day of its date, and is here set forth, as follows:

"This agreement, entered into this 18th day of May, 1885, between F. B. Crocker, of New York City, N. Y., and C. S. Bradley, of Yonkers, N. Y., constituting the first party, and the Cowles Electric Smelting and Aluminum Company, of Cleveland, Ohio, a corporation organized under the laws of the state of Ohio, constituting the second party, witnesseth that whereas, the first party have made certain discoveries and inventions relating to electric smelting processes and furnaces, and have made some applications for patents therefor, in the United States patent office; and whereas, the said second party is desirous of becoming the owner of such discoveries and inventions,—it is therefore agreed between the parties as follows: (1) For the consideration hereinafter mentioned, the receipt of which to our full satisfaction is hereby acknowl-

edged, the said first party does hereby sell, assign, and set over to the said second party all their interest in any and all discoveries and inventions relating to electric smelting processes and furnaces, and all patents they have obtained therefor, and all applications now pending and caveats on file in the United States patent office relating to electric smelting processes and furnaces, which do or may interfere with any application for patents made by Eugene H. Cowles and Alfred H. Cowles, of Cleveland, Ohio, now pending in the United States patent office. It is understood and agreed between the parties that this clause also includes the application of said first party now pending in the United States patent office and designated 'Serial Number 158,805,' and filed March 14, 1885. (2) Said first party also sells, assigns, and sets over to said second party their entire interest in all inventions, patents, and applications for patents in all foreign countries for the discoveries and inventions mentioned in the preceding clause of this agreement. (3) Said first party hereby authorizes and requests the commissioner of patents to issue to said second party patents for said discoveries and inventions mentioned in the first clause of this agreement. (4) Said first party for said consideration further agrees to sign and execute all papers necessary to perfecting applications for said inventions and obtaining patents therefor. (5) In consideration of the preceding, said second party hereby pays in hand to said first party the sum of five thousand dollars. In testimony whereof said parties have hereunto set their hands the day and year first above written.

Francis B. Crocker.
"Charles S. Bradley."

The material facts and circumstances which are referred to by the respective parties for the purpose of construing this contract, and ascertaining the intent and purposes of the parties therein, were these: The Cowles Electric Smelting & Aluminum Company, having just been organized at Cleveland, was about to engage in business, principally that of the manufacture of aluminum. In aid of this purpose it had become the owner of several inventions made by Eugene H. and Alfred H. Cowles, relating to the reduction of metallic ores and compounds, and especially to the production of aluminum from its ores and compounds by smelting them by means of the electric current. The first of these applications was one filed December 24, 1884, by E. H. & A. H. Cowles, and it was stated therein that their invention related to improvements in electrical furnaces and the method of operating the same; and it was further stated that the invention related to that class of electric furnaces in which heat was generated by means of the incandescence of a resistance body. The apparatus contemplated consisted of the electrodes of a dynamo-electrical machine placed within and on the opposite sides of the chamber or containing vessel and of the material deposited therein, and the process consisted of placing between the electrodes a mass of ore or other material to be operated upon, intermixed with carbon, both in a granulated or pulverized condition, and then passing through the material the electric current. In this mixture the carbon was intended to serve the purpose of a resistance medium in which a high degree of heat would be produced by compelling the current through it. Thereby the commingled ore in contact with it would be fused and separated from its chemical compounds. In reference to the material to be treated, it was said that it might be "mixed with the granular resistance medium, or imbedded in it, or otherwise brought in close contact therewith; or it may constitute, in itself, the resistance medium, according to the character of the material and the object sought to be accomplished." And in a subsequent part of the specifications this was further explained by saying: "Some ores or chemical mixtures may be of such a character, as to conductivity or resistance, as to become incandescent when treated in the above-described manner, in which case the addition of carbon is not necessary. The current of electricity passing through the mass of broken or pulverized ore, or mixture, will, in that case, generate the heat necessary to smelt or reduce it." The specifications give the construction of the apparatus and the mode of combination in detail. It is only necessary here to state them generally, as above. The claims appended thereto were 10 in number; some of them were for the apparatus and others for the process, of which may be especially noted claim 6, which was as follows: "(6) The method of smelting ore herein described, which consists in pulverizing the ore and introducing the pulverized ore in a dry state within

the circuit of an electric current by means of which the ore is reduced, substantially as and for the purpose set forth." This claim 6 was subsequently amended by inserting after the word "current," in the third line: "The said circuit being established through the body of dry pulverized ore of which it forms a part and." A further explanation was made of the process by an amendment as follows: "The heat is generated solely by the electric resistance of the particles of the granular body, exactly as in the case of an incandescent lamp by the resistance of the carbon filament to the passage of the current, and no other heat is employed at any stage of the work." Subsequently, by an amendment filed December 24, 1884, the specifications were changed, and in the matter of the specifications after such change occurred this passage: "To this end the invention consists essentially in the use, for metallurgical purposes, of a body of granular material of high resistance or low conductivity interposed within the circuit in such a manner as to form a continuous and unbroken part of the same, which granular body, by reason of its resistance, is made incandescent and generates all the heat required. The ore or other material to be reduced is usually mixed with the body of granular resistance material." In another part of the specifications it was stated that the degree of granulation might vary with the conditions of the case; and it was stated that the scope of the invention was not limited by the degree of granulation. And it was elsewhere stated that the proportions of ore and carbon would depend upon the character of the ore and the degree of heat required to reduce it, and that the degree of heat evolved would be determined by the resistance or conductivity of the mass and the strength of the current employed.

After stating that the matter of the apparatus was reserved for a separate application, entirely new claims were substituted for the original claims, three in number, of which the following is claim 1: "(1) The method of generating heat for metallurgical operations herein described, which consists in passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the material to be treated by the metallurgical process being brought in contact with or close proximity to the broken or pulverized resistance material, whereby the heat is generated by the resistance of the broken or pulverized body throughout its mass, and the operation can be performed solely by means of electrical energy." On February 14, 1885, the application was allowed; but, on the 20th day of March following, the case was withdrawn from issue in view of the prospective interference with another pending application, which turned out to be that of Bradley and Crocker, No. 158,805, specifically mentioned in the contract of May 18, 1885, and on April 10, 1885, such interference was declared. This was the state of the proceedings upon the application, at the date of the contract.

Another application by E. H. & A. H. Cowles was one filed February 24, 1885, being a divisional application founded upon that of December 24, 1884, just mentioned. It was for improvements in electric smelting furnaces. The details of construction suggested as embodying this invention were those enumerated in the main application, and the claims made thereon were for combinations of such apparatus. After some changes in the specifications and claims, it was announced at the patent office that the application was ready for allowance; but on May 1st it was declared that the case must be withheld from issue because of the fact that the main case was in interference with the Bradley and Crocker application, and on May 6, 1885, it was declared suspended to await the filing of an application by Bradley and Crocker upon their caveat which was found in the office. Notice of this suspension and the reason therefor was mailed to E. H. & A. H. Cowles, May 7, 1885, and this application of Cowles and Cowles stood in this plight on the 18th of May, 1885. Still another application was that of A. H. Cowles, filed May 15, 1885. It related to improvements in electric furnaces and methods of operating the same. The specifications delineated not only the apparatus, but also the method of operation. The apparatus consisted, substantially, of a containing chamber through the opposite sides of which the electrodes of a dynamo-electrical machine were inserted extending into the chamber towards each other so as to be in contact with the material to be reduced, and provided with mechanism whereby the electrodes could be pushed in so that the ends would be near each other or withdrawn to the wall of the chamber, as the requirements of the work to be per-

formed should indicate. The chamber also contained a lining of some substance which was a nonconductor of heat or electricity, a lining not made integral with the walls of the chamber, but packed in at the time of putting in the charge of material, or perhaps continued for successive operations. The process was one plainly indicated by the apparatus. The material which was to be subjected to the operation was stated to consist generally of intermingled ore, or metallic compounds, and carbon. Although it was stated in the specifications that the mingling of the carbon or other resistance material was generally done, it was also said: "But in some cases pulverized ore alone is used when it is a sufficient conductor of electricity." The claims also negative the necessity for the intermingling of the carbon or other resistance material. The material was filled into the chamber and covered with the lining material, provision made for the escape of gases, and the operation commenced by moving the points of the electrodes through the mass until they came sufficiently near each other so that the passage of the current would fuse the intervening or adjacent material. As soon as the fusion was started the electrodes were moved apart, gradually receding as the fusion progressed, whereby the mass of material between the electrodes acquired increased conductivity, until eventually the whole mass of material was brought within the influence of the current and melted down. The original claims as they stood at the date of the contract were for combinations of the apparatus only; but it should be noted in this connection that the specifications contained also the basis for a patent upon the process, and that eventually the patent did, in fact, issue for both, the first claim in which was as follows: "(1) The method of smelting ores and other substances by the incandescence of an electric material contained in said substances or mixed therewith, which consists in first bringing a limited quantity of the material to be treated between a pair of electrodes, and then gradually increasing the quantity of such material by causing the electrodes to recede from each other, substantially as herein set forth."

No proceedings in the patent office subsequent to the filing had taken place upon this application until after the 18th of May, 1885. On the other hand, there was at that time pending in the office the application of Bradley and Crocker, which claimed the invention by them of heating and reducing ores by electricity. That process was similar to that specified in the Cowles application of December 24, 1884, and is the one which was put into interference with that. It is not necessary to go into the details of that application, as there is no question material to the controversy relating to it. There was also then in the archives of the office a caveat deposited by Bradley and Crocker, February 26, 1884, which described the invention by them of an electrochemical or metallurgical process, in which the necessary "heat is produced and maintained by passing a powerful electric current either through the materials themselves which are undergoing treatment when these materials are conductors of electricity, or through separate conductors placed in the furnace, the energy of the electrical current being converted into heat by the electrical resistance of the materials or of the conductors through which it passes." The details stated in this caveat are of the apparatus employed and also of the mode of operation. In general, the apparatus consisted of carbon plates set in brick work and constituting the two electrodes. These electrodes were placed on opposite sides of the space containing the material, and there was a lining of the furnace consisting of nonconducting material. The mode of using the apparatus was by filling in the intervening space between the electrodes, and passing through it an electrical current in a way substantially like that already stated in the applications above described. In this caveat there was this passage: "We are about to make application for a patent for an invention resembling to a certain extent the one herein described, but in which the electric current we employ to produce the necessary heat in the furnace is also made to perform the function of electrolyzing a fused compound; that is, reducing a metal by the electrolytic action of the current that we employ to keep the bath in a state of fusion. But it is to be observed that in the invention described in this caveat the electric current by which we produce the required heat performs no electrolytic action upon the materials undergoing treatment, the reaction being purely chemical, and the function of the current being solely to develop the heat which is a necessary condition of

the reaction." This caveat is the one above mentioned, on account of which the application of Cowles and Cowles of February 24, 1885, was suspended on May 6, 1885. There was also pending in the office when the contract in question was made the Bradley application, upon which and its outgrowths the present controversy has arisen; and a somewhat particular statement of its nature, history, and then existing status seems necessary for the purpose of explaining the grounds upon which the conclusion here reached is founded. The application was filed by Charles S. Bradley, February 23, 1883. In it he stated that his invention was: "A new and useful improvement in the electro-metallurgical process," and it was said to relate "to the process of effecting the reduction of minerals or other compound chemical substances, while in a state of fusion, by the electrolytic action of an electric current; and it is especially designed for the extraction of metals from their ores or compounds, and their reduction to the metallic state." His method consisted of an operation therein described as follows: "Upon a hearth of brick or other suitable material is piled a heap or body of the ore, more or less pulverized, in the shape of a truncated cone, and a cavity or basin is excavated in the top of the heap to contain the fused portion of the ore which is to be treated electrolytically. In order to fuse the ore at the start, I bring the two electrodes into contact, separate them sufficiently to produce an electric arc, and then thrust them down into the ore lying at the bottom of the cavity or basin, where the ore soon fuses by the heat of the arc, and becomes a conducting medium or electrolyte through which the current from the electrodes continues to flow. The decomposition of the ore thereupon commences, the metallic aluminum being gradually deposited at the negative electrode, and the fluorine gas being set free at the positive electrode so long as the ore is maintained in a state of fusion; and I secure this result in my process by employing a current sufficiently powerful to develop the required heat in overcoming the resistance offered to its passage by the fused mass of ore, and, further, in having my electric generator or source of current so arranged that the strength of the electrolytic current may be properly regulated, and the mass of ore thereby kept at the proper temperature to obtain the most efficient electrolytic effect; or, in other words, to produce the largest yield of metal with the greatest economy in the electric current consumed." The claims were five in number, and were substantially as stated in claim No. 1: "The process of obtaining metals from their ores or compounds which consists in treating electrolytically a fused mass of ore contained in a basin or receptacle formed of the ore itself." On objection being made to these claims, Bradley, on April 8, 1885, amended his specifications, and substituted new claims. In his amendments, among other things, he inserted the words "or electro-chemical" after the word "electro-metallurgical" in the statement of the field of his invention, and placed, at the head of his communication to the office embodying his amendments, the title, "Improvement in Electro-Metallurgical or Electro-Chemical Process." And in respect to the incidents of his process he inserted the following statement:

"The arc, of course, ceases to exist as soon as there is a conducting liquid—the fused ore—between the electrodes, and the passage of the current then takes place through the fused ore by conduction, and the heat is produced as it is in an incandescent lamp. The arc is merely used to melt the ore in the beginning, and the ore is kept melted by incandescence, so to speak." Also the following: "It is obvious that other chemical and metallurgical processes may be carried on according to my invention in substantially the same manner as that I have described. It is also evident that various forms of furnace and built of various materials may be employed without departing from my invention." The substituted claims were for the process only, eight in number, the third of which is here stated: "(3) The herein described electro-metallurgical or electro-chemical process which consists in employing an electric current sufficiently powerful, not only to effect the electrolytic decomposition of the ore or compound treated, but also to develop by its passage the heat required to fuse said ore or compound or maintain it in a state of fusion." In no one of these claims was the initial fusion made an element or step in the process. The claims took up the process with the initial fusing already accomplished, adopting it as the datum from which the process described advanced.

On April 16, 1885, the claims were rejected upon references, especially to the detail of experiments of Sir Humphrey Davy in the Philosophical Transactions of the Royal Society. There were no other applications or caveats of Bradley and Crocker, or either of them, then on file. It is not deemed necessary to state the subsequent proceedings upon these several applications in minute detail; some of them are referred to in the opinion. It suffices here to state that the several Cowles applications were carried through to patents,—some of them after changes in the specifications and claims; and one of them in particular, that of A. H. Cowles, resulted in a patent for not only the process, but also the apparatus in which it was conducted. Nothing was done after the contract was made by the Cowles Bros. in respect to the Bradley application, nor for the purpose of securing any rights in the invention stated in the Bradley and Crocker caveat; and Bradley himself did nothing further with his application for nearly two years thereafter, when, on April 13, 1887, he took up the proceedings again, and, after a protracted struggle—in which there were repeated rejections and amendments of the specifications and claims—in the patent office, finally obtained three patents. One of these, that upon his original application, was numbered 468,148, was issued February 2, 1892, and was for the process stated therein. It was said in the specifications, which had been amended in this respect during the progress of the proceedings, that “the body of unfused ore may either be formed into an unconfined pile, as in Fig. 1, or it may be contained in a receptacle or box, 6, of any desired shape, so as practically to form a tank or holder lined of the ore itself, as in Fig. 2. Such a lining will prevent the destruction of the holder, and the process may go on indefinitely without interruption.” After describing his invention, he said: “I have described my process as preferably carried on by employing a body of the ore itself to form the basin or receptacle in which the electrodes are situated, between which the current flows through the ore for heating and electrolyzing the same. That specific invention, however, is not claimed herein, since it forms the subject-matter of patent No. 464,933, dated December 8, 1891. My present invention is not limited to the specific character of the receptacle nor the specific arrangements of the electrodes.” Then follow the claims, of which the first was this: “(1) The process of separating or disassociating metals from their highly refractory ores or compounds, nonconductors in an unfused state, of which the ores and compounds of aluminum are a type, which consists in fusing the refractory ore or compound progressively by a source of heat concentrated directly upon it, rather than by an external furnace, and as it becomes fused effecting electrolysis by passing an electric current therethrough between terminals which are maintained in circuit with the fused bath, whereby the process is rendered continuous, substantially as set forth.” Another of the patents obtained by Bradley was No. 464,933, issued December 8, 1891. It was entitled, “Process of Obtaining Metals from Their Ores or Compounds by Electrolysis,” and was based upon a divisional application of his original application, the general description of the process being that contained in the original application, with modifications made during its pendency. One of the amendments in the specifications was this: “The body of unfused ore may either be formed into an unconfined pile, as in Fig. 1, or it may be contained in a receptacle or box, 6, of any desired shape, so as practically to form a tank or holder lined of the ore itself, as in Fig. 2. Such a lining will prevent the destruction of the holder, and the process may go on indefinitely without interruption.” And he further expressly disclaimed the initial fusing by an electric arc as a part of this invention, in the following terms: “I do not herein lay claim * * * to the process of obtaining metals from their ores or compounds * * * consisting in first fusing the ore or compound by the direct passage of an electric current therethrough, and then, while maintaining the fused condition by said current, also electrolytically decomposing the ore or compound.” And he also distinguished this invention from the one specifically embodying his electrolytical process, by stating that he did not “herein lay claim, broadly, to the process of obtaining metals from their ores or compounds consisting in maintaining the ore or compound in a fused or molten condition by the passage of an electrical current therethrough, and electrolytically decomposing such ore or compound,” since, as he says, he had made those the subjects of another application. Claims 1 and 2 of this patent were as follows: “(1) The process of obtaining metals from their ores or compounds,

consisting in passing an electric current through a fused portion of the ore or compound contained in an unfused body or heap of said ore or compound. (2) The process of obtaining aluminum from its ores or compounds, consisting in passing an electric current through a fused portion of the aluminum ore or compound contained in an unfused body or heap of said ore or compound." Still another of the Bradley patents was No. 473,866, issued April 26, 1892, entitled, "Process of Obtaining Metals from Their Ores or Compounds," which states that it was "especially designed for the extraction of metals from aluminous and the like class of highly refractory ores or compounds, and their reduction to the metallic state,—for example, the extraction of aluminum from one of its ores, say cryolite." In his application, in addition to the apparatus provided in his original specifications, he states that he employs an auxiliary source of heat in the nature of blowpipe or similar flame projected upon the material in the vicinity of the electrodes, and keeping up the fusion in that way. The nature of this patent is disclosed substantially by the following, claim 1: "(1) The herein described process of obtaining metals from aluminous and the like class of highly refractory ores or compounds, which consists in fusing, and, when fused, establishing an electric current through a bath of the material to be treated, and by such current, together with a blowpipe flame or other auxiliary source of heat concentrated directly upon the material treated, rather than through the walls of a furnace or crucible, maintaining the fused bath of ore constant, and electrolyzing the same, as set forth." During the progress of the suit Grosvenor P. Lowrey died, and it was revived in the name of his executor, Francis P. Lowrey, who is the appellee in this court.

Loren Prentiss and E. N. Dickerson, for appellants.

Robert S. Taylor, for appellee.

Before LURTON, Circuit Judge, SEVERENS, District Judge, and HAMMOND, J

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The first of the questions presented by this record relates to the application of the rules of evidence in respect to the competency of proof of the prior and contemporaneous parol negotiations of the parties, for the purpose of affecting the construction of the contract. The competency of such evidence depends upon the nature of the proceeding and the purpose for which it is offered. If the proceeding is for the purpose of reforming the writing so that it shall truly express the intentions and purposes of the parties, such evidence is no doubt admissible, for in such a case the primary object is not to construe the contract, but to ascertain what the real contract was, to the end that, if the writing fails to express it, it may be reconstructed so that it shall do so. On the other hand, if the purpose of the suit is to enforce a written contract, whereby the writing is accepted as it stands and admittedly expresses the intentions of the parties, the general and familiar rule applies that such prior and contemporaneous negotiations are not admissible to affect the construction of the writing. This rule is founded upon the presumption that the parties have gathered in and finally put in form the result of the negotiations, the obvious purpose of the writing being to express in a definite and authentic form their final conclusions. The general rule just stated does not, however, exclude proof of the facts and circumstances showing the situation of the subject-matter, and the relations of the parties thereto, or other facts and circumstances tending to throw light upon those subjects.

Such matters stand upon a different ground from the mere negotiations of the parties relating to the terms of the contract. In the present case the suit was not brought for the purpose of reforming the contract, and no question is made but that it is in the form and language in which the parties intended it. Both parties stand upon it as written, the controversy being only as to what the writing means upon the proper interpretation of its language. There is considerable evidence in the record to which the court can therefore give no weight, which relates to their negotiations before and at the time of the signing and delivery of the written contract. But we may regard such evidence as shows to us the situation of the matters contracted about, and how the parties stood in relation to them. The most material facts thus shown in the present case are embodied in the preceding statement.

Coming, now, to the interpretation of the contract, it is contended on the part of the appellee that Bradley and Crocker, the parties of the first part in the contract, agreed to sell only such of their joint property as fell within the description of the subject of their grant, that no express mention was made therein of any individual property of either of them, and therefore that Bradley's individual application did not pass. On the other hand, the appellants insist that the general language employed, when considered in the light of the evident purpose and the reasons of the parties actuating them, includes, not only the joint property of Bradley and Crocker of the kind described, but also the individual property of each of them of the same kind, by plain intendment. The court below held that the latter was the proper view to be taken of the question, and in that we concur. Undoubtedly, if there are in any such case no circumstances which would change the primary grammatical construction, the terms employed would support the appellee's contention; but the grammatical rule raises only a *prima facie* presumption, and does not preclude the settling of the meaning by detracting somewhat from the exactness of the language in order to give effect to more cogent reasons of another sort. And the cases are very numerous in which this principle has been applied, and the plural language of the agreement has been held to cover and include the singular also. "If two persons have goods in jointure, and give all their goods, not only those they have in jointure, but their several goods also, pass." The substance of the rule is stated in *Co. Litt.* 197a, and several cases are cited in the opinion of the court below in illustration and support of it. *Justice Windham's Case*, 5 Coke, 7b; *Wharton v. Fisher*, 2 Serg. & R. 182; *Williams v. Hadley*, 21 Kan. 350; *Judd v. Gibbs*, 3 Gray, 539; *Von Wettberg v. Carson*, 44 Conn. 289; *Coffin v. Douglass*, 61 Tex. 406; *Shoe Co. v. Ferrell*, 68 Tex. 638, 5 S. W. 490; *Bank v. Beede*, 37 Minn. 527, 35 N. W. 435. The general rule above invoked is one which is applied also in the construction of statutes. *Black, Interp. Laws*, 154, and the instances there given.

It is conceded by counsel for the appellee that the reference in another place in this contract to "applications for patents made by E. H. & A. H. Cowles" would include the application which

was made by A. H. Cowles alone, although he says that if he were disposed to stand upon a small point of verbal criticism he could say that the latter application was not within the terms of the agreement in controversy. We think that is a just as well as frank concession, and that the reason for it is equally applicable to the construction of the language we are now considering.

Much stress is laid by the appellee upon the fact that the contract of May 18, 1885, did not in terms enumerate as coming within the grant the Bradley application, notwithstanding that it had been brought to the notice of the Cowles Company by the reference thereto in the Bradley and Crocker application, which was present at the time when the contract was made. This reference to the Bradley application was made for the purpose of stating the difference between that and the Bradley and Crocker application. In the reference, the general characteristic of the Bradley invention was stated, but not the details; and it is now strenuously insisted that the omission of any special mention in the contract of the Bradley application, whose existence was known, in connection with the fact that the Bradley and Crocker application is specifically mentioned, furnishes strong evidence that it was not intended by the parties that the Bradley invention should pass; and this consideration appears to have had great weight with the court below in determining the construction which ought to be put upon the contract.

Now, one of the applications of Cowles and Cowles, for a patent for improvement in electric smelting furnaces, which had been filed on February 24, 1885, was pending at the time of this contract. The details of the apparatus proposed by it were those suggested by their previous application, filed December 24, 1884, of which the one now mentioned was a divisional application. The claims were for combinations of such apparatus. After some changes in the specifications and claims, it was declared at the patent office to be ready for allowance on May 1, 1885, but it was at the same time declared that the case must be withheld from issue, because of the fact that the main case was in interference with the Bradley and Crocker application. And a little later, on May 6th, this Cowles application was declared suspended, because of the following facts stated in a notice directed to Cowles and Cowles, which stated that "the caveat of C. S. Bradley and B. F. Crocker, pending at the date of the filing of this application, is found to cover substantially the apparatus herein claimed; and, as provided by rule 196 the caveators have been notified to file a complete application. This application must be suspended in view of the above action." This notification was mailed to Cowles and Cowles on May 7, 1885, and, by due course of mail, must have reached them a week or more previous to the date when the parties met and concluded the agreement of May 18th. And its previous reception was probably the reason for the mention of caveats as one of the class of things desired by the Cowles in a letter written to Bradley and Crocker, May 11, 1885. The Cowles brothers must, therefore, have had quite as ample notice, not only of the existence of the caveat, but of its sub-

stantial nature, as they had of the Bradley application and its contents. The Bradley and Crocker caveat, therefore, stood directly across the path of one of the Cowles applications, and was obstructing the path of the applicants in the same way that the Bradley and Crocker application was obstructing that of another one. Yet the caveat was not distinctly mentioned in the contract, and is not included, unless it is included in the general terms. No one can doubt that the caveat must be regarded as within the scope of the contract. It is obvious, therefore, that the parties cannot be deemed to have excluded inventions and claims simply because they knew of their existence and did not include them in terms.

The above-mentioned argument of the appellee appears to have had much weight with the court below in determining the proper construction to be put upon the contract; for, as we gather from the opinion there given, it was the main consideration upon which the court held that the parties did not actually suppose that Bradley's invention was included. 68 Fed. 368. It is probable that the condition of the case on the application of Cowles and Cowles of February 24, 1885, at the date of the contract, was not brought to the attention of the court, as no reference was made thereto in its opinion. The manner in which this caveat was dealt with in the contract confirms the impression which is strongly induced by the general and sweeping terms of the contract as a whole when construed in the light of existing facts, that impression being that it was the purpose of the parties to bring under the operation of the contract every existing thing in the nature of inventions and applications which might tend to defeat any of the Cowles inventions and applications. Again, it is urged that the reference to the Bradley application in that of Bradley and Crocker indicated to the Cowles brothers that the Bradley invention was so far off from their own that it was of no importance for them to acquire it, but we do not think that such was the probability. On the contrary, we think that that reference bore on its face the signal of danger. It is stated that in that application Bradley had described "an electro-metallurgical process in which an electric current is employed to perform two functions: First, to effect an electrolytic disruption of the materials treated; and, second, to supply the heat necessary to maintain said materials in a fused state while they are being electrolyzed." Now, to a man having the familiarity with the subject which the Cowles brothers possessed, it was apparent that this process contemplated an operation which in its nature essentially consisted of a transposition of the two operations mentioned in this reference; for the material must first be fused before the electrolytic disruption could occur, that being necessarily a secondary effect. They knew that in their own applications for a similar process it had been stated that in some circumstances, depending upon the conductivity of the materials treated, no carbon or other independent material was employed as an agent in the operation, but the process was performed by the direct application of the current to the subject-matter to be reduced. It seems to us, therefore, that, if there is any inference to be derived from the probabilities

of the case upon this aspect, it is clearly against the party who now seeks to make use of it. The result is that it must be held that the individual application of Bradley then pending in the patent office was included in the grant, if it is, in other respects than with regard to its ownership, within the description of the things intended to be conveyed.

A point is made upon the descriptive words of the grant, "discoveries and inventions relating to electric smelting processes," and the endeavor is to establish that Bradley's process is not correctly described if we designate it as "electric smelting," and therefore was not included. But we think it was an apt and proper description of it. It was performed by electricity, and that was the feature of it which distinguished it from the old methods of reducing ores. By using the current the ore was "smelted." By the definitions of the dictionaries the word "smelting" is shown to be sometimes employed to signify simply "melting," "fusing," and sometimes, and more commonly in its practical sense, to mean the reduction of ores by melting them in the presence of some agent which would react upon the compounds of the ore when fused, and thereby separate them. Such a reagent is carbon. But if in Bradley's process the one agent performed both functions by melting and decomposing the ore, we can see no reason whatever for giving it a name which should also indicate the secondary effect in the process any more than it was necessary in the old art to include it in the designation. The term "electric" sufficiently distinguished it from the older method, for in itself it carried the idea of fusing and electrolyzing, both being its well-known functions. Because a different agency was employed to effect one of the things done in the operation would not alter the general character of the whole process, to which the comprehensive characterizing of "smelting" in the sense of "reduction" would fitly be applied.

The Bradley process was not less appropriately described as an electric smelting process than that of Siemens by the electric arc. At the hearing there was exhibited to us the work of Dr. Urbanitzky, originally in German, entitled "Electricity in the Service of Man." This was subsequently edited by Dr. Wormell, and was republished in English with an introduction by Perry, in 1886, at London and New York. In this work Siemens' process is described as "electro-smelting." The indications are quite strong that the court below was in error in supposing that even as early as 1885 the process of reducing metals by electricity was not denominated "electro-smelting."

This brings us to the question of the interpretation of the following language in the contract:

"And all applications now pending and caveats on file in the United States patent office relating to electric smelting processes and furnaces which do or may interfere with any application for patents made by Eugene H. Cowles and Alfred H. Cowles, of Cleveland, Ohio, now pending in the United States patent office."

It is urged upon us that we should accept as a test in the construction of this language that the parties intended it to be em-

ployed in a sense restricted to its technical signification,—such a signification as would be given to the same expressions in the patent office. This is based upon the suggestion that they were scientific men dealing with a scientific subject in the crisis of an interference. But, when we attend to all the circumstances, we doubt whether such a mode of dealing with the construction of the contract would be just, although in the end it does make a vital difference whether we adopt the test suggested or not. It is to be observed that one of these parties was a corporation which was just being launched upon a manufacturing business. The patents which it was expected would be obtained upon the inventions which it had secured were an adjunct necessary to their business operations. The company was buying its peace, and endeavoring to obtain and secure an indubitable title to the inventions which they intended to employ. They were not engaged in a hand to hand contest in the patent office or in the courts. They were endeavoring to so shape their affairs as to relieve themselves from the necessity of making such contests. They stood outside of any such place of controversy, and were dealing with the subject-matter on business principles. For these reasons we think there is much reason for believing that when they employed the general language, all inventions and discoveries, patents, applications, and caveats, which did or might interfere with their own applications for patents, they intended to gather in all which the other party had which would furnish any reasonable ground for claiming that they infringed. These facts and reasons are equally well calculated to show that the other party had an equivalent intention in making the grant; or, at all events, that they must have known that that was the understanding of the grantee when they closed the contract, and this would bind them to the agreement having that interpretation. It is a well-established doctrine that a party must be deemed to have assented to the contract in such a sense as he knew the other party intended it to signify, provided the language employed is capable of such a meaning. And we have no doubt that for the purpose of construing this contract we must suppose that the parties intended to deal with existing things, and in the form and character in which they existed. The leading purpose was to clear the way of all obstructions, so that the Cowles applications might proceed without any contest on the part of the other parties, with whom they were making the contract. It is difficult to suppose that these purchasers were intending to secure what might ultimately be determined to interfere with or defeat their claims, either upon a contest in the patent office or by judicial decree, as the result of litigation. It would rather seem that the proper test to be applied in the solution of the question, whether any invention or any application is to be included within the terms of the grant, is this: whether the invention or application was of such a character that it might interfere with the prosecution of their own applications; and by that we mean, of course, not an obstacle which had no substance or foundation on which a contestation could reasonably be based, but such as would furnish a reasonable ground for raising a con-

troversy. We do not find it necessary, however, to give the contract so broad a scope. In our opinion it did, without doubt, include all inventions and applications of Bradley and Crocker which would in fact afford sufficient ground for declaring an interference or would tend to defeat a patent on any of the Cowles applications if such a patent should, without any declared interference, be issued. Any other construction more favorable to the appellee would tend to defeat the leading and manifest purpose of the whole transaction.

The appellee contends that the words "which do or may interfere" have relation back to all of the preceding subjects of the grant, and include the words "discoveries and inventions." On the other hand, the appellants contend that they refer only to the words immediately preceding, "and all applications now pending and caveats on file in the United States patent office relating to electric smelting processes and furnaces." It must be confessed that the question is somewhat doubtful. In support of the appellants' contention that it relates only to the immediately antecedent words, it may be observed that it was known that there were applications and a caveat of the other party on file in the patent office relating to the subject. They also had in mind that the Cowles brothers had applications there. These properties were, therefore, of the same sort. And if we were to assume that the parties were dealing, as contended, "in the atmosphere of the patent office," the language employed would be apt and technical to describe the things "which do or may interfere"; whereas, using the language in the meaning which it has in the patent office, it would be a bungling and unusual expression to speak of "discoveries and inventions" as interfering. But as we are not disposed to interpret this contract strictly in the way in which such terms would be employed in the patent office, for reasons which are elsewhere explained, we are inclined to think, upon consideration of the leading object which the parties had in view, which was to clear the way for their own inventions and applications, that the limiting words "which do or may interfere" were intended to apply to all of the things granted, which are mentioned in this paragraph, except perhaps the Bradley and Crocker application mentioned in the subsequent clause. For this reason it becomes necessary to determine whether the Bradley application was one which did or might interfere with any of the Cowles applications.

We are not required to pass upon the validity of the patents involved in this suit, or of any of them. There is no issue of that kind before us, and we shall go no nearer to such a decision than the determination of the issue here made requires. The comparison of one patent with another, for the purpose of determining their substantial identity, is essentially one of a comparison of claims, though the specifications may be referred to, within limited bounds, for the purpose of construing the claims themselves. As we think that the contract in question must be deemed to refer to things as they then existed, we think the comparison should be made of the specifications and claims made by the parties as they stood at that

time, though we may refer to what has since been done upon the footing of those applications as illustrating their capacity. Considering that no patents had been issued, and the claims might be modified and put in any form which the specifications warranted, it is necessary to examine the specifications themselves for the purpose of showing what the real nature of the application was, and it is not of immediate consequence what the then pending claims were. Referring to the original application of E. H. and A. H. Cowles, filed December 24, 1884, it is seen that the invention related to improvements in electric furnaces and also the method of operating them. The general idea disclosed was that of the reduction of metallic ores and compounds by passing an electric current there-through. In carrying out this general purpose it was stated that the material to be treated should be pulverized and mixed with pulverized carbon, but it was also stated in the specifications that the carbon need not be supplied where the ore or other material being treated had sufficient conductivity whereby to carry on the operation. Taking these two parts of the specifications together, it resulted in this: that the carbon would be used wherever it was found to be a necessary adjunct, and this would depend upon the particular ore or compound that was being reduced. The employment of the carbon was not, therefore, made an essential part of the process. And, further, by an amendment which had then been made, the proportion of carbon in any case had been made indeterminate. By another amendment the degree of pulverization was rendered immaterial.

In the claims as they originally stood, the third claimed simply "for a combination with the two electrodes placed at opposite sides of the furnace chamber of a mass of granular or pulverized material interposed between the same." The sixth was "for a process which consisted in pulverizing the ore and introducing the pulverized ore in a dry state within the circuit of an electric current, by means of which the ore is reduced." These claims, however, were introduced before the amendments above referred to were made. Thus it will be seen that the specifications were of such a character as that it was competent, upon the basis of them, to claim the process of reducing metallic ores or compounds by bringing them between the electrodes of a dynamo-electrical machine, and passing through them the current, using carbon or not, as the character of the material made expedient. Whether such claims would be valid or not, it is not necessary here to inquire. Even before the making of the contract, such claims were in fact made in the applications; and there can be no question that the parties engaged in the purchase and sale of these inventions and applications, for the purpose of taking them out of the way, apprehended that such claims might properly be made and were tenable.

Referring, next, to the application of February 24, 1885, by the Cowles brothers, it is found to have been a divisional application, founded upon the one just considered. This was for so much of the invention stated in the original specifications as related to the apparatus. The matter of it is not very material to the present purpose, but it illus-

trates the flexibility of the proceedings in the patent office upon applications for patents therein pending, and it related to a class of inventions where the apparatus suggests the process. Another application was filed by A. H. Cowles, on May 15, 1885. It related to improvements in electric furnaces, and the method of operating the same, and the specifications showed both the apparatus and the method. Thus, although his claims were for combinations of the apparatus, the specifications also contained the grounds for a patent for a process; and, eventually, the patent issued upon this application actually covered both the apparatus and the process. Let us turn for a moment to these claims which were finally allowed and made the substance of his patent. It is material to observe in this connection that both in the specifications and claims of this patent the necessity for mixing carbon or any equivalent substance with the ore was expressly negatived; for he states in the specifications that "this [referring to the charge] consists ordinarily of electrical resistance material, such as electrolyte carbon, and the ore to be reduced, * * * but in some cases pulverized ore alone is used, when it is a sufficient conductor of electricity." And his first claim was "for the method of smelting ores and other substances by the incandescence of an electrical resistance material contained in said substances or mixed therewith, which consists in first bringing a limited quantity of the material to be treated between a pair of electrodes, and then gradually increasing the quantity of such material by causing the electrodes to recede," etc. The same observation may be made upon this as was made upon the application filed December 24, 1884, viz. that the employment of the carbon was not made essential to the process, but was left to the various requirements of the use, and the extent of its employment left to the judgment of the operator.

Considering next the Bradley application of April 23, 1883. It is seen to have been for an electro-metallurgical process. The first step in the process which he described consisted in piling upon a hearth a heap of ore in the form of a truncated cone, making a basin in the top of the heap. He then took the two electrodes connected with the wires running from the dynamo-electric machine, and, bringing them near together, plunged then into the ore at the bottom of the basin, where, by reason of their proximity, an electric arc would be formed producing intense heat, and thereby melting the immediately adjacent material. As the ore melted, the electrodes were moved farther apart, whereupon the arc ceased, and the current, instead of passing between the lumps or granules of the material, passed through the mass which had become melted, whereby heat was generated serving to keep the mass molten; the result of which would be to melt down the other parts of the ore adjacent to that already melted, the electrolytic action of the current going on simultaneously after the initial fusion by the arc had been accomplished. According to the idea of the inventor, the concurrent fusing of the mass and the electrolyzing of the same would be continued until the operation ceased. It was also suggested that the operation might be continuous, and only needed the addition of fresh ore. He also indicated in his specifications an advantage in thus fusing the ore within a

body of ore which remained unfused, in that it saved the walls of the crucible or other containing vessel in which such operations had generally been performed from the very serious corrosion, cracking, and crumbling resulting from the action of liberated gases and the intense heat. Taking this process all in all, it would seem, at least to one not thoroughly acquainted with what had already been accomplished in the reduction of ores and metallic compounds by electricity, to have been one of great merit. But the researches of Sir Humphrey Davy, Siemens, and other scientific men had already made a considerable advance in developing this new art. This application of Bradley's contained matter upon which were founded claims of many sorts, and was divided into three distinct lines; but up to May 18, 1885, it continued a single application. The claims appended originally to this application made no mention of any method of initially fusing the ore, but started the process upon which his claims were founded by treating the mass of ore as already fused, as is shown by his claim 1, which in this respect is a sample of all: "(1) The process of obtaining metals from their ores or compounds which consists in treating electrolytically a fused mass of ore contained in a basin or receptacle formed of the ore itself." What appears prominent in the above specifications and claims was Bradley's idea of employing the electrolytical power of the current to the ore, whereby the metal sought was disrupted from its compounds. It is evident that he did not himself fully understand the peculiar details of the action of the current upon the material; and he seems to have supposed that some other agency was at work than mere heat and atomic disruption thereby, or, if not, that some chemical agency was in operation; for he changed the statement of the general character of his invention by adding the words "or electro-chemical" after the word "electro-metallurgical" as it originally stood, and also said: "It is obvious that other chemical and metallurgical processes may be carried on according to my invention." But this is not very material. He also amended his specifications by saying: "It is also evident that various forms of furnace, built of various materials, may be employed without departing from my invention." He amended his claims, and it is important to refer to these claims as amended, in determining what the parties intended to sell to the Cowles Electric Smelting & Aluminum Company, for they were the existing claims at that time. The first claim was simply "for a process in which the required heat as well as the electrolysis is produced by means of an electric current or currents." The second "for the process of electrolyzing materials in a state of fusion in which the heat required is produced or supplied by means of the current which is employed to effect the electrolysis." The third: "The process which consists in employing an electric current sufficiently powerful, not only to effect the electrolytic decomposition of the ore or compound treated, but also to develop by its passage the heat required to fuse said ore or compound and maintain it in the state of fusion." The rest of the claims were of a somewhat similar character, with some slight changes, except that in some of them he included the unfused surrounding ore as a receptacle in which to carry on the process.

We might stop here for the purposes of the intended comparison, but the subsequent history of this application and its final development is proper to be considered for the purpose of showing what interference with the Cowles applications this application of Bradley's and the invention supposed to be embodied in it might create. In 1887 Bradley again took up the proceedings upon his original application. It was divided into three, two offshoots from the original having been started, and all three were carried through to patents. It would be tedious to follow each successive step. The application went through successive metamorphoses, until it finally emerged in three separate patents; but there was continuity of the essence of the invention. The patent issued upon the original application was for a "process of separating metals from their highly refractory ores, nonconductors in an unfused state, which consists in fusing the ore progressively by a source of heat concentrated directly upon it rather than by an external furnace, and, as fusion takes place, effecting electrolysis by the electric current carried through it." The use of the body of the ore as the receptacle in which the process should take place was expressly stated to be not claimed, and so, also, the specific arrangement of the electrodes. The patent issued upon the first divisional application struck off was for a process of obtaining metals from aluminous and similar ores or compounds, and consisted in fusing and when fused establishing an electric current through a bath of the material to be treated, and by the current and some auxiliary source of heat all concentrated directly upon the material treated, rather than through the walls of a furnace or crucible, maintaining the ore in fusion and electrolyzing it. In the specifications the receptacle in which the process should occur was expressly excluded, though a lining by using the unfused ore for that purpose was retained, and it is again stated that other chemical and metallurgical processes might be carried on according to that invention in substantially the same manner.

The patent founded upon the second of the divisional applications was, quoting the first claim therein, for: "(1) The process of obtaining metals from their ores or compounds consisting in passing an electric current through a fused portion of the ore or compound contained in an unfused body or heap of said ore or compound." It was stated in the specifications that the body of unfused ore might either be formed into an unconfined pile, or in a box or tank lined with the ore itself, and it was stated that by adding to the mass of the ore the process might go on indefinitely. There is no mention of the initial fusing as one of the steps of the process, and there was an express exclusion of it in the statement preliminary to the claims. That process, including such initial fusing, was made the subject of another patent, which latter fact has been already shown by the reference to the patent which we have just previously considered. Nor is there any mention made in the first two claims of any electrolyzing process, unless it is to be implied as a result of passing the current through the fused ore. These claims speak of the process being performed in the material contained "in an unfused body or heap of ore." As the containing ore serves

only the purpose of a receptacle, it would seem that so much of the claims is merely structural. When employed as the lining of the tank according to the specifications, the unfused ore performs precisely the same function as the lining of the tank in the Cowles patent, 319,945, which is for a structure and not for a process. But we will not stop to dwell upon this.

Recurring to the situation of the applications of the several parties, it is impossible for us to hold that the Bradley patent was not or might not constitute an interference with any of the Cowles applications. Without referring to all of the points upon which collision might occur, and we think in fact existed, it will be sufficient to compare the applications of A. H. Cowles and its original claims with that of Bradley, as his application stood when the contract with which we are dealing was made. We have already pointed out the characteristics of these two applications. In each of them the process consisted of reducing ores and metallic compounds by depositing the material to be treated between the electrodes of a dynamo-electrical machine, and passing therethrough the electric current. After the initial fusing,—which for the purposes of the comparison may be laid out of the case, because it was not made essential to the Bradley claims as they then stood,—the melted ore in the Bradley process between the poles became the same electrolyte as in the Cowles process, when the latter process was applied to ores or other materials possessing in themselves sufficient conductivity, and probably also when applied to ores or materials with which carbon or some equivalent substance would be advantageously intermixed; because we are satisfied that in this Cowles process, whenever the carbon should be employed, after the initial fusing the current would pass between the electrodes in large measure through the fused ore by reason of the breaking up of the continuity of its paths through the carbon by the progressive destruction of the carbon and the gathering of the metal upon the surfaces of the granules, and because also the paths thus made would offer less resistance to the current than the surrounding mass of carbon and unfused ore; and more especially would this be so if the process was applied to the reduction of highly refractory ores, where the great heat to which the materials must be subjected would render the conductivity of the molten mass approximately that of the carbon, and thus the carbon and the material would become a homogeneous mass with respect to its conductivity. But, be that as it may, it is enough that with respect to the two processes they were not only alike, but identical, in some of their applications. It is said that there are no ores with respect to which the Cowles process would be a successfully operative one without the carbon. But, if the initial fusing be ignored, Bradley's must be equally so.

Referring again to the first claim of the patent to A. H. Cowles, it is readily seen that it in fact includes the whole of Bradley's process, initial fusing and all. "It consists in first bringing a limited quantity of the material to be treated between a pair of electrodes." He says, in his specifications, that at the start the electrodes are placed near together. This is exactly what Bradley did, and for

the same purpose. It is not material to know whether, at this stage, the current passes in these processes by an arc or not. The step in the process being the same, and the result the same, it is inferable that the mode in which the current passes is the same in both processes. Then, following the above quotation of the Cowles claim, he adds: "And then gradually increasing the quantity of such material by causing the electrodes to recede from each other." This again is what Bradley does, and these two steps constitute the substance of the process of each of them. Suppose that Bradley had never disclaimed the initial fusing, and had obtained only a patent for his process including that, and Cowles under his patent had gone into the business of smelting ores which do not require the aid of carbon, can it be doubted that he would have infringed the Bradley patent? It is difficult to see how anything even plausible could be said in his defense.

Strenuous effort is made by counsel in behalf of appellee to demonstrate that the leading idea of the Cowles application consisted in the distinctive part of his process which employed the use of carbon intermingled with the ore to serve as a resistance material to generate heat, or to act as a chemical reagent to absorb the extraneous compounds. We think it may be doubted whether this was so, being made, as it was, a contingent element in the process. But, assuming it to be so, it must be answered that, although it was the leading idea, that idea did not constitute the limits of his invention any more than Bradley's idea of initial fusing by the electric arc, or the use of the unfused body of the ore for a receptacle, or the electrolytical process of Bradley, constituted his invention. As a matter of fact, we have no doubt that Bradley's leading idea was the application of the electrolytical agency of the current in his process; but, if it were held that the other features of his invention were thus to be excluded, it would make havoc with most of the claims in his patents. And we are constrained to think that too much importance was attached in the court below to the results of the comparison of the supposed leading ideas thus made. The efficiency of the electric current to break up and separate the chemical compounds of a fused mass of ore by maintaining the current through it is a faculty of the current itself, inherent and indivisible. Bradley's idea of separating it from the factor itself, and exalting it into an independent element or step in his process, was a merely fanciful one. The actual process which he described necessarily involved it, just as the Cowles process also did. The process being the same in other regards, and all the conditions being substantially alike, the electrolyzing energies of the current would operate in a similar manner and produce the like results. Counsel for the appellee states the plain truth when he says that "the passage of an electric current through a fused metallic compound is bound to produce electrolysis in amount proportional to the volume of the current passing."

There is no room for distinguishing them in this respect. It was not necessary that Cowles should have known how the current acted in effecting the reduction, or what peculiar power or energy

of the current effected the result. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073. The patentee of an invention of a process is entitled to the benefit of all which his process will accomplish. Discoveries of natural forces or of their laws are not the subjects of patents. It is only the employment of such forces by invented means, for useful purposes, which gives the inventor any standing ground. *O'Reilly v. Morse*, 15 How. 62. And an inventor is entitled to claim for all the capabilities of his process, however prominent he may have made any single idea embodied therein. Further, to distinguish between these leading ideas, it is urged that the idea prominently set forth in Bradley's application was that of the employment of electrolysis in separating metals from the other elements in ores and compounds, and we are satisfied that the fact in this regard is as claimed, and that Bradley had conceived the idea of promoting this agency of the electric current, and making it the characteristic feature of his invention. But we think there is nothing of substance in it which saves his invention from interference with the Cowles patent. Inasmuch as the Cowles process necessarily employed the electric current, it necessarily employed that which was inseparably incident to it.

Disregarding, then, the initial fusing, which Bradley himself disregarded in his original claims, and as well also in the claims in some of his patents; and disregarding the employment of the carbon resistance material, as Cowles did in some of his claims; and seeing also that electrolysis is not an element, but a mere incident, to one of the factors employed in both the Cowles and Bradley inventions,—we should find that their processes were not merely similar, but identical. But complete identity is not necessary. As was stated by Mr. Justice Curtis in *Winans v. Denmead*, 15 How. 330:

"If the machine complained of were a copy, in form, of the machine described in the specification, of course, it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors would be valueless, if it were enough for the defendant to say: 'Your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed.'"

This was said in a case where the original patent was for a cylindrical ore body in a railroad car, where the structure held to infringe was hexagonal. But it is equally applicable to inventions for processes. The patentee is entitled to claim, not only that which he precisely claims, but, where he claims for a combination or process embodying the use of certain elements, his claims will include such combinations and processes as adopt substantially the same means; where the variation is only such as common intelligence in that art would suggest. Incidental appliances in operating the substantial means invented would not prevent a second patented invention from infringing upon the first. The language of some of the Bradley claims is broad enough to admit the admixture of carbon, if his invention was a primary one, and the employment of carbon was a mere auxiliary of the current in effecting the reduction, according to the doctrine of *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299; *Proctor v.*

Bennis, 36 Ch. Div. 740; McCormick Harvesting Mach. Co. v. C. Aultman & Co., 16 C. C. A. 259, 69 Fed. 371; and kindred cases.

This record is not made up for the purpose of enabling the court to decide how far the Bradley invention advanced the prior art. If it was all he claimed for it, it first supplied the efficient means of reducing to the service of the public an agency of great power and value in a highly important industry. To such an invention the courts will give precedence according to its breadth, and will treat all modifications of it which involve only the exercise of the ordinary skill and learning of that art as comprehended in the invention. And having regard to the Bradley patents, it seems not too much to say that if the claims are valid for what they import, and so have priority in the field occupied by them, they would be entitled to a large privilege. The testimony before us shows that, when the Cowles brothers brought out their invention designed for a similar purpose, its novelty and importance were recognized by scientific and practical men, and it was made the theme of discussion and congratulation in learned societies.

The rule to which we have above adverted is illustrated by the well-known case of *Tilghman v. Proctor*, 102 U. S. 707, in which the patent alleged to have been infringed was for a process of obtaining fat acids and glycerine from fatty substances. In describing his process Tilghman had stated that it consisted of subjecting a mixture of fat and water in certain proportions to the action of heat and pressure. After deciding the patent to be valid, the court considered the defense of noninfringement. There were several grounds taken by the defendant in support of that defense, one of which was that the defendant added to the mixture of fat and water from 4 to 7 per cent. of lime, which it was claimed stimulated the union of the elements in the mixture. This it was claimed distinguished their process from that of the complainant. But this contention did not prevail. The court, by Mr. Justice Bradley, said:

"They use water in admixture with fat, heated to a high degree, far above the boiling point, and yet subjected to such pressure as to prevent the water from being converted into steam; and though they may also use other things at the same time, which other things may facilitate the operation, or render a less degree of heat necessary than would be required when water alone is used, and thus actually improve the process of Tilghman, yet this process is included in their operation, and forms the basis of it. It is idle, therefore, to say that they do not infringe Tilghman's patent. It is unnecessary to determine what precise part the lime used by the defendants plays in their process; whether, as the complainant contends, it saponifies the fat to a certain extent, leaving the remainder to be acted upon by the water alone purely after the process of Tilghman; or whether, as the defendants contend, the lime produces a more perfect and active commixture of the fat and water, or predisposes the fat to unite with the requisite elements of water necessary for producing glycerine and the fat acids. In either case, the process of Tilghman, modified or unmodified by the supposed improvement, underlies the operation performed in the defendant's boilers."

And in the case of the driven-well patent (*Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073), which was also for a process, there was a similar ruling. The suit was brought upon a reissued patent. One of the defenses was that the claim sued on was broadened in the re-

issue. This was rested upon the fact that the original specifications and claims in express terms limited the process to "places where no rock is to be penetrated," whereas in the claim of the reissued patent there was no such limitation. But the court held there was no substantial difference between the two when read with reference to the subject-matter and in the light of facts known to those informed upon the subject. It was known that, if rock should be met with in driving, the process must be supplemented by drilling, which, although a distinct operation, was one which would occur to the common understanding as a means of helping out the operation when that was embarrassed by unusual difficulties. And it was held that this did not change the substantial nature of the process. Said the court, by Mr. Justice Matthews:

"It does not follow, either from the amended or the original patent, that a driven well, according to the process described, may not be constructed and operated, notwithstanding in its construction some rock has to be penetrated. There may be a layer of rock on the surface. When this is removed or cut through, a driven well may then be constructed in the space thus uncovered from the obstruction. So, if a stratum of rock is met in the course of driving the rod or tube, that layer may be penetrated, not by driving the rod or tube through it, but by other usual means of boring and drilling. After it is passed, the rod or tube, having been inserted in the opening made through the rock, may then be driven in the usual manner through the remainder of its course until it reaches a water-bearing stratum of earth, as if no rock had been met in its passage."

Taking the drawing accompanying the Cowles specifications, which illustrate not only the apparatus but by clear suggestion the process itself, it is evident that a person ordinarily skilled in the art would have no difficulty in constructing it upon the specifications of the Bradley application. There is a box or tank having a lining for the purpose of saving the walls from injury, the two electrodes running through the opposite sides of the box and made adjustable so that their extremities could be brought close together or moved apart as the requirements of the operation would indicate, and the material to be operated upon located between the electrodes and in contact therewith. The material might be ore and carbon mixed, as shown in the diagram, or it might be the material alone, according to its nature. It is an established rule, for the purpose of determining whether there is a substantial identity or equivalency of two inventions, that we may apply this test, and inquire whether the construction which is alleged to infringe may, by the skill of one conversant with the art, be built upon the specifications of the patent said to be infringed.

Something is sought to be inferred from the subsequent conduct of the parties to aid in the construction of the contract. Where the instrument is of dubious import, proof of this kind is receivable in order to show in what sense the parties understood it. But such proof is liable to open up a controversy in regard to what the conduct of the parties really was, and can only be resorted to when the contract, read in the light of surrounding facts, leaves the construction in doubt. But, if such doubt existed in the present case, the action of the parties here referred to gives nearly equal ground for opposite conclusions. It is urged that the Cowles Electric Smelting & Aluminum Company

did not prosecute the Bradley application, but allowed it to lie dormant in the patent office for many years. On the other hand, Bradley himself did not move again upon it for nearly two years after the contract was made. And we think it may fairly be said that the Cowles Company, finding their own and that of Bradley and Crocker sufficient for their purposes, had no special requirement for the Bradley application, which at that time stood rejected, though such rejection was not final. While, on the other hand, if Bradley supposed his own application still available for his own advantage, it is somewhat singular, knowing that it related to a then rapidly-developing industry, he should have left it so long neglected. Bradley claims that his process is capable of being carried on continuously by simply adding unfused ore, but there is the same capacity in this respect in the Cowles process. In either of them, by tapping the tank or other containing vessel at or near the bottom and making provision for a constant supply of material by any common method, the process could be continued indefinitely. Such supplements would not alter the process itself, and would indeed be only such as ordinary skill would provide if it should be found desirable to employ them. Upon the whole case, we are satisfied that the inventions covered by the Bradley application were intended to be included by the terms of the contract; that Bradley's unauthorized proceedings thereon, whereby he procured his patents, must be held to inure to the benefit of the Cowles Electric Smelting & Aluminum Company. The result is that the decree below should be reversed, the original bill dismissed, and the relief prayed by the cross bill should be granted.

EXCELSIOR COAL CO. v. OREGON IMP. CO.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

No. 196.

PATENTS—INFRINGEMENT—COAL SCREENS.

The Roberts reissue, No. 7,341, for an improvement in coal screens and chutes, is not infringed by an apparatus lacking the reservoir which is the principal feature of the Roberts patent, and controlling the flow of coal only by the use of gates at the upper and lower ends of the chute. *Excelsior Coal Co. v. Oregon Imp. Co.*, 16 C. C. A. 219, 69 Fed. 246, reaffirmed.

Appeal from the Circuit Court of the United States for the Northern District of California.

John L. Boone, for appellant.

Sydney V. Smith, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. After a rehearing of this cause, we have no doubt that the former decree of this court affirming the decree of the circuit court in dismissing the complainant's bill, reported in 16 C. C. A. 219, 69 Fed. 246, was correct. Our conclusion at that time was based upon the decision of the supreme court

in the case of *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 Sup. Ct. 482. The complainant's patent is for an improvement in coal screens and chutes. It consists in the combination of a receiving hopper, with a reservoir, a screen, and a chute, so arranged in a portable machine that coal may be continuously dumped into the hopper from a swinging tub as it is unladen from the vessel, or otherwise, while at the same time it is delivered screened in carts from the chute. The principal feature of the patent is the reservoir, O. The reservoir is directly below the hopper and at the top of the chute, or rather it is an enlargement of the upper end of the chute. In the patent it is said that the function of the reservoir is that of "a store room, so that, in case of temporary delay in the vehicle carrying the coal to the yards, the work of unloading the ship or other vessel can proceed without the necessity of piling the coal upon the wharf." In the case of *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, above referred to, the coal screen which was used by the Black Diamond Company differed from the appellee's device in this case only in the fact that it had but one gate in the chute, while the appellee's has two. The supreme court, in the opinion in that case, referring to the patent, said:

"If there be any invention at all, then, in the combinations specified in the third and fourth claims, it is in the introduction of the reservoir, O, beneath the hopper, which is really an enlargement of the chute, for the purpose of affording a lodgment for the coal until it is drawn off for use. Great stress was laid by plaintiff's counsel upon this feature of the invention, but, even conceding it to be patentable, there is nothing corresponding to it in the defendant's machine. On the contrary, the coal falls through a square opening in the bottom of the hopper directly upon the chute, where it is detained by a gate, which is kept closed until the coal is withdrawn. It is evident that the hopper itself is substantially the only reservoir, although a small amount of coal is necessarily detained in the upper part of the chute until the gate is raised. The chute is nowhere enlarged to form a reservoir."

The gates in the appellee's screen are placed, the one at the top of the chute, and the other near its lower end. If there is no reservoir in the Black Diamond Company's chute, it necessarily follows that there is none in that of the appellee. The presence of two gates in the appellee's chute, as the same are used, cannot create a reservoir corresponding to that of the patent. Both gates must be opened in order to permit the outflow of coal. The appellee's chute is not enlarged so as to furnish a reservoir. It is but a means of outlet from the hopper, which is the only reservoir, and it is not itself a storage place for coal. There is clearly no infringement. The decree of the circuit court will be affirmed, with costs to the appellee, as before ordered.

PHILADELPHIA CREAMERY SUPPLY CO., Limited, v. DAVIS & RANKIN BLDG. & MANUF'G CO.

(Circuit Court, N. D. Illinois. March 8, 1897.)

PATENTS FOR INVENTIONS—INFRINGEMENT—MILK CREAMERS.

Letters patent, No. 239,569, issued April 5, 1881, to Theodore Bergner, for creaming machines, were based upon specifications providing for the removal of the skimmed milk by means of a pump, which specifications were amended three years after filing so as to cover the entire process of creaming milk mechanically by centrifugal force. *Held*, that since the only new element in the device was the method of removing the milk, such patent was not infringed by a creaming device in which no pump was used.

In Equity. Suit by the Philadelphia Creamery Supply Company, Limited, against the Davis & Rankin Building & Manufacturing Company, to restrain the alleged infringement of a patent.

Banning & Banning and Chas. H. Aldrich, for complainants.
Pierce & Fisher and Robert S. Taylor, for defendants.

GROSSCUP, District Judge. The bill is to restrain the infringement of letters patent No. 239,569, issued April 5, 1881, to Theodore Bergner, assignee of Edwin J. Houston and Elihu Thompson; and letters patent No. 192,662, issued January 29, 1884, to Theodore Bergner, assignee of Wilhelm Le Feldt and Carl G. O. Lentsch. The last-named patent having expired, since the bill was filed, by reason of a German patent, no relief is asked thereon. The relief claimed is based on the fifth, sixth, seventh, and eighth claims of the first-named patent. The patent relates to machines of the class in which the separation of the lighter and heavier constituents of liquids is effected by the action of centrifugal force, and is said to be particularly adaptable to cases in which, from the nature of the materials dealt with, centrifugal machines of the ordinary type cannot be employed; for example, in the separation of two mingled liquids of different density, as in the creaming of milk. The claims broadly cover the process of creaming milk mechanically by centrifugal force. The claims are as follows:

(5) The process of creaming milk mechanically, skimming off the cream mechanically, and removing the skimmed milk mechanically by centrifugal force. (6) The process of creaming milk mechanically, skimming off the cream mechanically, and augmenting the volume of the charge so as to remove both the cream and the skimmed milk separately by centrifugal force. (7) The process of creaming milk mechanically, skimming off the cream mechanically, and supplying fresh milk under a regulated feed, so as to drive off the cream and skimmed milk separately, while maintaining incipient and progressive separations of the supply into accretions of cream and skimmed milk. (8) The process of creaming milk, and skimming off the cream by the action of centrifugal force.

The original specifications were filed April 24, 1877, but the claims above recited were not those annexed to such specifications, but were first suggested by the patent office January 19, 1880, and were afterwards filed by the patentee July 19, 1880. It will thus be seen that an interval of nearly three years intervened between the filing of the application and specifications and the perfecting of the claims as they

now appear. It is important to bear this in mind, for that period of time was eventful in the development of the art to which this patent relates.

In the view I have taken of this case, it is unnecessary to decide whether, under the doctrine of *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, a patent for the process claimed could be maintained, such process being, by its own designation, effectuated by mechanical means. It is, of course, well known that cream and milk, though intermixed, are of different densities, and, if allowed to stand in a vessel, will, by force of gravity, separate themselves, the milk settling to the bottom, and the cream rising to the top. The present perfected cream separators are based upon the idea of substituting centrifugal force for gravity, and may be described as follows: Into a suitably supported bowl rapidly revolving is introduced the milk and cream in its state of original mixture. The effect of the centrifugal force thus applied to the full milk causes the denser material, the pure milk, to be precipitated further than is the cream, the lighter material, thus separating the incoming fluid, after its entrance into the bowl, into two bodies, taking the form in the bowl of two vertical columns, the pure milk lying next to the periphery, and the cream within the inner line of such milk column and the axis of the bowl. The exact boundary line between the milk and cream columns is, of course, indefinable, a little of each necessarily running through into the other; but for practical purposes the separation is complete. Just where, in the bowl, this line of separation will occur, undoubtedly depends upon the conditions existing, such as the rate of revolution, the quantity of the intake, and the character of the full milk. But, the conditions being alike, it may be taken for granted, I think, that the boundary line between the cream and milk columns will always appear at the same place within the bowl. Now, let an orifice be made through the bottom of the bowl, just on the cream side of the line, and another orifice upon the skimmed milk side of the line, and, theoretically, the cream would flow through the first, and the milk through the second, of these orifices, provided their respective size was exactly proportionate to the ratio of incoming milk and cream. But, of course, such a nice adjustment is, in practice, impossible. In the operative creamers these orifices are separated by an interior partition extending laterally, near the bottom of the bowl, from the cream line out into the skimmed milk zone, and nearly to the periphery. With such a partition the orifices may be large enough to permit the outflow of a greater quantity than the intake, for the tendency of centrifugal force is to overcome gravity, and thus hold the fluids in the vessels, notwithstanding the orifices, the outflow being simply the result of the forcible giving place to the inflow, and therefore likewise proportioned. With such an arrangement, too, the cream and milk will each reach its proper orifice, for the cream orifice is immediately beneath the outer circumference to which it, under the conditions, can go, while the skimmed milk, unable, under the conditions, to go nearer the axis, will have the tendency, under centrifugal force, to draw round the partition and back to the orifice immediately underneath the pure milk line. It is also apparent that, if the cream orifice is left free,

and the size of the skimmed milk orifice reduced, so as not to take off all the skimmed milk taken in, the surplus will flow out through the cream orifice under force of the intake; thus decreasing the richness of that fluid. It is said that the skimmed milk orifices of the separators in actual operation are thus regulated in order that the richness of the cream may be increased or diminished at pleasure.

I have described the present cream separators. Prior to 1877, though, no such separators were in use; no separator of any kind acting continuously was in use. If the specifications and claims of the patent under consideration had pointed out a device such as now exists, the validity of such claim would, probably, be unimpeachable. But while Houston & Thompson set forth at that time a device giving to the world a continuous separator, it was not the separator now in use, and differed from it in a feature so essential that it cannot be overlooked. The employment of centrifugal force as a substitute for gravity in the separation of solids from liquids, and of liquids of different density from each other, clearly antedated the patent under consideration. The French patent known as the "Fives-Lille" is, perhaps, the best illustration, as it was the most advanced apparatus, of the preceding art. Theoretically, it foreshadowed the present cream separator. There is no proof that, practically, it ever continuously separated fluids of different density, principally because no practical way of delivering fluids separately from the revolving bowl had been devised; but experimentation and thought, in this and in other like contemporaneous devices and suggestions, were in the right direction. They had already demonstrated the practicability of employing centrifugal force as a substitute for gravity. After the filing of the Houston & Thompson application and specifications, but before the suggestions of their present claims, there came, both into this country and into Europe, a larger interest in the subject of cream separators. De Laval, Le Feldt, and Lentsch, Burmeister & Wain, and Nielsen-Petersen, and many others, were engaged in working out the problem. The discussion in the trade journals, especially those of Germany, was wide and intelligent. Glimpses, at least, of the finally perfected cream separators were appearing. Of course, the thought of the world on this subject did not clarify at once. Though the physical laws were well known, it took several years to adapt them to the desired use, for the exact adjustments, though simple, and now apparently obvious, were still unhit upon. The point of difficulty was the separate delivery of the cream and milk from the revolving bowls. This difficulty was overcome in the three years between the time of the Houston & Thompson application and the filing of their present claims, and was overcome, as I think, principally through the disclosures of the Le Feldt and Lentsch and Nielsen-Petersen devices.

The progress of the art, then, may be summarized as follows: At the date of the Houston & Thompson application, the use of centrifugal force to separate liquids of different density was well known, and had been theoretically incorporated in previous publications, apparatus, and patents; but none of these conceptions were

ever yet in practical use. The problem remaining unsolved was how to draw off, through separate channels, without interrupting the revolutions of the bowl, the several substances thus separated. Its solution was one of great interest, for it involved the separate drawing off of liquids when held apart from each other by a force which, if interrupted for an instant, would defeat all the plans. Houston & Thompson, in their application and specifications, pointed out that this could be done by the use of a pump applied to the orifice through which the denser ingredients were expected to pass out. Between the time of that application and specifications and the perfecting of the present Houston & Thompson claims, other men, notably Le Feldt and Lentsch and Nielsen-Petersen, pointed out that such delivery of the separate ingredients without interruption could be effected by the proper location and adjustment of the orifices, and their separation from each other by a proper partition; thus omitting the necessity of a pump.

Now comes the question: Does the fact that Houston & Thompson made the first practical centrifugal separator, in which, however, a pump was employed to deliver the ingredients from the bowl, entitle them to a process broad enough to include separators in which no pump is employed? It must be constantly borne in mind that the fundamental conception of all these separators is the division of the varying ingredients into vertical columns within the bowl by virtue of centrifugal force. Also, that that was well known before the Houston & Thompson application. At the time of that application the only problem before them, and before the world, was how to deliver the separate ingredients, through separate channels, from the bowl. The Houston-Thompson plan is pointed out in the following paragraph from their specifications: "The denser ingredients or constituents pass under the deflecting plate, A², into the tubular shaft, A¹, from which they are removed from time to time, as required, by a pump." I find nothing in this description, nor in any word in the letters patent, indicating that this pump could be dispensed with. Houston & Thompson had a plan to solve the problem, but that plan involved the pumping off of the milk; thus leaving the cream orifice, under the cream line, free to carry off the cream displaced. I am not sure that a creamer employing the pump would successfully operate. As a matter of fact, the pump was never used in practice. But, assuming that such a process were successful, it seems to me that in the respect pointed out it would be substantially different from a process in which there was no pump suction. Of course, if Houston & Thompson were the first to have pointed out the use of centrifugal force for this purpose, the presence of the pump in one separator and its absence in another would seem of smaller consequence. But, bearing in mind that all this, except the method of delivery from the bowl, already belonged to the world at large, and that the comparison must, therefore, be confined to the method of such delivery, the difference at once is seen to be significant. It is just the difference between a method that by nice adjustment of parts works automatically and a method necessitating the use of an added force,

namely, suction. Neither is the present method of delivery from the bowl a mere improvement upon the pump. It completely cuts out the pump in its shorter circuit to the desired end.

It will thus be seen that I do not regard the pump as a mere incident or adjunct of the Houston & Thompson device. In my judgment, it is the gist of their invention,—almost the entire sum of what they added to the previous art and knowledge. Keeping that in mind, it seems to me that the present cream separator solves the particular problem of separate delivery from the bowl along lines entirely different from the action of a pump, and therefore entirely different from the process to which alone Houston & Thompson can lay any claim. A decree may be prepared which will meet the views of this opinion.

EDDY et al. v. NORTHERN S. S. CO.

NORTHERN S. S. CO. v. EDDY et al.

(District Court, E. D. Michigan. January 5, 1897.)

1. CHARTER OF LAKE STEAMERS—CONSTRUCTION OF CHARTER—CLOSE OF NAVIGATION.

By charter dated October 16, 1894, the charterers agreed to pay \$2,700 for every east-bound cargo, from the head of Lake Superior to Buffalo, which the steamer "might be able to carry between the date above specified to the close of navigation for the season of 1894." There being nothing to show that this freight was exceptional, *held*, that the charter contemplated that the owners should furnish west-bound cargo; that the charter was to terminate at the time fixed by custom for the close of navigation, viz. November 30th; and that, having arrived at Buffalo on the last trip November 24th, so that she could not possibly unload and load another cargo before the 27th, the steamer was under no obligation to attempt another trip.

2. SAME—CLOSING OF LAKE NAVIGATION—USAGE—MARINE INSURANCE.

The fact that, of late years, policies of marine insurance for vessels on the Great Lakes, have been made to expire on December 5th instead of November 30th, as formerly, has not impaired the recognized usage whereby navigation is considered as closed on the latter date.

3. PAROL EVIDENCE—MARITIME USAGE—CLOSE OF LAKE NAVIGATION.

Parol evidence of a usage whereby lake navigation is considered as closing November 30th each year is admissible to show the termination on that date of a charter which requires the vessel to carry as many cargoes as she can between the date of the charter and the "close of navigation for the season."

This was a libel in rem by Charles A. Eddy and others against the Northern Steamship Company, alleged to be due under a charter party. The respondent filed a cross bill to recover damages for alleged breach of the charter party by the libelants.

John C. Shaw and H. D. Goulder, for libelants and respondents in cross libel.

Norris Morey, for respondent and cross libelant.

SWAN, District Judge. The original libel in this cause was filed to recover the sum of \$2,700 and interest, claimed to be due the libel-

ants, as owners of the steamship Selwyn Eddy, for freight, as per charter party, on a cargo transported from Duluth, Minn., to Buffalo, N. Y. The following is the charter party set forth in the libel:

"This agreement entered into this 16th day of October, 1894, between Northern Steamship Company, party of the first part, and John Shaw, manager steamer Selwyn Eddy, party of the second part. It is hereby agreed that the party of the first part shall pay to the party of the second part twenty-seven hundred (\$2,700) dollars, free of handling and loss and damage claims, for each and every east-bound cargo that the said steamer Selwyn Eddy might be able to carry between the date above specified to the close of navigation for the season of 1894; cargoes to be furnished by Northern Steamship Company, and carried from head of Lake Superior to Buffalo. It is further understood that this agreement has nothing whatever to do with any west-bound cargoes. Such cargoes, if any, are to be provided for by said John Shaw, manager. It is also further understood that the party of the first part shall pay to the party of the second part twenty-seven hundred (2,700.00) dollars for each trip, upon delivery of freight at completion of each trip. This agreement executed in duplicate.

"[Signed]

Northern Steamship Company,

"By John Gordon, Gen'l Mgr.,

"By F. P. Gordon,

"John Shaw."

Under this contract the steamer Selwyn Eddy, from about the 16th day of October until November 26th, transported for the Northern Steamship Company from the head of Lake Superior to Buffalo, N. Y., the cargoes furnished by the Northern Steamship Company. Freight was duly paid upon each of said cargoes at the agreed rate, except the last, which was delivered at Buffalo November 24th, in time for unloading that day. This required from 24 to 36 hours, according to the testimony of the charterer's agent, Gordon. The time required for a round trip from Buffalo to Duluth and return to Buffalo was, at that season of the year, 11 days. As is manifest from its terms, the charter party gave the owners of the Selwyn Eddy the right to procure and transport west-bound cargoes, and contemplated that the owners would avail themselves of this privilege for their own benefit. The proofs make it clear that one or two days would be required to procure and load a west-bound cargo for the Eddy. With the utmost expedition in loading and unloading, the Eddy could not have departed from Buffalo before November 27th, had there been no delay in procuring a west-bound cargo. Foreseeing that the steamer could not discharge her cargo, procure and lade another, and complete a round trip, until the 6th or 7th of December, even if the conditions of weather and temperature should be favorable, the owners of the Eddy contracted for the carriage of a cargo for other parties from Escanaba to Buffalo, and declined to venture another trip to the head of Lake Superior. The Northern Steamship Company thereupon demanded of the master of the Selwyn Eddy that upon the unloading of his cargo, November 25th, he should make another trip to Duluth for another cargo, under the charter. This the master of the steamer, acting under the instructions of her owners, refused to do, unless the charterer would guaranty the safety of the vessel. The owners of the steamer claimed that she had fulfilled her obligations under the charter, and that the conditions of navigation on Lake Superior were

such as made it reasonably certain that the steamer would not be able to make the trip, owing to the lateness of the season; insisting also that under the charter the obligations of the steamer expired on the 30th day of November, which, according to the usage of lake commerce from time immemorial, has been accepted as the close of the season of navigation. The proofs are full and satisfactory that 95 per cent. of all the vessels engaged in lake commerce are laid up by the 1st of December; that time being regarded by the usage of the lakes as the limit of safe navigation. Indeed, the difficulty of obtaining a steamer to take the place of the Eddy and make the trip her owners refused to make arose from the general observance of this usage by steamship owners, who had either chartered their vessels for winter storage, or laid them up for the season. The steamers of the Northern Steamship Company itself were, with one or two exceptions, laid up before the Eddy's last trip was completed. The proofs also show that a few vessels take the hazards of running beyond that time when conditions seem favorable, induced doubtless by high freights, but such trips are exceptions which prove the rule. There is nothing in this record to show that the freights under the charter sued upon were exceptional or unusual. It is a fair inference from this fact, and from the provisions of the charter, that the steamer was to carry only east-bound cargoes, while her owners were to furnish the west-bound loads, and, from the recognized perils and expense attending ice-obstructed waters, that neither party had in mind extraordinary risks, or intended to contract for their compensation. It clearly appears that upon the last trip of the Eddy to Duluth, and on her return therefrom, she encountered much ice, and all indications pointed to an early actual close of navigation upon that lake. It is true that the steamer Globe, after the declination of the Eddy to make another trip, succeeded in making the voyage and returning to Buffalo with an east-bound cargo; but this was unusual, and was compensated by a corresponding increase of freight money, viz. \$6,000, or more than double that agreed to be paid to the Eddy. Two or three other steamers also are shown to have reached Buffalo after the 4th or 5th of December of that year. The navigation of Lake Superior during the latter part of November and early in December, when feasible, is beset by perils not incident generally to the navigation of Lakes Michigan, Huron, and Erie, and their connecting waters, and is attended with unusual expense, because of the necessity of employing tugs to break the ice, and the delays caused by ice and storms; the testimony being that the lower lakes are often navigated for two weeks after commerce has ceased on Lake Superior. Not the least of the dangers of voyages to Lake Superior ports is the freezing over of the St. Mary's river, and the closing of the harbors at the upper end of the lake. For many years the term of policies of marine insurance upon the lakes has been expressly limited to expire upon the 30th day of November, at noon, which has been accepted as the limit of safe navigation in the opinions of underwriters and mariners as well. Voyages extending beyond the 1st day of December have been permitted by insurers upon special terms and increased premiums. Of late years the term of the policies has been extended to noon of December 5th, but

it may be fairly stated that this allowance has not impaired the recognized usage of the lakes that the season of navigation closes with November 30th, and manifestly does not extend that season. The parol evidence establishes, beyond doubt, the universality and force of this usage; and it must be taken to be a well-recognized incident of every contract for lake transportation, where the terms of the charter do not expressly otherwise provide. Contracts for maritime service "for the season of navigation" are held to terminate November 30th of each year. The *Balize*, 1 Brown, Adm. 424, Fed. Cas. No. 809. The parties to the charter under consideration must be deemed to have contracted with reference to this usage. It would be unreasonable to hold, in the absence of a provision indicating a different purpose, that the owners of the steamship and the charterer, in view of the freight stipulated for in the terms of the contract, had in mind any extension of the obligations of the vessel beyond the customary period of navigation. The charterer itself, as early as October 25, 1894, by its general freight department circular of that date (libelant's Exhibit B), declined to receive at Eastern points freight for transportation after certain dates, and limited the receipt of shipments at Buffalo, as follows:

"It is now expected that the last sailings from Buffalo will be on Saturday, November 17. All freight must be in Buffalo, and ready for delivery to our steamships, not later than Friday, November 16th.

"[Sgd.]

Stewart Murray, General Freight Agent.

"Approved: John Gordon, General Manager."

Consistently with this notice, the charterer usually laid up all of its own steamers between November 15th and 20th (Gordon's deposition), although the *Northwind* succeeded in making a trip after the refusal of the *Selwyn Eddy*. When the hazards of navigation, by reason of the obstructions and perils incident to later navigation, become extraordinary, and, in all human probability, insuperable, the vessel is not to be held for a breach of contract for declining to take upon herself those perils, nor are the owners answerable for refusing to run their vessel until further progress is made physically impossible by ice. It is contended on behalf of the respondents that a different meaning should be attached to the phrase, "the close of navigation for the season of 1894," from that which would be given to the charterer had the language used been, "until the close of the season of navigation of 1894." It is impossible to see any purpose in the phrase used in the charter party differing from that which would have been expressed had the latter words been the language of that instrument. They are equivalents in every particular. The construction sought to be placed upon the charter by the respondents would require that the steamer should be run to Duluth until the actual physical close of the navigation of the lakes. This seems to me strained and unnatural, and I find in the charter nothing to indicate a purpose by either party to disregard the usage of the trade, or bind the other to extraordinary undertakings or obligations. The parol evidence referred to above was objected to at the hearing as tending to contradict the contract. On the contrary, however, it is entirely consistent with that instru-

ment, and was therefore admissible for the purpose offered. *Bradley v. Packet Co.*, 13 Pet. 89, 100; *Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. 1; *Myers v. Walker*, 24 Ill. 138; *U. S. v. Peck*, 102 U. S. 64. There is no merit in the defense, and a decree must be entered for the libelants for the sum of \$2,700, with interest and costs from November 26, 1894. As the rights of the cross libelant are rested entirely upon an erroneous construction of the obligations of the charter party, the cross libelant is not entitled to recover the \$6,000 paid for the services of the *Globe*, and the cross libel must be dismissed, with costs.

THE BERTHA M. MILLER.**TARR et al. v. JORDAN et al.****(Circuit Court of Appeals, First Circuit. March 23, 1897.)****No. 204.****1. MARITIME LIENS—SUPPLIES—PRESUMPTION OF NECESSITY.**

To create a lien for supplies ordered by the master in a foreign port, it must appear that the supplies were reasonably necessary, and that a credit to the vessel is necessary. The necessity for the supplies may be presumed from their nature, and from the fact that the master ordered them; and, in the absence of other facts, the necessity for binding the vessel may also be presumed. But if the supply man knows that the master has funds of the owners, or of his own, credit to the vessel is not authorized, and no lien is created.

2. SAME.

One furnishing a small amount of supplies to a fishing vessel in a foreign port, on the order of the master, has no lien, though he give credit on his books to the vessel and owners, when he knows that the vessel brought in and sold for cash sufficient fish to furnish means of payment. Nor is it material that the vessel departed on the day of receiving the supplies, no fraud being practiced.

Appeal from the District Court of the United States for the District of Massachusetts.

This was a libel in rem by Fritz H. Jordan and others against the schooner *Bertha M. Miller* (James G. Tarr and others, claimants) to enforce an alleged lien for supplies. The district court rendered a decree for libelants, and the claimants have appealed.

An opinion was filed below by Nelson, District Judge, July 16, 1896, in the following terms:

The supplies in this case were furnished to the vessel in a foreign port upon the order of the master. The evidence is sufficient to prove that the supplies were furnished upon the credit of the vessel, and that the libelants had no knowledge that the vessel was run on shares or under a charter that provided that the charterers should supply the vessel for the voyage. As the supplies were necessary for the voyage, and the prices charged were reasonable, the libelants have, by the maritime law, a lien on the vessel therefor. Decree for libelants for \$114.29, with interest from September 1, 1894, and costs.

Michael J. McNeirny, for appellants.

Eugene P. Carver and Edward E. Blodgett, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

WEBB, District Judge. The schooner *Bertha M. Miller*, owned in Gloucester, in the state of Massachusetts, was by her owners chartered to the captain and crew for the business of "fresh fishing," in March, 1894, for the fishing season. By the terms of the charter, the captain and crew were to have sole control of the whole vessel, during the season (unless sooner the owners should terminate the charter, the right to do which was reserved), in the prosecution of the fishing business. The charterers were to provide everything necessary for the contemplated business at their own expense, and it was expressly agreed that neither the owners nor the vessel should be liable for any debts or liabilities incurred by the charterers for fishing gear, outfits, provisions, or other expenses in the prosecution of the fishing enterprise, but that for all such debts the charterers should be solely responsible. As compensation for the use of the vessel, the owners were to receive one-fifth of the gross proceeds of the fish which might be caught on said schooner, or in the prosecution of the fishing enterprise, during said time, all expenses of towing, wharfage, and weighing being first deducted from said gross proceeds. There can be no doubt that, under this charter, the charterers became owners of the schooner *pro hac vice*; that is, so long as the charter should continue in force. The "fresh fishing business" was prosecuted along the coast, and consisted of catching fish, which were kept fresh, by being packed in ice, until the vessel could run into some port where her fish could be sold. The trips were from one or two days to two weeks in duration, according to circumstances, depending on the distance it might be necessary to go, and the success in taking fish. While this charter remained in force, August 14, 1894, the schooner, with a fare on board, ran into the port of Portland, in the state of Maine, to make sale of her catch. While there, the captain, finding the vessel stood in need of provisions and supplies for the further prosecution of her business, ordered of the libelants what was so necessary, and the articles ordered were supplied.

That Portland was a foreign port for this schooner is not disputed. That fact gave the master power to subject the vessel to a maritime lien for necessary supplies, furnished by one having no knowledge of the particular terms on which he was sailing her. But this power of the master is not without limitation or qualification. It must appear that the supplies are reasonably necessary, and that the credit to the vessel herself is necessary. The necessity of the supplies is presumed from their nature, and from the fact that the master orders them; and, in the absence of other facts, the necessity for binding the vessel may also be presumed. But if the material man knows that the captain has funds or means of his owners, or of his own, credit to the vessel is not authorized, and no lien is created. *The Lulu*, 10 Wall. 192; *Thomas v. Osborn*, 19 How. 22; *The Kolorama*, 10 Wall. 204; *The Patapsco*, 13 Wall. 329; *The Grapeshot*, 9 Wall. 129. When the *Bertha M. Miller*, in August, 1894, sailed into Portland, she had on board the fish caught

on her trip, and they were to be sold there. Whether they belonged to the owners or to the captain and his associates, they furnished the captain with means to pay for the small quantity of supplies his vessel wanted. As matter of fact, he had bargained his fish before the supplies were ordered, and was to be paid for them in cash as soon as they were delivered. The libelants knew the business in which the schooner was engaged, and how that business was conducted. We do not mean to be understood as saying that they knew anything about the charter of the vessel. Had the schooner come in empty, after an unsuccessful fishing cruise, we have no doubt that she might have been made subject to a lien for the supplies furnished by these libelants.

Some controversy has arisen on the question whether the libelants credited the vessel or her owners for those supplies. The evidence leads to the conclusion that the libelants made the charges on their books to the schooner and owners, showing that they looked to both for payment. But the important question now is whether they had a right to charge these supplies to the vessel, and make her responsible for them. In view of all the evidence, we cannot doubt that the libelants not only knew the nature and methods of the business of the schooner, but that they also knew that she brought in for a market a fare of fish, which the captain could make use of to procure necessities, without binding his vessel. Under such circumstances there was no right to charge those supplies to the schooner, and the form of entry on the libelants' book was of no effect.

But it is contended that, inasmuch as the vessel departed on the same day the supplies were put aboard, to pursue further her fishing business, the charge to her was warranted. The rights and obligations of the parties must be determined by the facts as they existed when the credit was given, and not by subsequent events, especially if there was no fraud practiced. In this case the master of the schooner, after receiving pay for his fish, called at the libelants' place of business, to pay for his supplies, and was postponed by the statement that the libelants had not had time to make up their bills. It was only after this that he sailed from Portland.

Had this cause depended alone upon the facts noticed in its opinion by the district court, we should unhesitatingly have affirmed its decree. But as it appears to us that, however necessary the supplies were, there was no necessity for furnishing them on the credit of the vessel, and that this was known to the libelants, the decree must be reversed. The decree of the district court is reversed, and the case is remanded to that court, with directions to dismiss the libel, with costs for the appellants in each court.

NEW ZEALAND INS. CO. v. EARNMOOR S. S. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

1. ADMIRALTY JURISDICTION—FEDERAL COURTS—STATE STATUTES—GENERAL AVERAGE—INTEREST.

In the exercise of their admiralty and maritime jurisdiction, the federal courts are governed solely by the legislation of congress and the general principles of the maritime law, and are not bound by state statutes. Accordingly, *held*, that in its determination of the question of the allowance of interest in a libel upon a contract of marine insurance, a court of admiralty is not to be guided by state statutes as to the method of ascertaining the proportions of a general average loss and as to the allowance of interest on contracts.

2. INTEREST—MARINE INSURANCE.

When the owner of a vessel has demanded from an insurer an amount claimed to be due under the policy of insurance by reason of injury to the vessel from perils insured against, and the insurer, while admitting a less amount to be due, has resisted payment of the amount claimed throughout a long litigation, but has never tendered the amount admitted, it is proper for a court of admiralty to allow interest from the time of the demand on the amount finally found to be due, though slightly less than that claimed.

Appeal from the District Court of the United States for the Northern District of California.

Andros & Frank, for appellant.

Chas. Page, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The appellant, New Zealand Insurance Company, was respondent in the court below to a libel brought by the appellee, the Earnmoor Steamship Company, Limited, upon a policy of marine insurance, by which the insurance company insured the appellee against any loss on its steamship Earnmoor which might be caused by any one of the perils usually set forth in a policy of marine insurance. Both companies were incorporated under the laws of the United Kingdom of Great Britain and Ireland; the steamship company having an office for the transaction of its business at Newcastle, England, and the insurance company having an office for the transaction of business in the city and county of San Francisco, state of California, in which city and county the policy sued on was issued. On or about January 10, 1889, and during the life of the policy, the ship, bound on a voyage from Philadelphia to St. Thomas, while proceeding down the Delaware river met with a serious disaster, requiring salvage services and subsequent repairs, which gave rise to a claim in general and particular average against the appellant as underwriter upon the hull and appurtenances of the vessel. In due time an average adjustment was made by adjusters, which shows a loss by the shipowner in particular and general average of a certain amount. Of this amount the appellant was called on to pay a share proportionate to the amount insured by it. The average statement was presented to the appellant July 23, 1889. It charged in particular average, \$43,344.70, and in general average, \$41,598.44. In the settle-

ment based upon this statement the appellant was charged, as its proportion of those amounts, \$997.41. The appellant declined to admit its liability for the amount so claimed as loss, upon the ground that certain items in the adjustment were improperly considered and admitted by the adjusters. These items were specifically pointed out by the appellant, and a restatement made by it, omitting the items objected to, and stating what it conceded to be the proper amounts in particular and general average, as follows: In particular average, \$41,502.36; in general average, \$35,480.36. It is true that in the statement so presented by the appellant the amount of the appellant's proportion of the particular and general average was not stated, but its ascertainment upon the basis presented was a mere matter of mathematics, to which the maxim, "*Id certum est, quod certum reddi potest*," may be properly applied. No tender, however, of any amount under the policy was made by the appellant. On the 22d day of January, 1892, the appellee filed its libel in the court below to recover the proportion of the entire particular and general average loss suffered by the shipowner shown to be due by the adjuster's statement, and amounting to the sum of \$997.41. To the libel thus brought the appellant appeared, and contested the amount properly payable by it upon the policy, contending that the sum properly due from it was a less sum, and only its proportion of the amounts given in its statement heretofore referred to. No tender of such proportion, however, was made by the appellant. The litigation thus commenced continued for several years, during which time a great deal of testimony was taken in different parts of the country. Upon the final hearing the court below decided that, except in two particulars, the adjustment made by the adjusters, and upon which the original demand of the appellee was made upon the appellant, was correct. 73 Fed. 867. All other objections to that adjustment were, at the hearing in the court below, overruled, with the consent of the appellant; and by agreement of the parties the adjustment was returned to the adjusters, to be made to conform to the opinion of the court in the particulars referred to. The actual difference between the amount claimed to be due under the original adjustment and that found to be due by the court below was \$43.60. The question which constitutes the ground of the present appeal then arose in the court below; that is to say, the question as to whether the appellant should be required to pay interest on the amount found to be due upon the policy. The court below held that the amount found due should bear interest at the rate of 7 per cent. per annum from July 23, 1889,—the date the average statement was presented to the appellant,—and so adjudged. It is from that portion of the decree allowing such interest that the present appeal is taken.

It is urged on the part of the appellant that under the statute of the state of California the appellant is not chargeable with interest. In support of that position, sections 2152 and 1917 of the Civil Code of California are cited. Those sections are as follows:

"Sec. 2152. The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost

as the value of his part of the property affected bears to the value of the whole. But an adjustment made at the end of the voyage, if valid there, is valid anywhere."

"Sec. 1917. Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per cent. per annum after they become due, on any instrument of writing, except a judgment, and on moneys lent, or due on any settlement of account, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him. In the computation of interest for a period less than a year, three hundred and sixty days are deemed to constitute a year."

The argument for the appellant is that, while there is not an express agreement in the policy as to the form and manner by which the amounts due from the several contributory interests, or that of the underwriters who have taken risks on those interests, should be ascertained, the state statute quoted points out how this shall be done, and that the libelant was bound to observe the provisions of that statute, and that, if it did not, it was its fault, and not that of the respondent; that an average statement is in the nature of a statement of an account rendered, which account must be settled, and the balance ascertained; and that the word "ascertained" imports, *ex vi termini*, certainty, and that it was for the assured to fix definitely the amount due from the interests underwritten by the insurer, before which time no interest could properly accrue. All this may be true enough in a suit pending in a court of the state to which the state statute would apply. But that statute is inapplicable to a court of admiralty.

"In the exercise of their admiralty and maritime jurisdiction," says Justice Story in the case of *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717, "the courts of the United States are exclusively governed by the legislation of congress, and, in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have a right to prescribe all rules; to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least so far as I have any knowledge, either by any state court or national court within the whole Union. For myself, I can only say that during the whole of my judicial life I have never, up to the present hour, heard a single doubt breathed upon the subject. * * * The admiralty jurisdiction covers the whole maritime law applicable to the case in judgment, without the slightest dependence upon or connection with the local jurisprudence of the state on the same subject. The subject-matter of admiralty and maritime law is withdrawn from state legislation, and belongs exclusively to the national government and its proper functionaries."

In *The New York v. Rea*, 18 How. 223, the supreme court, in speaking of a statute of the state of New York in respect to shipping, said:

"This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts, but cannot regulate the decisions of the federal courts administering general admiralty law. They can be governed only by the principles peculiar to that system as generally recognized in maritime countries, modified by acts of congress, independently of local legislation."

See, also, *The Selah*, 4 Sawy. 40, Fed. Cas. No. 12,636; *Watts v. Camors*, 10 Fed. 148; *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622.

That a marine insurance contract is a maritime contract is not open to question. *Insurance Co. v. Dunham*, 11 Wall. 1. The propriety of the action of the court below in allowing interest upon the amount found to be due the appellee upon the policy of insurance in question is, therefore, to be tested by the rules applicable to courts of admiralty. One of the admiralty rules prescribed by the supreme court is as follows: "In cases in admiralty, damages and interest may be allowed if specially directed by the court." Rule 23. This leaves the matter of interest to the sound discretion of the court. The circumstances of the present case satisfy us that it was wisely and justly exercised in the present instance by the court below. The case would be very different if the appellant had tendered to the appellee the amount it, in effect, admitted to be due from it under the policy, but at no time prior to the decision of the court below did it do so. The appellant had, of course, the right to contest the amount claimed from it; but surely it ought to have offered to pay the amount it admitted to be due. Instead of doing so, it withheld from the appellee for nearly seven years what it admitted was justly due from it; and at the end of a costly litigation, extending through that long period, the result of which showed that there was a difference of only \$43.60 between the amount originally demanded by the appellee and that actually due from the appellant, contends that the small difference found and adjudged by the court below to exist deprived the assured of the right to interest on the proper amount from the date when it should have been paid or tendered. We are of opinion that the court below was clearly right in rejecting that contention, and in allowing the appellee interest from July 23, 1889, on the amount found to be due from the appellant under the policy sued on. The judgment is affirmed.

THE SANDFIELD.

AMERICAN SUGAR-REFINING CO. v. THE SANDFIELD.

(District Court, S. D. New York. February 27, 1897.)

1. DAMAGE TO CARGO—BROKEN RIVET—SEA PERILS.

At the close of a stormy voyage on which a steel steamer was damaged about her decks, had her wheel chains parted, and her propeller shaft fractured by heavy seas, a leak was discovered around a rivet in the after port bilge. Three-sixteenths of an inch of the outer end of the rivet was gone; the end of the remaining part showed evidence of fracture. This bilge had been sounded daily before the heavy weather began, and had been opened and cleaned by the crew before the loading of the cargo. No water was entering it at such times. *Held*, upon evidence of similar loss of rivet heads in previous cases, probably from excessive vibration through the racing of the propeller in rough weather, that the rivet was fractured by that cause, which was a peril of the sea.

2. SAME—SEAWORTHINESS—INEQUALITY IN STRENGTH OF RIVETS.

The cylindric part of the broken rivet was somewhat oblique to the plane of the inner head, showing that the holes in the overlapping plates through which it had been driven when hot were not perfectly true. Both heads

of the rivet had something of a cant. No other was broken. *Held*, that although the cant at both ends might diminish its endurance by subjecting it to an unequal strain, yet, not being a weak or improper rivet, mere inequality in the strength of the rivets would not amount to unseaworthiness or a violation of a charter provision that the ship shall be "tight, staunch and strong."

3. SAME—SEA PERILS—PRESUMPTIVE CAUSE.

Where it satisfactorily appears that sea perils have been encountered adequate to cause damage to a seaworthy ship, and there is general proof of seaworthiness, the damage is presumptively due to such perils.

4. SAME—INJURY BY SEA WATER—EXCEPTION OF LOSS BY PERILS OF THE SEA.

Damage to cargo by sea water entering the hold around a loose rivet, which has been fractured by perils of the sea, is a loss by perils of the sea within the exceptions of a charter party and bill of lading.

5. SAME—DILIGENCE IN DOCKING FOR EXAMINATION—HARTER ACT.

A comparatively new steel steamer, built by first-class makers, which had passed its first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound, started on the voyage in question in January, 1896. No accident to the bottom had intervened. *Held*, that reasonable care of a vessel does not require docking for examination more than once a year, in the absence of some known necessity for it, and that accordingly there was no lack of diligence in the inspection of the ship.

6. SAME—CHARTERED SHIP—CLAUSE "ALL CONDITIONS AS PER CHARTER PARTY" IN INDORSED BILLS OF LADING—EFFECT OF CHARTER EXCEPTIONS—LATENT DEFECT.

The goods were shipped in a chartered ship by the charterers, and the bills of lading contained the clause, "All conditions as per charter party." *Held*, that the receivers of the cargo, as indorsees of the bills of lading, took the goods subject to the provisions of the charter party; that the ship was entitled to the benefit of an exception of "latent defects in the hull" contained in the charter party; and that if there was any defect in the rivet, it was latent, and within the exception.

7. SAME—LEAVING SLUICE SHUT—OPERATION OF HARTER ACT NOT IMPLIEDLY EXCLUDED.

The charter party contained a number of exceptions, including perils of the sea, and a further provision that "nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by improper opening of valves, sluices or ports, or by causes other than those above excepted." *Held* (1) that the damage was by "a cause above excepted," in the sense of the clause; (2) that the engineer's neglect in leaving the sluice shut was not an "improper opening" of it; (3) that this clause did not impliedly exclude the operation of the Harter act or deprive the ship of the benefit of the exceptions therein contained.

8. SAME—HARTER ACT—"MANAGEMENT"—LEAVING SLUICE SHUT.

The opening of a sluiceway, designed to empty the bilges, was neglected during heavy weather. The accumulating water overflowed the bilges and damaged cargo properly stowed in the holds. *Held*, that the neglect to open the sluices was a fault in the "management of the ship," within the third section of the Harter act, and that the ship and owners were exempted thereby from liability for the resulting damage.

Libel by the American Sugar-Refining Company against the steamship Sandfield to recover the sum of \$10,000 for damage to a cargo of sugar.

Cowen, Wing, Putnam & Burlingham, for libellant.
Convers & Kirlin, for claimant.

BROWN, District Judge. The above libel was filed to recover damages to a large quantity of sugar in Nos. 3 and 4 holds of the

steamship Sandfield on her voyage from Alexandria, Egypt, to New York, in February and March, 1896. The damage was caused by a great accumulation of sea water. How the water got access to those holds was not known until after the cargo was discharged and the vessel docked, when a defective rivet in the outer plating of the ship was found, leading into the port bilge or sluiceway, about three feet forward of the sluiceway, in the stuffing-box bulkhead, and a few inches below the flooring over the limbers, about fourteen feet below the water line.

The vessel sailed from Alexandria on January 30, 1896. There was no leak of any kind until February 14th, four days after passing Gibraltar. On that day weather of extraordinary severity set in, and continued gales were encountered until arrival at the Delaware Breakwater on March 6th. In this weather the ship received much injury from the seas; two lifeboats were damaged, one washed away; the winches were damaged, pipes and ventilators on deck carried away, bridge, rails and stanchions bent and broken; the after deck started in two places, the wheel chains parted several times, shackles parted, and the propeller shaft fractured through racing, while pitching in the heavy seas. The leak occurred during this stormy weather. The defects in the rivet, when examined, were sufficient, according to the estimate of Mr. Mancor, the libellant's expert, to fill the port bilge, which was 80 feet long from the sluiceway to the bulkhead forward, in about seven hours. Had the sluiceway leading into the well been opened twice a day during the stormy weather, as was customary at other times, no such accumulation of water would have occurred, as the leak would have been soon discovered in pumping the water from the well, and the pumps were sufficient to prevent any accumulation of water or consequent damage. But the opening of the sluiceways during the heavy weather was neglected; and the accumulating water having overflowed the bilges, gradually engulfed the bags of sugar, and formed within the bilges a candied mass, which at length somewhat checked the leak, but not without a large loss and damage to the sugar.

When the defective rivet was found on docking the ship, it was knocked in, and has been produced in court. The cylindric part is somewhat oblique as respects the plane of the inner head, which is intact, showing that the holes in the overlapping plates through which it was originally driven when hot, were not perfectly true, so that both heads must have had something of a cant. The exterior end of the rivet, after being driven in hot, was battered down, so as to fill up the flaring countersink on the outer surface of the ship's plate, extending into the plate about three-eighths of an inch in depth, and thus forming a clinch or outer head, flush with the plate. The defective rivet proves to be three-sixteenths of an inch short, and the countersunk portion, which should be flaring outward, is gone. The defendant contends that the rivet and the rivet hole were in good order at the time when the vessel sailed; that the outer rivet head or countersunk portion was broken off

by fracture, probably through the great vibration caused by protracted racing in heavy weather; that if the rivet was defective at the time of sailing the defect was latent, and therefore within the express exception of the charter under which the sugar was shipped; and that the failure to open the sluiceway was negligence in "the management of the ship," for which, under the Harter act, the respondents are not answerable.

The libellant contends that the rivet was defective when the ship sailed, and that the damage falls within the express liability created by the provisions of the charter and the bill of lading, and that those provisions supersede the Harter act in the present case, even if "due diligence" were shown, which, it is claimed, is not proved.

Before considering the terms of the charter and bill of lading, my conclusions concerning some controverted matters of fact should be stated. The clear weight of evidence seems to me to show the following:

1. That the exterior end of the rivet to the extent of about three-sixteenths of an inch, including all the flaring or countersunk portion, was gone at the time the ship was docked and the defect discovered, i. e., before the rivet was driven out.

The loss of three-sixteenths of an inch in length could not have been caused by the two or three blows of the hammer by which the rivet was driven back. Had the rivet been then entire, it could not have been driven back without first cutting out, or breaking off, the flaring portion which forms the clinch or head. It was neither cut nor broken off at that time; and it could not have got into the present shape by rust alone. Had the flange been broken in driving back, or had the flange rusted away, the cylindrical part of the rivet would have shown its full length, or nearly its full length, instead of being three-sixteenths of an inch short; and if broken off, the circumference at the end would naturally also have shown marks of forcible breaking all around, quite different from those which the rivet now exhibits. On the other hand the rivet does show upon the circumference, at the outer end, some toothed marks of rupture, such as would be likely to attend a fracture at the depth of the countersink, viz. three-sixteenths of an inch; and I accordingly find that there was such a fracture and loss of the outer end of the rivet to that extent.

2. This fracture and the loss of the countersunk portion of the rivet occurred some time during the heavy weather that the ship encountered, beginning on February 14th, more than two weeks after the ship sailed from Alexandria. This is the necessary inference from the fact that the rivet hole was about 14 feet below the water line, and from the facts (a) that prior to the ship's arrival at Alexandria, there had been no noticeable leak; (b) that no leak was visible at Alexandria, when the limber boards were all taken up and the pockets of the limbers carefully cleaned at the place where the defective rivet was afterwards found; and (c) that after sailing from Alexandria, and for 16 days until heavy weather set in, the sluices were open daily and no water was found up to that

time, nor on the preceding voyage from Newport to Genoa, when the sluices were opened daily. There is no known cause to which the loss of the countersunk part of the rivet can be ascribed before the heavy weather on this voyage; and if the loss of the rivet head had taken place at some indefinite time before sailing, there would have been some previous leak noticeable. The rivet, it is true, now shows corrosion upon its circumference; but this rust is not greater than is explainable by the action of the sea water on this voyage, particularly when combined with sugar, forming a sugar acid. The corrosion is, in fact, very much less than might have been caused in the same time by this acid infusion in a different situation, as shown by the case of *The Alvena*, 74 Fed. 252.

3. There is not sufficient evidence to warrant my finding that there was any lack of diligence in the inspection of the ship. The vessel was comparatively new, and built by first-class makers. She passed her first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound. No accident intervened. Diligent care of the ship does not require redocking more than once a year, in the absence of some known necessity for it; and at the time of this voyage, a year had not expired since the last docking.

4. The excessive vibration caused by long-continued racing in heavy weather is adequate to explain the breaking off of the countersink of the rivet. This has been known to occur before; usually with more than one rivet head broken off. Here there was but one broken. This, however, does not discredit the cause in this case, because there is otherwise abundant evidence of the existence of the cause in the long-continued very heavy weather, and much other damage to the ship. In the case of *The Alvena* there was no evidence of the existence of any sufficient external cause. 74 Fed. 252, 254, 255. But where the existence of an adequate cause of the damage to a seaworthy ship is proved, that is presumptively sufficient to relieve the ship. *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413, 416; *The Sintram*, 64 Fed. 884. Cases of single rivet heads broken off are in evidence. That only one was broken is evidence of the soundness of the general structure, or that the vibration was not sufficiently violent or long continued to break others. It is also likely enough that the cant given to the rivet by driving it through the overlapping holes which were not quite true, and the cant given to the clinch at both ends might diminish its endurance, by subjecting it to an unequal strain, and increasing the injurious effects of the vibration of the plates against it. If such was the fact, any such mere inequality in the strength of the rivets does not amount to unseaworthiness, or a violation of the provision of the charter that the ship shall be "tight, staunch and strong."

Upon the above conclusions of fact, it follows that the access of water through the rivet hole arose primarily from a peril of the sea; that is to say, it was an access of sea water through an accident to a seaworthy ship, arising from extraordinary weather, the conse-

quent racing of the engine, and the snapping off of one of the rivet heads. By the general exception of sea perils, the ship is consequently relieved from liability, unless it further appears from the evidence that the injury arising from the leak might have been avoided by reasonable diligence, or that some special provisions of the contract of carriage preclude any exemption of liability from such a cause.

The evidence leaves no doubt that had the sluiceway been opened twice daily, as customary, no damage would have happened, notwithstanding the leak. It is evident, however, that the daily opening of the sluiceways is a part of the "management of the ship"; and inasmuch as the evidence shows that the owners and their agents exercised "due diligence," the ship and owners are exempted from liability for this resulting damage by the third section of the Harter act (Act Feb. 13, 1893; 2 Supp. Rev. St. 81, 82), unless the provisions of the Harter act are superseded by the contract, as the libellant claims. *Hine v. Bermudez Co.*, 68 Fed. 920, 923. Although this act applies to shipments upon foreign vessels transporting cargoes to this country, I have no doubt that shipowners for whose benefit the exemptions of the third section were provided may waive these benefits and bind themselves to a more extended responsibility than the statute imposes, if they choose to do so; but no such waiver should be found, except upon explicit proof, or undoubted inference.

The charter party in this case, after reciting that the ship should be tight, staunch and strong, and in every way fitted for the voyage, provides for the delivery of cargo, but with numerous exceptions, which are stated in section 4, among which are the following:

"The act of God, perils, dangers and accidents of the sea or other waters of what nature and kind soever, * * * any latent defect in hull and machinery, stranding, collisions, and all other accidents of navigation, and all losses and damages caused thereby are excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner; but unless stranded, sunk or burnt, nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or absence of customary ventilation, or by improper opening of the valves, sluices and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage; but any latent defects in the hull, pipes or machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners or any of them, or by the ship's husband or manager."

The nineteenth clause of the charter provides that:

"The Mediterranean, Black Sea and Baltic grain cargo steamer bill of lading, 1885, is to be used under this charter, and its conditions are to form part thereof."

The bill of lading contains the clause, "All conditions as per charter party," giving the date of the charter, and then enumerates substantially the same exceptions as the charter; but as respects latent defects it reads that "latent defects in the machinery shall not be

considered unseaworthiness," etc.; whereas the charter reads, "latent defects in the hull ^{and} or machinery," etc.

The shipment in the present case, however, was by the charterers; and the libelants, as indorsees of the bill of lading, took the goods subject to the provisions of the charter party, inasmuch as the bill of lading expressly recites, "All conditions as per charter party." The somewhat narrower provision of the bill of lading as respects the hull, therefore, does not exclude the additional provisions of the charter, and the provisions of the charter must, therefore, govern.

The effect of the charter exceptions is largely the same as the provisions of the Harter act—passed eight years after this form of bill of lading was adopted. By the language of the charter, a latent defect in the hull or machinery is not to be considered unseaworthiness, when, as I find here, there was no want of due diligence. If there was any defect in the rivet, it was a latent defect, as it was not visible upon such inspection as was required and given, as above found; so that the ship cannot be deemed unseaworthy under the charter. *The Carib Prince*, 15 C. C. A. 385, 68 Fed. 254.

The negligent failure to open the sluiceway in the heavy weather is clearly covered by the express exception of "perils, dangers, or accidents of the sea or other waters, * * * and all other accidents of navigation, and all losses and damages caused thereby, even when occasioned by negligence of the master, mariners or other servants of the shipowners."

In effect, this exception, as applied to this case, is identical with the third section of the Harter act, since the same negligence is a part of the "management of the ship." *The Silvia*, 64 Fed. 607, affirmed 15 C. C. A. 362, 68 Fed. 230; *The Etona*, 64 Fed. 880.

The subsequent provision of the charter, viz. that "nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned * * * by causes other than those above excepted," does not aid the libellant, because the exception of sea perils and of negligence of the seamen in connection therewith is one of the "causes above excepted"; and it was that cause that made the leak operative to the libellant's damage.

The charter contains the further provision:

"That nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned * * * by improper opening of valves, sluices and ports."

There can be no doubt that the opening of valves, sluices and ports during the voyage is a part of the "management of the ship." *The Silvia*, supra. Damage arising from negligence in this regard, therefore, would fall within the exemption of the Harter act; though this charter and the bill of lading provide that nothing therein shall exempt the owner from liability caused by improperly opening the valves, sluices or ports. The negligence in this case, however, does not fall within the language of this qualification. For this damage did not arise from any improper opening of the sluice-

gate, but from the neglect to open it at all during the heavy weather. The language of this adopted form of bill of lading, and the similar words of the charter, were a subject of such special deliberation, that I do not feel authorized to extend it to improperly keeping the valves, sluices and ports shut. The danger contemplated from the improper opening of valves, sluices and ports, was apparently of a different and much more serious kind, viz., the danger to the whole ship from being thus opened to the sea; making her liable to be quickly sunk, or to great general damage before the fault could be remedied. The probable ground of this particular exception, therefore, forbids its extension by construction to cases beyond its letter and its probable reason.

Even if the effect of this exception in cases coming within it, would be to supersede the provisions of the Harter act, and to make the ship and owner legally liable for the damage arising from open valves, etc., under their general liability for negligence, as to which I express no opinion, nevertheless, inasmuch as I cannot find this damage to be covered by this clause of the charter and bill of lading, the previous general exceptions, and the third section of the Harter act to the same effect are sufficient to absolve the ship.

The libel must be dismissed, with costs.

THE MAURICE B. GROVER.

(District Court, N. D. New York. March 25, 1897.)

COLLISION—SIGNALS—STEAMER AGROUND IN CHANNEL—ACTS IN EXTREMIS.

A steamer aground in the river St. Mary, about 300 feet south of the light crib at Sailors' Encampment Island, *held* solely in fault for a collision with her of a descending steamer, in that she failed to answer the usual signal given by the latter on turning the bend above, and gave no signal indicating that she was aground; and later, when the danger of collision was apparent, gave a signal of four blasts to summon a tug, which was understood on the other vessel as a signal to come on, or hurry up. The latter vessel *held* not in fault for an alleged mistake in choosing the side for passing, such choice having been made in the face of a sudden peril, brought about by the inexcusable negligence of the steamer aground.

Norris Morey, for libellant.

Harvey D. Goulder, for claimant.

COXE, District Judge. On the 7th of May, 1896, the steamers Maurice B. Grover and John V. Moran collided in the river St. Mary at a point about 300 feet south of the light crib at Sailors' Encampment Island. The Moran was proceeding from Buffalo to Duluth loaded with 600 or 700 tons of freight. She is 214 feet on the keel, 234 feet over all and 37 feet beam. On the day in question she drew about 12 feet 2 inches aft and 7 feet forward. After having delivered some freight at the Mill dock she resumed her voyage, and, in crossing the shoal below the light crib, she ran

aground about 5 o'clock in the afternoon and remained there until she was struck by the Grover some two hours afterwards. The Grover is 300 feet over all and 40 feet, 8 inches beam. She was loaded and was proceeding down stream destined for Buffalo. Her draught was about 13 feet 10 inches.

Navigation at the Sailors' Encampment channel has always been regarded as dangerous and particularly so in May, 1896, when the water was unusually shallow. At a point known as "the dark hole," some distance above, the Grover gave the usual bend whistle to warn approaching vessels that she was coming down the river. At the turn above the crib a dredge was lying near the line of the channel, which is about 300 feet in width. To make the turn, avoid the dredge and straighten up on the Encampment range line was a maneuver of considerable difficulty. The Grover accomplished it about sundown and was proceeding on the usual course when she became aware that the Moran was lying in the channel below the crib. The exact position of the Moran at this time is in dispute, but the court is of the opinion, after giving due weight to all the testimony, that she was lying across the western half of the channel headed a little up stream, her bow pointing towards Ross' dock and reaching to or nearly to the range line which marks the center of the channel at this point. It is impossible to locate the Moran with perfect accuracy but if the libelant's theory of her position is accepted without qualification the court must not only convict a large number of respectable and disinterested witnesses, who say they saw the Moran's bow over the range line, of perjury, but it must find the master of the Grover guilty of incredible stupidity in attempting to go under the stern of the Moran when, substantially, the entire channel was open before him. On the other hand it is impossible to see how she could have extended 30 or 40 feet beyond the range line when the mark on her keel indicated that she was held by an obstruction on the shoal some 80 feet from her stern. Again, it is undisputed that on passing close to the black stake the Grover put her helm hard a-port and that she was still swinging to starboard when the collision occurred. A simple experiment will demonstrate that it would have been impossible for her bow to strike the Moran 108 feet from the latter's bow if she were lying where the claimant locates her. To a layman it seems impossible that the Grover, under a port helm, and still swinging to starboard after passing the black stake, could have hit the Moran amidships at a point only about 70 feet west of the center of the channel. The safer way in these cases is to give credence to all the evidence and the presumptions to be drawn therefrom and locate the vessels as accurately as possible from a general consensus of all the testimony.

At the time of the collision the Moran had up her running lights. She gave no signal to the Grover at any time, but just previous to the collision, and after the Grover had straightened up on the Encampment range, she blew a signal of four blasts for a tug to

come to her assistance. The tug answered the signal but those in charge of the Grover swear that they did not hear the answer. The signal of four blasts may mean a call for a tug or it may mean "hurry up," depending upon the length of the blasts. At the time of the collision the sun had gone down behind the western trees, but it was still light and there is no pretense on either side that any embarrassment was occasioned by fading or insufficient light. There was no wind which at all affected navigation. The current at the Encampment is between two and three miles an hour. The chart introduced in evidence indicates that for a considerable distance east of the channel and below the point where the Moran lay the water was deep enough for the navigation of a vessel of the draught of the Grover. On the other hand there is evidence that vessels similar in size have touched bottom there. It is not pretended that the collision was due to inevitable accident. It is conceded on all sides that it was the result of careless seamanship.

The accusations against the Moran are as follows:

First. She went aground negligently. She knew of the improvements being made and of the coamings thrown up in cutting the new channel. She was warned of the shoal orally and by the flags which marked the danger limit. She took the risk deliberately and with full knowledge of the situation, when, had she gone below the flags there would have been no danger of grounding.

Second. Having gone aground at a point where she was a menace to passing vessels it was her duty to get away as quickly as possible. A tug offered her services immediately and there is every reason to believe that had they been accepted the Moran would have floated long before the Grover appeared upon the scene. Negligence is predicated of the refusal to accept the assistance of the tug.

Third. It is said that the Moran was negligent in displaying her running lights. Seeing her red light and white foremast light a descending vessel had a right to assume that the Moran was under way and crossing the river.

Fourth. The Moran should have given a danger signal. She was lying directly across the westerly half of a narrow, shallow and difficult channel, at a point where the channel takes a sharp westerly turn. She was aground and helpless. She should have informed the Grover of her plight.

Fifth. It was a palpable fault for the Moran to give the signal for the tug after the Grover had made the turn above the light crib and a collision seemed probable.

There is force in all of these propositions but the last two only will be considered.

When the Grover gave the bend signal at "the dark hole" it was clearly the duty of the Moran to answer it. This would be so in any case. The Grover hearing no response to her signal had the right, pursuant to the inspectors' rule, to consider the channel at the Encampment clear. But if this were a duty devolving upon the Moran when under way how much more was it her duty when lying

aground? Without doubt the Grover was entitled to notice of this fact. How was she to know that a vessel lying below the crib was aground? How could the Grover maneuver intelligently in ignorance of this fact? There was danger in the Moran's position. She should have given the danger signal in time. The F. W. Wheeler, 78 Fed. 824. If the Grover had known before making the turn upon the Encampment range that the Moran was aground the collision would have been avoided. Instead of doing this the Moran remained silent when she should have spoken and spoke when she should have remained silent. When it was too late to give any signal which could avail and just at the time when the situation was critical and becoming dangerous the Moran gave four blasts upon her whistle. This was intended as a call for assistance from the tug. But if the blasts were short, and they may well have been curtailed in the excitement of the moment, the signal was an invitation to the Grover to "come on," to "hurry up." It was so understood by the master of the Grover. It is not important to inquire whether the Grover was justified in mistaking the signal. The Grover was so near at the time that it was impossible for the tug to render any assistance before the Grover passed. The Moran should have waited until the danger was over before complicating still further an already hazardous situation by a premature and misleading signal. The problem confronting the Grover was difficult enough without adding a new element of uncertainty. To give an unnecessary signal at such a time which might be misconstrued into a request to do the worst thing possible was a grave fault.

The Grover is charged with fault in the following respects:

First. That she proceeded at too great a rate of speed.

Second. That she did not maintain a competent lookout.

Third. That she was not manned by a competent and sufficient crew.

Fourth. That she did not stop and reverse in time.

Fifth. That she should have turned her head to the eastward and passed around the bow of the Moran instead of attempting to run under her stern.

There is no evidence to establish the first four of these propositions. The evidence is uncontradicted that the Grover checked down three times before reaching the Encampment range and was proceeding at a slow rate of speed, barely sufficient to give her steerageway. She had a full complement of officers and men and they were at their respective posts. The moment a collision seemed probable her engine was reversed and she was backed with all the power at her command.

The sole question, then, to be considered is whether or not negligence can be imputed to the Grover in porting instead of starboarding when a short distance—about 150 feet—above the crib. Viewed in the light of all that is now known it certainly seems that it would have been wiser if the Grover had attempted to pass across the bow of the Moran. Other vessels, alone, and with tows, had

passed her bow in safety both ascending and descending the river. One of these, the *Menedosa*, in tow of the *Glengarry*, was approximately the same size and draught as the *Grover*, but the testimony establishes the fact that she rubbed against the shoal to the eastward of the channel in making the turn. It should also be borne in mind that the bow of the *Moran* had swung down during the time she lay aground and projected further into the channel at the time of the collision. But it is manifestly unfair to judge the *Grover* in the light of the situation as it is now developed. The judge should endeavor, as far as possible, to place himself in the position of the master of the *Grover* and pass judgment upon his action in the light of what was known at the time. Had the master known that the *Moran* was aground 300 feet from the crib, had he known of the shoal and of the danger which confronted him, it would not be difficult to inculcate the *Grover*. At the trial it was thought that this view might with propriety be taken, but the more the record has been studied, the more settled has become the conviction that the *Grover* cannot be held responsible for mere errors of judgment committed in extremis, errors fairly attributable to the negligence of the *Moran*. The *Grover* supposed that the *Moran* was under way. She was headed directly across the river. To attempt to run across her bow in such circumstances would have been culpable negligence. The master of the *Grover* did not know of the presence of the shoal at the point where the *Moran* lay. Few of the river pilots knew of it. The master of the *Moran* was certainly ignorant of it or he would not have attempted to cross at that point. A number of accomplished mariners whose experience is unquestioned testified that it would have been impossible to have passed the bow of the *Moran* without running upon the rocks. Others thought it was possible; but this is not material as bearing upon the proposition now under consideration. The question is not whether the *Grover* adopted the best possible course but whether she adopted the best course in the sudden exigency which confronted her. Did the master of the *Grover* do what a prudent mariner in like circumstances might have done? By reason of the inexcusable fault of the *Moran* he found himself face to face with a sudden peril. He had to choose in a moment whether to turn to the right or to the left. He decided to take the usual course and go to the right. This course seemed to him at the time to present fewer obstacles than the other. There was danger no matter which course he adopted. There was no time for nice calculation. The dilemma was made by the *Moran*; he was not responsible for it; he did what seemed to him best. Assume that he was wrong; the rule is clear that a vessel cannot be held liable for mistakes committed in such exigencies.

It is argued that the *Grover* was at fault for not giving the signal required by rule 24 of the act of 1895 (28 Stat. 649). The rule seems inapplicable to the case at bar for the reason that these steamers were not "meeting." In any view it is not perceived how the signal could have aided the *Moran* as she was aground and unable to move.

After giving the most careful consideration to the testimony the court has been compelled to reach the conclusion that the collision was due solely to the negligence of the Moran. The libel is dismissed.

THE LOTTIE K. FRIEND v. THE ALBERT N. HUGHES.

(District Court, E. D. Pennsylvania. March 29, 1897.)

COLLISION—VESSEL AT ANCHOR—TUG AND TOW.

A tug without a proper lookout (having no one exclusively devoted to that duty), and with a heavy schooner in tow on a long hawser, held in fault for a collision, while going down Delaware Bay with the tide, of her tow with an anchored vessel, in that she came quite close, nearly head on, a little to the eastward of the anchored vessel, before discovering the situation, and then turned sharply westward, signaling her tow to follow, which the latter could not do soon enough, because of her weight and the influence of the tide.

This was a libel in rem against the tug Albert N. Hughes to recover damages caused by a collision of her tow with the schooner Lottie K. Friend.

Henry R. Edmunds, for libelant.

John F. Lewis and Horace L. Cheyney, for respondent.

BUTLER, District Judge. The suit is for damages from a collision in the Delaware Bay, September 21, 1895. The libelant was at anchor, and is admitted to have been free of fault. The respondent was passing down, towing the schooner "Lawrence" astern, by a long hawser. The latter was heavy, and going with the tide responded tardily to her helm,—requiring two men at the wheel. A short distance above the libelant, and a little eastward, a small vessel was lying at anchor; and another a little further eastward was getting under way. These small vessels the tug and her tow passed safely. The tug also passed the libelant, a short distance to the westward, while the tow swung down and struck her well forward, on the star-board side. The answer, admitting the libelant to have been faultless, charges the tow with responsibility for the collision, alleging that she failed to follow the tug as closely as she should; and this raises the only material question in the case.

The record contains much conflicting testimony, as is usual in such cases. After a careful examination of it I have reached a conclusion adverse to the respondent. To analyze and discuss this testimony would be a useless labor; and I will therefore simply state my conclusions. In addition to the above undisputed facts, I find that the tow followed the course of the tug as closely as she could under the circumstances. Being large and heavy, and going with the tide, she responded slowly to her helm. The small vessel at anchor above the libelant was a little further eastward than she is shown on the draft at page 9 of respondent's brief, and the libelant a little further west-

ward than she is shown. The respondent passed the small vessel with little, if any, change of course, (the tow following pretty directly behind at this time,) and approached the libelant nearly head on, but a little to the eastward, getting quite close before discovering the situation. She then turned sharply westward and signaled the tow to follow. The latter endeavored to do so, but necessarily swung down under the influence of her momentum and the tide, and struck the libelant as above described. She may have been a bad steerer as the tug charges. But if she was, the tug, having towed her before, should have known it and taken precautions accordingly. The respondent was without a proper lookout, having no one exclusively devoted to that duty; and this, doubtless, was the cause of her running so near the libelant before changing her course. The collision was then inevitable, unless, possibly, by turning in the opposite direction. With the change westward the tow would necessarily be brought into collision; there was no chance of escape in attempting to follow. The distance between her and the libelant was too short for any available effort to keep off, especially in view of her speed and the force of the tide. She would necessarily swing down and turn lower than the tug, and thus be drawn into contact with the libelant just as she was.

The allegation that she took a sheer eastward, (on which the defense rests,) as some of the respondent's witnesses assert, cannot be accepted against the evidence to the contrary. Besides, there is nothing to account for such a sheer. If it occurred after the tug turned westward and signaled her to follow, it is wholly unaccountable that she should have turned in the opposite direction. If it occurred before the tug turned westward, then the tug should have gone eastward, as it would have been safe to do. It was perilous to turn westward under such circumstances, and attempt to haul the tow across the libelant's bows; and of itself would render the tug responsible for the collision.

The libel is sustained, and a decree may be prepared accordingly.

DONALLAN v. TANNAGE PATENT CO.

(Circuit Court of Appeals, First Circuit. March 13, 1897.)

No. 189.

APPEAL—DISMISSAL ON APPELLANT'S MOTION.

An appellant cannot of right dismiss his own appeal; and, when an appeal is dismissed on his motion, he is not entitled, in the absence of special equitable considerations, to have the order expressed to be without prejudice; but where an appeal from an interlocutory order granting a preliminary injunction was so dismissed, the order may state the fact that the dismissal was before any hearing on the merits.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Tannage Patent Company against John E. Donallan for infringement of letters patent No. 291,784 and 291,785, for a process of tanning leather. The circuit court made an order granting a preliminary injunction (75 Fed. 287), and the defendant appealed. The cause was heard on appellant's motion to dismiss its appeal without prejudice.

Geo. L. Roberts, James H. Lange, and W. Orison Underwood, for appellant.

Frederick P. Fish and Wm. K. Richardson, for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This is an appeal from an interlocutory order or decree granting a preliminary injunction. The appellant files the following motion:

"Now comes the original defendant in the above cause, the appellant before this court, and moves that the appeal taken by him from the interlocutory order or decree of the circuit court, granting a preliminary injunction, be dismissed, without prejudice to any proceedings in the circuit court, or to the right of the defendant to take any subsequent appeal, and without prejudice to the questions which may be raised by such subsequent appeal if lawfully taken, but with costs of the appeal to the appellee."

The appellee does not object to the dismissal of the appeal, but it does object to the qualifying expressions asked for.

An appellant cannot as of right dismiss his own appeal. U. S. v. Minnesota & N. W. R. Co., 18 How. 241, 242. That ordinarily, on a dismissal on his own motion, the appellant is not entitled to an order expressed without prejudice, follows from what is said in the case cited, at page 242, that usually the court will not allow such a dismissal if the appellant intends at some future time to bring another appeal. How very cautious the supreme court usually is to shut out presumptions of any qualification in connection with such orders appears from U. S. v. Griffith, 141 U. S. 212, 11 Sup. Ct. 1005.

Where, after a hearing, a cause is disposed of by the court on appeal, for some reason not touching the merits, it is now well settled that the judgment should usually show that it is without prejudice. So, on his own motion to dismiss, an appellant may

sometimes show inadvertence or mistake or some other special reason which may entitle him to equitable consideration and a special order. But we have no suggestion of any such exceptional matter here. We have no judicial knowledge of anything except what we have stated, and that there has been no hearing by us on the merits. Whether, under our expressions in *Gamewell Fire-Alarm Telegraph Co. v. Municipal Signal Co.*, 9 C. C. A. 450, 61 Fed. 208, 209, and in *Marden v. Manufacturing Co.*, 15 C. C. A. 26, 67 Fed. 809, the appellant is not, in any event, sure of all he desires to reserve, is for him to consider. As he moves to dismiss his appeal of his own volition, we have no occasion whatever to aid him, under the circumstances of the case, either by any special order, or by any expressions of opinion. We will therefore adopt the usual order entered on these motions in the supreme court and here, adding to it sufficient to advise the circuit court of what appears on our records, that there has been no hearing on the merits of this appeal. On the motion of the appellant, and before any hearing on the merits, it is ordered that this appeal be dismissed, with the costs of this court for the appellee, and that a mandate issue forthwith.

NEW YORK SECURITY & TRUST CO. v. LOUISVILLE, E. & ST. L.
C. R. CO. et al.

CLARKE v. HOPKINS et al.

(Circuit Court, D. Indiana. March 18, 1897.)

1. RAILROAD MORTGAGES—PRIORITY OF JUDGMENT FOR DEATH LOSS.

A judgment against a railroad company for a death loss occurring in the operation of the road cannot be regarded as a necessary operating expense, and is not entitled to priority of payment over a mortgage upon that ground.

2. SURETY IN SUPERSEDEAS BOND—PREFERENCE OVER PRIOR MORTGAGE.

When a surety signs a supersedeas bond without requiring any indemnity for so doing, he must be held to have done so on the personal credit of the principal, and is not entitled, upon the affirmation of the judgment, to preference over a prior mortgage upon the property of the principal.

In Equity. On demurrer to answer to intervening petition.

Miller & Elam, for petitioners.

William L. Taylor, for receivers.

BAKER, District Judge. On July 17, 1890, the petitioner recovered judgment for \$9,000 and costs against the Louisville, Evansville & St. Louis Railroad Company. The judgment was recovered for a death loss arising from the negligence of the railroad company in causing the death of the petitioner's testator, who, at the time of the injury resulting in death, was a passenger on a train on said railroad. The railroad company sued out a writ of error to the supreme court of the United States, and procured a supersedeas upon filing a bond in the penal sum of \$12,000, signed by the Louisville, Evansville & St. Louis Consolidated Railroad Com-

pany and David J. Mackey, who was then its president. The judgment was affirmed on March 15, 1894. A suit was thereafter brought on the bond against David J. Mackey. A judgment was recovered on December 31, 1894, for \$11,530.34 and costs, and an execution was duly issued thereon, and returned nulla bona. On January 4, 1894, in the suit of Thomas Barrett et al. against the Louisville, Evansville & St. Louis Consolidated Railroad Company, Edward O. Hopkins and James H. Wilson were appointed by this court receivers of all the property and rights of said Louisville, Evansville & St. Louis Consolidated Railroad Company. They gave bond, and took immediate possession of said railroad property. On September 6, 1894, the New York Security & Trust Company filed an original bill in this court for the foreclosure of certain mortgages executed to it as trustee, covering all the property of said Louisville, Evansville & St. Louis Consolidated Railroad Company and its constituent companies, and on November 26, 1894, by an order of this court, the two cases then pending were consolidated, and Edward O. Hopkins and James H. Wilson were made the receivers of said property in the consolidated suit. During all the time after the testator lost his life down to about the time when the receivers were appointed in the case of Thomas Barrett et al. v. Louisville, Evansville & St. Louis Consolidated Railroad Company, the interest on all its mortgage indebtedness was paid. On and prior to January 4, 1894, David J. Mackey was the president of the Louisville, Evansville & St. Louis Railroad Company, and also of the Consolidated Company, and had the general management and control of the same, and was, at and before the said time, indebted to said railroad company in the sum of \$70,000, of which sum not more than \$18,400 has ever been paid or collected. Mackey is insolvent, and has been since January 4, 1894. The property in the hands of the receivers is covered by a mortgage indebtedness amounting to more than \$5,000,000, which embraces all the property and income of the railroad, and which was executed and duly recorded long before the petitioner recovered his judgment. The earnings and income of the railroad are insufficient to meet current expenses and to pay interest on the mortgage indebtedness. The petitioner asks that his claim be adjudged to have a preference and priority of payment over the mortgage indebtedness of the railroad company. I have carefully examined all the cases cited by counsel, and have reached the conclusion that the claim is not entitled to a preference. A review and analysis of the numerous cases cited leading to this determination would not prove profitable, and the court therefore contents itself with a brief statement of the grounds on which its conclusion is based.

The law of its creation, and the nature of its business, necessarily require that a railroad should be maintained as a going concern by running its trains and serving the public as a common carrier. The duty is of legal obligation, and is of the essence of its right to corporate existence. The purchase of supplies, the employment of labor, the making of repairs and of suitable traffic arrangements are indispensably necessary to enable the railroad to perform its

public duties. Credit is essential to secure the property and service required to keep it in operation. Some courts have placed the right to charge the expenses on the income, and, if necessary, on the corporate property itself, in preference to the mortgage indebtedness, on the ground that the supplies, labor, repairs, and traffic arrangements go to the betterment of the mortgaged property. This ground seems unsatisfactory, because it often happens that no such betterment results; and, if such result occurs, it would be an unsound and dangerous doctrine to hold that the expenses incurred in improving the mortgaged estate can be recouped out of the mortgagee's security. No one ought to be improved out of his mortgage security without his consent. Other courts place the doctrine upon the theory of implied consent. The argument is that the mortgagee has taken his security with the knowledge that the railroad must be kept in operation, and therefore he will be presumed to have impliedly agreed that the expenses necessarily incurred in maintaining it as a going concern shall have a preference in payment over his mortgage indebtedness. It is not quite apparent how a mortgagee can be held to an implied consent in the face of his mortgage, which, in express terms, grants to him a prior lien on the entire income and property of the corporation. The right to priority of payment for property and services necessary to the operation of the railroad as a going concern would seem to arise from the primary and paramount duty owing to the state and the public to keep it a going concern, found in the law of its creation and in the purpose of its existence. It thence follows that when a mortgage is placed upon such property the security must, in the nature of things, be held to be subordinate to the charges which are necessarily incurred to enable the railroad to perform those prior and paramount duties due to the state by the law of its creation. But, whatever may be the true foundation of the doctrine, it cannot, without a flagrant invasion of contract rights, be extended to any other claims than those growing out of debts necessarily incurred in keeping the road in operation. It has never been held, and logically it cannot be held, that injuries to persons and property arising from its operation are among such preferred debts. Such injuries are accidental and fortuitous, and their payment cannot be regarded as necessary and indispensable operating expenses within the contemplation of the law. Hence it follows that the petitioner's claim is not entitled to priority on the ground that it was a necessary operating expense.

It is further contended that the petitioner is entitled to priority, because his right to sue out an execution and levy upon the property of the railroad company was denied to him by taking out a writ of error and filing a supersedeas bond, and that the surety, thus having saved the railroad property from seizure and sale, is entitled to indemnity and protection, and that the petitioner can avail himself of this equity in favor of the surety. The court is of opinion that this contention is unfounded. When a surety signs a supersedeas bond without requiring any indemnity for so doing, he must be held to have done so on the personal credit and re-

sponsibility of the principal. He becomes such surety voluntarily, and if he neither asks nor receives indemnity, on what ground can he be permitted to invoke an equitable lien, and be entitled to preference over a prior mortgage? If the surety had loaned the money to pay off the judgment, and thus have saved the property covered by the mortgage, he could not have acquired a prior lien for the money so advanced. By signing the bond he simply agrees to pay off the judgment at a later day, if the judgment should be affirmed. Why should one who has bound himself contingently to pay the judgment occupy a more favorable situation than he who pays it in the first instance? No case warrants such a preference of a surety unless other equitable circumstances exist which create an equitable right of priority. In the present case there are no equitable circumstances existing in favor of the surety. Indeed, he is a debtor of the railroad company to an amount largely in excess of the petitioner's claim, and is insolvent, and is not asking the court for protection.

The demurrer to the answers of the receivers is overruled, at the petitioner's costs.

MERCANTILE TRUST CO. v. BALTIMORE & O. R. CO.

(Circuit Court, E. D. Pennsylvania. March 6, 1897.)

1. RAILROAD RECEIVERS—SETTLEMENT OF CLAIMS.

The authority given to railroad receivers "to compromise, adjust, and settle, in their best discretion," claims against the railroad company, vested no right in judgment creditors to have their respective claims paid in full.

2. SAME.

A judgment creditor will not, in general, be allowed to enforce his judgment by sale of property in the hands of a receiver.

3. SAME—ANCILLARY DECREE.

Even if a circuit court had acted improvidently in including all the property of a railroad company in a receivership, the circuit court of another district will not, by its ancillary decree, except a portion of the property in that district from its operation.

Sur Petition of William Friel and Others.

R. C. Dale and Samuel Dickson, for petitioners.

Wm. H. Addicks, for Railroad Co.

DALLAS, Circuit Judge. The authority given to the receivers "to compromise, adjust, and settle, in their best discretion," claims against the railroad company, vested no right in the petitioners to have their respective claims paid in full. A judgment creditor will not, in general, be allowed to enforce his judgment by sale of property in the hands of a receiver, and nothing is here alleged to distinguish the case of these petitioners from that of any other person who, upon a cause of action previously accrued, recovers judgment after appointment of receivers. I cannot agree that the relief asked by the petitioners should be granted upon the ground that a mistake was made in including all the property of the defendant company in this receivership. Whether such action should

have been taken on the original bill it is not, I think, necessary for me to consider. It is, in my opinion, enough to say, upon the present application and at this time, that such scope having, in fact, been given to the receivership by the circuit court for the district of Maryland, the ancillary decree of this court should not, in effect, be so modified as to except a portion of the property in this district from its operation. These petitioners have no right to immediate payment superior to that of other creditors of the same class, nor to insist that the subsisting order of this court shall be reformed or partially annulled for their benefit. It is important for the interest of creditors generally that between the primary decree, which was made for the benefit of all creditors alike, and that of this court, there should be no material variance, and I have not been convinced that the harmony which now exists should, at this time, be disturbed for the special advantage of particular claimants. The prayer of the petition of William Friel and others is denied.

WARD v. ROBERT J. BOYD PAVING & CONTRACTING CO. et al.

(Circuit Court, W. D. Missouri, W. D. January 4, 1897.)

CONSTITUTIONAL LAW—CLASSIFICATION OF CITIES AND TOWNS—SPECIAL LEGISLATION.

The Missouri statute of March 18, 1893, concerning sewers and drains "for cities in the state having a special charter which now or hereafter contains more than 2,000 and less than 30,000 inhabitants," and for such cities of the third and fourth class as may by a vote of the people adopt the act, violates section 7, art. 9, Const. Mo., which provides for the division of the towns and cities of the state into four classes, and declares that the powers of each class shall be defined by general laws.

Wash Adams and Hugh C. Ward, for complainant.
Karnes, Holmes & Krauthoff, for defendants.

PHILIPS, District Judge. This is a bill in equity to enjoin the collection of certain tax bills issued by the city of Westport, in Jackson county, Mo., as a special tax assessed against complainant's property for the construction of a district sewer. The city of Westport is alleged to be a city of the fourth class, organized under the statutes of the state. The construction of the sewer in question was directed by an ordinance of the city, duly adopted, and the imposition of the special tax for the payment thereof was also authorized by ordinance of the city. This tax is claimed, by the holder of the certificates therefor, to be a special lien on a large amount of real estate in the hands of the complainant, as receiver of the Mastin estate, which it is alleged the respondents are threatening to enforce, and which constitutes a cloud upon the title to said property. It is further alleged in the bill that the basis of the action taken by said city in having said work done and said tax certificates issued is an act of the general assembly of the state of Missouri, entitled "An act concerning sewers and drains for cities in the state having a special charter which now or hereafter contains more than 2,000 and less than 30,000 inhabit-

ants, and for cities of the third and fourth classes," approved March 18, 1893. The contention of complainant is that this act is in contravention of the constitution of the state, and he therefore seeks to enjoin the collection of and have the tax certificates declared invalid. To this bill the paving company has interposed a demurrer, which has been submitted to the court on briefs of counsel.

Section 7 of article 9 of the state constitution is as follows:

"Sec. 7. Cities and Towns, Organization and Classification. The general assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village existing by virtue of any special or local law, may elect to become subject to and be governed by, the general laws relating to such corporations."

This provision of the constitution is both mandatory and prohibitory. Its command is not only that the legislature shall provide for the organization and classification of all cities in the state, but such provision must be by general laws, not special enactments. It then commands the classification of such cities, and interdicts the creation of more than four classes. It further commands, not only that the legislature shall define the restrictions and powers of each of said classes, but also that this shall be done by general law. It then proceeds to declare the purpose of the convention in making this requirement to be "so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." The clear intent of which is to prevent the multiplication of classes of municipalities, and the giving to one within the same class different powers or functions, and imposing upon any one restrictions different from those in the same class or division. In short, it is to secure absolute uniformity, by general law, applicable to all the given classes, respecting the faculties with which they might be endowed, and the limitations placed upon their functions by the legislature; so that any person, anywhere, desiring to ascertain what are the powers and restrictions of any one city of a given class in the state, could be advised thereof by looking at the "general law" defining such powers and restrictions.

The legislature, in conformity with the constitutional requirement, proceeded to make the classification found in chapter 30, p. 303, Rev. St. Mo. 1889, as follows:

"Sec. 972. Cities of First Class. All cities and towns in this state containing one hundred thousand inhabitants or more shall be cities of the first class.

"Sec. 973. Cities of Second Class. All cities and towns in this state containing thirty thousand and less than one hundred thousand inhabitants shall be cities of the second class.

"Sec. 974. Cities of Third Class. All cities and town in this state containing three thousand and less than thirty thousand inhabitants, which shall elect to be a city of the third class, shall be cities of the third class.

"Sec. 975. Fourth Class. All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class.

"Sec. 976. Villages. All towns not now incorporated in this state containing less than five hundred inhabitants are hereby declared to be villages."

Section 977 makes provision for cities existing by virtue of the present general law, or by local or special law, electing to become of the class to which its population entitles it, under the provisions of this article.

It is admitted that the city of Westport is a city of the fourth class, organized under the statute of the state. The statute (article 4 of said chapter) makes detailed provision concerning the construction of sewers in cities of the third class. Article 5, which makes general provision for the government of cities of the fourth class, is quite meager as to any detailed provisions on the subject of sewers. The power to construct them arises by implication, or rather seems to have been assumed by the legislature. Section 1589, after enumerating various powers to be exercised by the city, contains this clause, "To pass such ordinances, not inconsistent with this article, as may be expedient in maintaining the peace and good government, health and welfare of the city," from which, possibly, it might be assumed that as, by general consensus, the construction of sewers and proper drainage is essential to maintain the public health, authority to construct them is within the terms of the grant. Section 1592 declares, *inter alia*, that "all special tax bills issued as herein provided for special assessments for paving, macadamizing, curbing, guttering, grading, excavating, building, and repairing streets, alleys, avenues, and sidewalks, as well as sewers," etc. On the 11th day of April, 1895 (Laws Mo. 1895, p. 66, which went into effect on the date of adoption), the legislature enacted a general law respecting the government of cities of the fourth class, which sets out in detail the powers of such cities, conferring in express terms the power, in section 75, to cause a general sewer system to be established, composed of three classes of sewers, to wit, public, district, and private sewers. It then defines where said public sewers shall be constructed, and as to their dimensions, and further provides for the levying of a tax on all property made taxable for said purpose over the whole city to pay therefor; and the succeeding sections provide for a system of district sewers, and the mode of construction, and the manner of paying therefor. So that this act and the one in question were in force at the time of the adoption of the ordinances of the city of Westport under which it is alleged the work in question was inaugurated.

The bill charges, and the arguments of both parties concede, that said ordinances were adopted pursuant to the provisions of said act of 1893. The first section of this latter act declares that:

"In every city in this state having a special charter which now or hereafter contains more than two thousand and less than thirty thousand inhabitants, and in every city in this state of either the third class or of the fourth class, the acting municipal authorities thereof, upon a vote by ballot of two-thirds of the qualified voters of such city, voting at an election held for that purpose, in favor of adopting the provisions of this act, shall have the power by ordinance to provide drains and sewers for the same, and to enforce and regulate connections therewith; and every such city shall, on the written petition of the resident owners of a majority of the front feet of ground in sewer districts to be established as hereinafter provided, or when such municipal

authorities shall deem any sewer necessary for the protection of the public health, have power to accept and acquire by gift, devise, purchase or by condemnation proceedings, both within and beyond the territorial boundaries of such city, the right of way for drains or sewers, and the use of natural water courses of drainage for public drainage and sewer purposes for such city."

In disregard of the provisions of said section 977 of the Revised Statutes, and regardless of the special charters under which cities may have been organized, the powers thereby conferred, and the restrictions thereby imposed, the first section of the act of 1893, by way of amendment to such special charters, declares that, in every city having a special charter which now or hereafter contains more than 2,000 and less than 30,000 inhabitants, authority is given by a vote of two-thirds of the qualified voters to construct sewers, with all the powers and privileges conferred by this special act; thus, in effect, creating a fifth class, composed of special chartered cities of a special population. In the first place, it is to be observed that under said section the power to build sewers does not come into existence until invoked by the ballots of two-thirds of the voters of said city. So that this is a power subject to such condition. Then, section 2 of the act declares that:

"Before authorizing or constructing any sewer or drain under the provisions of this act, the acting municipal authorities of such city shall by ordinance subdivide the territory of such city into two or more sewer districts."

There is no provision in the act for constructing public sewers to be paid for as a general tax assessable against the whole property of the municipality, and, before any sewer can be constructed, the city government must subdivide it into two or more districts, and the vote of the whole city may compel any district therein to build a sewer at the expense of the taxpayers of the district; whereas, under the general law, both in respect to cities of the third and fourth classes, the board of aldermen are authorized (section 75) to cause a general sewer system to be established, including public, district, and private sewers. No vote of the constituency is required to confer this power under the general law upon the board of aldermen. Section 76 of the general law provides for district sewers which may connect with public sewers, thereby lessening, we assume, in many cases, the expense of construction to the district; and they may be built "whenever a majority of the property holders resident therein shall petition therefor"; and the board of aldermen, without such petition, may construct such sewers "whenever the board shall deem such sewers necessary for sanitary and other purposes." Section 3 of the act of 1893 authorizes the city to make use of any natural course of drainage or water course as a public drain or sewer route, either within or beyond the territorial boundaries of the city; and the municipal authorities are authorized to declare the same to be a public drain and sewer route, and to declare what district or districts shall be deemed benefited thereby, and further authorizes the city to acquire the right thereto by gift, purchase or condemnation, and imposes a tax on the declared benefited territory therefor. Sections 4, 5, 6, and 12 of this spe-

cial act empower the city to construct such sewers, with inlets, branches, and appurtenances either wholly within one sewer district, or partly in two or more, and partly beyond the territorial boundaries of the city, and impose special tax bills therefor; and the city is further empowered to acquire the right of way for said sewers through private property within or beyond the corporate boundaries of the city in the same way, with special provisions for condemnation proceedings, and for the condemnation to its use of water ways. Said section 12 declares that the whole cost of acquiring the use of such water courses and right of way for any such sewer, including cost of condemnation proceedings, shall constitute a lien on the lands within the district or districts, exclusive of public highways, streets, and alleys declared to be benefited, in proportion to the area of such tract, and shall be collected by special tax bills. No such provisions are found in the general law respecting cities of the third and fourth classes, and no such burdens on sewer districts are imposed. Under the general law (section 76) the taxes for district sewers shall be apportioned "against the lots or pieces of ground exclusive of improvements, in proportion to the area of the whole district exclusive of the public highways"; whereas under the act of 1893 (sections 14 and 15) the tax is authorized to be imposed upon the lands, omitting the words, "exclusive of improvements," so that both the land and the improvements, as an appurtenant of the freehold, are subject to the special tax. Under the general statute (section 76) only one certified tax bill is required to be made out upon an assessment against each lot or piece of ground within the district, "in the name of the owner thereof"; whereas, by section 15 of the act of 1893, "three special tax bills, each for one third of the amount of the special tax against each lot or tract of land in the district or districts," are authorized. Each of said tax certificates shall be payable, respectively, on or before one, two, or three years, with interest from the date thereof at the rate of 10 per centum per annum until paid; whereas, under the general law (section 76), the tax bill shall bear interest at the rate of 10 per cent. from the issue thereof, and, if not paid within six months, bear interest at the rate of 15 per centum per annum. And section 16 of the act of 1893, at variance with the general law, expressly declares that "no such tax bill need give the name of any party owning or interested in any land charged and bound by the lien." Section 77 of the general law prohibits any sewer being run diagonally through private property when it is practicable, without injury to such sewer, to construct it parallel with one of the exterior lines of such property; nor shall any public sewer be constructed through private property when it is practicable to construct it along a street or other public highway. No such restrictions are imposed by the act of 1893. There are other differences in the powers conferred by the two enactments.

So, it is made apparent that, where the voters of cities of the third and fourth classes should decline by a two-thirds vote to put in operation the act of 1893, such cities would be left with the

right to avail themselves of the powers, and be subject to the restrictions, of the general law for the government of cities of those classes. Thus, it becomes too manifest to admit of debate that, under the operation of these two statutes, cities in this state of the same class may exist not possessing the same powers nor subject to the same restrictions in the manner of constructing sewers. A city whose qualified voters should vote on themselves the burden of constructing sewers under the act of 1893 would thereby become possessed of powers greater and widely different from those possessed by another city of the same class whose voters declined to come under the law of 1893. Likewise, as shown by the foregoing comparison of the two statutes, we would have cities in the same state of the same class, subject to different restrictions in the manner of constructing sewers. It is no answer to this to say that the act of 1893 is general in its nature, as it applies to all cities of the given class who may vote to come under it.

As said by the supreme court of this state in *Murnane v. City of St. Louis*, 123 Mo. 479-488, 27 S. W. 712:

"As to any city organized under the classification directed by the new constitution, it is not alone sufficient that an amending law be a general one. Such amendment must not only be by general law, but that law must also conform to the classification of cities which that section (meaning section 7, aforesaid) of the constitution requires as to those cities organized since its adoption. No change of strictly corporate powers, in cities incorporated under the laws authorized by the constitution of 1875, can be sustained merely because such laws are general in form, as in the *Rutherford Cases* [82 Mo. 388; 11 S. W. 249]. Such laws must also comply in other respects with the demands of section 7. The number of classes of cities and towns for whose organization the legislature 'shall provide' is limited to four; and any general law conferring strictly charter powers upon a city, under the present organic law, must be so framed as 'that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.'"

And speaking to the same subject, in *Kansas City v. Scarritt*, 127 Mo. 653, 29 S. W. 848, the court says:

"There was no design to isolate any of the cities from the great body of the people of the state, or to grant to any city special immunities or privileges. On the contrary, the idea was to place all those in like situation under like laws, civic duties, and obligations."

The act of 1893, in its practical effect, creates an additional class of cities. It provides for the recognition of cities having special charters "which now or hereafter contain more than two thousand and less than thirty thousand inhabitants," and also applies to cities termed as "of either the third or of the fourth class" whose municipal authorities may build district sewers, with peculiar powers, "upon a vote by a ballot of two-thirds of the qualified voters of said city, voting at any election held for that purpose in favor of adopting this act." Without such vote the power to construct sewers, with the privileges accorded by the act, does not come into existence. When two-thirds of the inhabitants do so vote, there exists a new class of cities, clothed with powers and privileges possessed by no other class of cities in the state; whereas the positive mandate of the constitution is that all cities, by a general law, shall be classified into not more than four classes, and the

cities of each class shall be clothed with the same powers, to be "defined by general laws." The powers thus to be conferred by the legislature are to be vested in "such municipal corporations"; that is, in the legal entity, the body corporate, to be exercised by it in its corporate capacity, not dependent upon the consent of a changeable, varying constituency, but upon the exercise of a sound legislative discretion by the governing board of the municipality. The general law of 1895 (section 76) empowers the board of aldermen, whenever "it shall deem such sewers necessary for sanitary or other purposes," to construct district sewers. This is in conformity with the sense of the constitutional convention expressed in section 7 of article 9; whereas, under the act of 1893, the power of the board of aldermen to construct sewers is made to depend absolutely upon the vote of a given number of inhabitants. And it is worthy of repetition to say that under these two acts of the legislature, where the inhabitants of one city exercised their option by a two-thirds vote to come within the operation of the act of 1893, and another city stands still, whereby it is nevertheless left armed with power to obtain sewers by the legislative action of the governing board, the state of case is presented either of two cities of the same class clothed by the legislature of the state with different functional powers, and subject to different restrictions in proceeding in the construction of sewers, or there is a fifth class of cities created. These two enactments cannot stand together. The one is special; the other is general. The legislature, in the later enactment of 1895, has made provision by general law applicable alike to cities of the third and fourth classes; and it does seem to me that, if the special act of 1893 does not fly in the face of the constitution of the state, it must be confessed that human language is inadequate to put under restraint the great evil of special legislation in this state. It was to the suppression of the great evil of favoritism through such enactments and the incongruities in our laws for the government of different communities of the commonwealth that the members of the convention of 1875 bent their best energies and gave their best thoughts.

As said by the state supreme court in *Kansas City v. Scarritt*, supra:

"City charters were the favorite ground for special legislation. The constant tinkering to which those instruments were subjected, not only created confusion and uncertainty in constructing the law, but covered the state with specimens of incongruous pieces of patchwork legislation, which gave widely varied rights to, and imposed dissimilar duties and obligations on, the citizens of different localities, without any substantial grounds for those variances. The object of the constitution of 1875 in dealing with this topic was to secure some uniformity in the organization and action of municipal corporations in the state; hence the strict limitations laid down in regard to the classification of cities, and the prohibition of more than four classes of city charters, even when created by general laws of incorporation, under the new constitution."

So profoundly concerned were the framers of the constitution to vindicate their purpose in this respect, in recognition, on the one hand, that this abuse sprung largely from the incautiousness or

incompetency of legislators,—to say nothing of the method of “log rolling” by which measures are gotten through, having the form and substance of general laws, but in design and practical operation solely for the benefit of a particular locality,—and recognizing, on the other hand, the timidity of some courts, with a mawkish deference to a co-ordinate branch of government, in hesitating unduly to declare its acts unconstitutional, that they wrote into the fundamental law the provision that whether or not the subjects-matter of legislative acts could by “a general law be made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject.” Section 53, art. 4.

To one familiar with the history of the city of Westport, its municipal aspirations and environments, in whose interest the act in question had its birth, the relevancy of its provisions to that locality are as apparent as though it had been entitled “An act for the construction of sewers in and about the city of Westport, in this state.” Without questioning the benefits to certain of the inhabitants of this city coming from this special statute, the solemn duty rests upon the court to follow where, in its judgment, the constitution—the supreme law of the land—leads. It results from the views of this statute entertained by the court that the demurrer should be overruled. It is accordingly so ordered.

**STATE OF SOUTH CAROLINA v. PORT ROYAL & A. RY. CO. KING
et al. v. SAME. OGDEN v. SAME. Ex parte
LOUISVILLE & N. R. CO.**

(Circuit Court, D. South Carolina. March 15, 1897.)

1. RAILROAD LEASE—JOINT OWNERSHIP—BOARD OF MANAGEMENT.

Where all the business of a railroad lease was conducted by a board of commissioners under a name selected by the joint owners of the lease, and one of the joint owners became bound for a debt incurred to this board in the conduct of the business, the other joint owner had the right to maintain a suit to compel him to pay over the amount of that debt to the unincorporated association conducting the business of the lease, as that association could not maintain a suit against one of its members.

2. SAME—PRINCIPAL AND AGENT.

Where the common agent selected by the joint owners of a railroad lease to conduct the business of the lease was, by the terms of the agreement, to receive the gross earnings, and pay all current expenses, accounting to the principals for the net results, the several interests of the principals in any debt accruing to the agent in the conduct of the business do not arise until the accounts of the agent were made up and the gross earnings had been used in meeting the current expenses; and therefore one of the two joint owners of the lease may be compelled to pay over to the common agent the whole of a debt for which he is bound, and not merely one-half thereof.

3. SAME—MANAGERS HOLDING OVER.

Although an agreement between the joint owners of a railroad lease for the annual selection of commissioners to conduct the business of the lease made no provision for the commissioners thus selected to hold over in the event of a failure to select new commissioners, yet, as the public interest

required it, and the very existence of the lease depended on it, it was the duty of the old board, when there was a failure to appoint new commissioners, to go on and preserve all interests for whom it might concern.

This is an intervening petition filed by the Louisville & Nashville Railroad Company to compel the receiver of the property of the Port Royal & Augusta Railway Company to pay over to the Georgia Railroad Company the amount of a claim for traffic balances due by the receiver to that company. The Louisville & Nashville Railroad Company is owner of a half interest in a lease of the Georgia Railroad & Banking Company, and the Georgia Railroad Company is merely a name selected by the owners of that lease under which all the business of the lease is conducted, and in the conduct of which the claim in question arose.

Joseph B. Cumming, for petitioner.

Henry Crawford and Mitchell & Smith, for purchasers.

SIMONTON, Circuit Judge. This is an intervention in the main causes, seeking payment of a claim against the receiver, held by the Georgia Railroad Company. The claim is for traffic balances due by the receiver to that company. Under the terms of the order of sale, the purchaser of the Port Royal & Augusta Railway property assumed the payment of debts due by the receiver. The facts of the case upon which depends the solution of the issues made by the petitioner are these:

W. M. Wadley obtained from the Georgia Railroad & Banking Company a lease of its railroad line and railroad property for 99 years, on an agreed rental. He assigned one-half interest in the lease to the Louisville & Nashville Railroad Company. The terms of the assignment were these:

"This agreement, made and entered into this 17th day of May, 1881, by and between William M. Wadley, of Monroe county, Georgia, of the first part, and the Louisville and Nashville Railroad Company, of the second part, witnesseth: Whereas, the said party of the first part has become the lessee of the Georgia Railroad, with all its dependencies, as will more fully appear by a copy of the lease hereto attached; and whereas, it is deemed of great importance to the said Louisville and Nashville Railroad Company to become interested in said lease in connection with other parties: Now, therefore, it is hereby mutually covenanted and agreed that the said party of the second part, for and in consideration of the sum of twelve thousand five hundred dollars (\$12,500) paid by the party of the second part to the said party of the first part, and the deposit of five hundred thousand dollars (\$500,000) of bonds, being one-half the amount stipulated to be deposited, as security for the faithful performance of said lease, with the Farmers' Loan and Trust Company of the city of New York, the said party of the second part shall be entitled to an equal joint control and management of the said Georgia Railroad and its dependencies, together with one-half interest in all advantages and profits resulting from the same; it being understood and agreed that the said Georgia Railroad and its dependencies shall be managed by a board of six commissioners to be appointed annually, three to be chosen by the said party of the second part, and the other three by such other party as may control the other one-half interest in the said lease, said six commissioners to elect a seventh, who shall be president of the board and chief executive officer for the management of the property under the control of the board. Should the six commissioners, as chosen, be unable or fail to agree upon the seventh as president of the board, then and in that event an impartial umpire shall be

selected to decide; and his decision shall be final. This covenant and agreement to continue of full force and effect for and during the full term for which the Georgia Railroad and dependencies has been leased to the said party of the first part, and to include all profits already accrued under said lease since its commencement."

On the 1st of June, 1881, the assignment of the other half of the lease was made to the Central Railroad & Banking Company of Georgia, in writing, on the same terms. This leased property was conducted as provided in these assignments for several years. But the Central Railroad & Banking Company was put into the hands of receivers, who took the place of the Central, and shared in the lease during the receivership. The proceedings under which the receiver was appointed culminated in a sale of the property of the Central Railroad. Messrs. Ryan & Thomas, who purchased at this sale, claimed to have purchased, with all the other property, the interest in this lease. This, however, has been denied by Mr. Comer, who was one of the receivers of the Central Railroad & Banking Company; and these adverse claims are still unsettled. In the meantime the Georgia Railroad was operated by the Georgia Railroad Company. In their operations a large business was done with the Port Royal & Augusta Railway Company, which connected with the Georgia Railroad, and from this business grows this claim for traffic balances. The Georgia Railroad Company is not a corporation. It is only a name selected by the owners of the lease under which all the business pertaining to that lease is conducted. The practice was to submit monthly accounts to each of the owners of the lease, and to pay over to each one-half of the net results of the business of the month. When the annual rental became due, each owner of the lease paid its one-half of the entire annual rent into the hands of the Georgia Railroad Company, who paid it to the lessors. Since the sale of the Central Railroad & Banking Company, the Louisville & Nashville Railroad Company has paid the whole rental, and has received all the monthly profits. The petition filed by the Louisville & Nashville Railroad Company prays that the receiver be ordered to pay the balance due on traffic balances to the general manager of the Georgia Railroad Company. The prayer of the petition is resisted by Messrs. Ryan & Thomas, the purchasers of the Port Royal & Augusta Railway Company, who file a demurrer thereto.

The first question is as to the right of the Louisville & Nashville to prefer this petition. Assuming, for the sake of argument, that Messrs. Ryan & Thomas are the owners of one-half of interest in this lease, can the Louisville & Nashville Railroad Company maintain this petition? Were the petition presented by the Georgia Railroad Company, then, under the assumption we have made, we would have a suit by an association composed in part of Messrs. Thomas & Ryan against Messrs. Thomas & Ryan; that is, they would be plaintiffs and defendants in the same action. Under the law of South Carolina (Rev. St. § 1776), an unincorporated association may be sued and proceeded against by the name and style it is usually known, without naming the individual members. No pro-

vision of this character is made for suits by them. If, however, such were the case, it could not change the rule of law that the same person cannot be in the same right plaintiff as well as defendant. This being so, in what way could this claim be brought into court, and adjudicated, other than that adopted here? The main cause is on the equity side of the court. The proceeding, in effect, is one asking that a debt incurred with the manager of the business, the person to whom normally and by contract it would have been paid, be paid to it, to be accounted for, with all the other results of the business, in the mode provided by the standing agreement between the real owners of the property, the principals of this common agent.

The other objection to the granting of the prayer of the petition is that this is a debt due to the Georgia Railroad Company; that Messrs. Thomas & Ryan are part owners in the business conducted under that name, as owners of one-half the leasehold interest; and that, at the most, they can only be called upon to pay the one-half of the claim. As I understand it, the owners of this lease selected a common agent to manage and conduct the entire interest in the lease. This involved the management and conduct of a large and valuable business as common carriers over an important link in several through lines. The common agent, in the conduct of this business, received the earnings, and paid all current expenses. It accounted with its principals for all its receipts, and they were entitled to the net results. But, by the mutual agreement, all the earnings went first into the hands of the common agent, and the several interests of the principals therein did not arise until the accounts of the agent were made up, and the gross earnings had been used in meeting the current expenses. This being the case, no one of the owners could go to a debtor of the Georgia Railroad Company, and demand the one-half of the debt he owed. Such part owner did not have a several interest in that debt or the amount it represented. Under the contract between these owners, all earnings go to the common agent. It alone is authorized to receive and receipt for them. And, when so received, they are expended and accounted for. This being so, the receiver of the Port Royal & Augusta Railway Company was bound to pay over to the Georgia Railroad Company the traffic balances, and this obligation has, under the terms of sale, devolved upon the purchaser.

It has been assumed, for the purposes of this opinion, that Messrs. Thomas & Ryan are the owners of one-half this leasehold estate. The pleadings are not of a character to discuss and decide this question; nor is it now discussed or decided. Upon its determination other questions will arise, which may affect the payment of the money now claimed,—questions between the different owners of the leasehold estate and the equities existing between them. It is to be regretted that the pleadings are not in such shape as to justify a consideration of them. But the present proceeding presents but one class of questions: Did the receiver of the Port Royal & Augusta Railway owe the traffic balances claimed here in his transactions with the Georgia Railroad Company? What is the amount

of these balances? These seem not to be disputed. Then to whom must these be paid? In my opinion, they must be paid to the only person authorized to receive them, the Georgia Railroad Company.

It has been urged with much force that the agreement provides for the selection, by each part owner of the leasehold interest, of three commissioners annually; that there is no provision under which they can hold over; that there have been no commissioners appointed by both part owners for several years; and that the so-called "association" is *functus officio*. But in view of the disputed rights which exist, especially in view of the fact that the commissioners and chief executive officer in charge when the disputed point arose have been intrusted with a railroad of quasi public character, which must be kept a going concern, not only because the public interest required it, but because the very existence of the lease depended on it, it was the right and duty of the board to go on and preserve all interests for whom it may concern. Their administration of these trusts, thrust upon them by peculiar and unforeseen circumstances, can, and no doubt will, be criticised and examined hereafter. The demurrer is overruled, with leave to the respondents to answer over if so advised.

BEST et al. v. BRITISH & AMERICAN MORTG. CO.

(Circuit Court, E. D. North Carolina. April 1, 1897.)

1. USURY—COMMISSIONS.

When one negotiates a loan through a third party with a money lender, and the latter bona fide lends the money at a legal rate of interest, the contract is not made usurious merely because the intermediary charges the borrower with a heavy commission; the intermediary having no legal or established connection with the lender, as agent. *Whaley v. Mortgage Co.*, 20 C. C. A. 306, 74 Fed. 77, followed.

2. SAME—STIPULATION FOR.

A loan secured by a deed of trust is not rendered usurious by a provision in the deed that in case of sale under the deed the proceeds shall be applied to the payment of expenses of sale, including commissions and a counsel fee. Such a provision is in the nature of a penalty, and the court can determine, when it has taken the matter within its jurisdiction, to what extent the penalty can be enforced.

Shepherd & Busbee and W. R. Allen, for complainants.

R. O. Burton, for defendant.

SIMONTON, Circuit Judge. This case began in the superior court of Greene county, N. C., and has been removed into this court. The complaint is by B. J. and R. E. Best, brought in the first instance to restrain a sale under a trust deed executed to secure the British & American Mortgage Company for a loan made by it to the Bests. The charge is that the loan secured by the mortgage is usurious. The further purpose of the complaint is to redeem the mortgage debt so soon as this question of usurious interest is settled. The facts of the case are these: On 20th January, 1890, the complainants employed, by an instrument in writing, Messrs. Theo. Edwards and W. T. Dortch, who

reside in North Carolina, to obtain for them a loan of \$10,000, to be secured by a mortgage of real estate. The authority to these gentlemen is general. They are to negotiate the loan through any brokers, at a commission not exceeding 6 per cent., which is not to be considered as a part of the loan. The amount desired was \$10,000. Messrs. Dortch and Edwards employed as brokers for the purpose Messrs. Shattuck & Hoffman, of New Orleans. These brokers negotiated the loan with the British & American Mortgage Company, a foreign corporation, having an office in that city. The testimony shows that Shattuck & Hoffman do a general brokerage business, a part of which is the placing of loans on commission. The business of the mortgage company is the lending of money. The brokers were able to negotiate with the mortgage company for a loan of \$7,500 only, and not for \$10,000. With this the complainants were content. They then executed a deed of trust in the nature of a mortgage by way of indenture tripartite between themselves; Albert R. Shattuck, of New Orleans, trustee, and the British & American Mortgage Company as *cestui que trust*. This deed secures this loan of \$7,500 upon the tract of land described in the pleadings; the loan being evidenced by five notes, four of them being for \$750 each, dated 24th May, 1890, and due respectively on 1st days of November, 1890, 1891, 1892, 1893, and one note for \$4,500, dated the same day and due 1st November, 1894. With these also were five notes for interest,—one for \$233.35, due November 1, 1890; one for \$472.50, due November 1, 1891; one for \$420, due November 1, 1892; one for \$367.50, due November 1, 1893; and one for \$315, due November 1, 1894. These notes are calculated at the rate of 7 per cent. interest. The deed of trust provides that, in case the power of sale therein provided for be exercised, the proceeds of sale shall be applied—First, to the payment of the costs and expenses of executing the trust, including the commissions of the trustee, and 10 per cent. for the creditor's attorney fees in the event of litigation; next, to the payment of the unpaid part of the loan in full, the remainder to the grantor. The mortgage company paid to Shattuck & Hoffman, the brokers, \$7,500, who deducted their 6 per cent. commissions and remitted the remainder, \$7,050, to the Bests.

Is this a usurious contract? The crucial test in cases of this kind is, was the broker who negotiated the loan the agent of the lender? If in negotiating the loan he exacts a commission, either under direct instruction from his principal, or because of an understanding with the principal that he must look to the borrower for compensation, the transaction is tainted with usury. The circuit court of appeals of this circuit has established the law for us, in *Whaley v. Mortgage Co.*, 20 C. C. A. 310, 74 Fed. 77:

"There are three established principles of law on this subject, which are as follows: (1) There can be no doubt that when one negotiates a loan, through a third party, with a money lender, and the latter bona fide lends the money at a legal rate of interest, the contract is not made usurious merely by the fact that the intermediary charges the borrower with a heavy commission; the intermediary having no legal or established connection with the lender, as agent. *Fowler v. Trust Co.*, 141 U. S. 385, 12 Sup. Ct. 1; *Grant v. Insurance Co.*, 121 U. S. 105, 7 Sup. Ct. 841; *Call v. Palmer*, 116 U. S. 98, 6 Sup.

Ct. 301. (2) So, also, when an agent authorized to lend money for his principal exacts, without the knowledge or authority of such principal, money from the borrower for his own benefit, this does not make the contract usurious. *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. 301. (3) But when a lender authorizes his agent to make loans for him under a general arrangement that he must look to the borrower for his compensation, and such agent for the lender effects a loan, and charges the borrower a commission, this will make the contract usurious, whether the lender knew of the charge or not (*Fowler v. Trust Co.*, 141 U. S. 385, 12 Sup. Ct. 1), for this exaction is by the authority of the lender, the principal."

There are several suspicious circumstances in this case, which have been acutely discussed and clearly presented by the attorney for the complainants. But suspicious circumstances can only come in as aid to testimony. When they are met and contradicted by the evidence of witnesses whose characters are not attacked, they should not be allowed to overbear facts sworn to. As was said in *Mortgage Co. v. Whaley*, 63 Fed. 747, the testimony of witnesses, although their character has not been attacked, can be compared with testimony of other witnesses, and indeed with the admitted facts in the case, and may be overborne by them. When, however, it is proposed to contradict the direct testimony of unimpeached witnesses by inferences from facts, this result cannot be reached unless the existence of these facts and the natural inferences from them cannot be reconciled with the conclusion that the direct evidence is true. The two actors in this loan—Hoffman, the broker who negotiated it, and Rowland, the cashier of defendant, who made it—both swear distinctly and positively that the relation of principal and agent did not, in any sense, exist between Shattuck & Hoffman and the mortgage company. The former swears that he placed offers to loan with any lenders he could agree with,—many others besides this defendant, although he frequently did business with the defendant. Both swear that in this transaction he acted solely for the complainants, with no understanding or agreement with the mortgage company for anything else but the loan. It is true that the trust deed is in print, and that in it is printed the name of Shattuck as trustee, and of the mortgage company. This is a strong ground of suspicion, and would be conclusive were it not for the sworn facts that Shattuck & Hoffman did similar business with other well-known and large firms, did a very large business themselves, and frequent business with this mortgage company. It is true that this transaction is mentioned in the correspondence between the broker and the Bests as \$3,180. But there is nothing to show that this was not the private number of the brokers. Naturally they treated this as a transaction of their own, and for convenience gave it a number, especially as by the known custom of this business they superintended the collection of installments of interest. The transaction between English and the Bests was his own, and no connection whatever with it is shown on the part of the defendant. What was said of Jamisson is not important. He was shown the offer of the agents of the Bests to the brokers, and thought well of it, and he was a director in the company. The offer was shown to, and was approved by, the company. The evidence does not establish the charge of usury, from the fact that the brokers took a commission of 6 per cent.

Is the clause in the deed that, "in case of sale under the deed of trust, the proceeds shall be applied to the payment of expenses of sale, including commissions and a counsel fee" usurious?

This clause does not come into operation until there is a breach of the contract. The presumption is always that parties will observe and keep their contracts. At all events, this result is not certain. It is contingent. The contract otherwise being bona fide and not usurious, this uncertain provision should not change its character. *Canal Co. v. Vallette*, 21 How. 422. In *Spain v. Hamilton's Adm'r*, 1 Wall. 626, the court say, "The payment of anything additional depends also on a contingency, and not upon any happening of a certain event, which itself would be deemed insufficient to make a loan usurious." This question was made in an exception to the circuit decree in *Whaley v. Mortgage Co.*, 20 C. C. A. 306, 74 Fed. 77. And in the concluding part of the decision of the court was sustained in general words. A provision like this is in the nature of a penalty, and is enforced as such. As the court has taken this matter within its jurisdiction, it can determine to what extent the penalty can be enforced. The attorney's charges will be allowed, but no further commissions to the trustee. All actual expenses which he may have incurred are allowed him.

The conclusion of the whole matter is that this contract is not usurious. Let the clerk of this court, with the attendance and aid of the counsel for the parties in the cause, compute the amount now due, according to the tenor and effect of the contracts, and add thereto the 10 per cent. for attorney's fees, and such sums as for actual expenses which the trustee may have incurred in executing his trust, and then let a decree be prepared carrying out the principles of this opinion. Each party to the case to pay their or its own taxed costs in this court.

CALIFORNIA FRUIT TRANSP. CO. v. ANDERSON et al.

(Circuit Court, N. D. California. March 15, 1897.)

No. 12,222.

WIFE'S INTEREST IN HOMESTEAD—CONSIDERATION FOR MORTGAGE.

Under the California laws the wife has an interest in the homestead which requires a consideration for her agreement to convey or incumber it, and therefore her mortgage of the homestead to secure an antecedent debt of the husband is not binding on her.

Bill in equity to foreclose a mortgage executed by J. Z. Anderson, and joined in by his wife, Sallie E. Anderson. She demurred, on the ground that the property mortgaged was covered by a homestead, and she had received no consideration for her interest therein.

Purcell Rowe, for complainant.

S. F. Leib, for respondent Sallie E. Anderson.

MORROW, District Judge. This is a bill in equity to foreclose a mortgage executed by J. Z. Anderson, and joined in by his wife, Sallie

E. Anderson. While it does not appear affirmatively in the bill that the premises incumbered include homestead property, still that fact was conceded and assumed on the argument upon the demurrer filed by the respondent Sallie E. Anderson to the bill. She alone has demurred, and urges the following grounds:

"First. That said bill does not state facts sufficient to constitute a cause of action against said defendant.

"Second. That it appears from said bill that the notes and indebtedness for which the alleged mortgage therein mentioned was given to secure were the notes and indebtedness of J. Z. Anderson alone, and not in any way or to any extent the notes or indebtedness of this defendant; and it is not alleged, and it does not appear, that there was any consideration as to this defendant for the making or execution of said mortgage by her upon any of the interests owned or rights held by her in or to the property described in said mortgage, or in or to any part thereof.

"Third. That it appears from said bill that the said mortgage, as to this defendant, was made and executed by her without consideration, and hence cannot be enforced against her, or as against any interest in or right held by her in or to said property, or in or to any part thereof.

"Fourth. That it appears from said bill that there is a misjoinder of defendants herein, in this: that this defendant is improperly joined as a defendant in this action, because it appears from the allegations of said bill that no interest owned or right held by this defendant in or to any part of said lands can be sold or foreclosed in this action, because no mortgage was ever made or executed by her to said plaintiff and complainant upon any consideration."

The only question of law raised by the demurrer is whether the fact that Sallie E. Anderson executed the mortgage for the prior debts of her husband (she herself, so far as the bill discloses, having received no consideration) binds her. The mortgage upon the property in question was given to secure the California Fruit Transportation Company for the pre-existing debts of Mr. Anderson. The allegations of the bill clearly show that the mortgage signed by Mrs. Anderson was for the prior debts of her husband, for the payment of which she is not shown to have been in any way legally bound. So far as she was concerned, therefore, her agreement that her interest in the property covered by the homestead declaration be incumbered for her husband's prior debts was without consideration.

In the case of *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028, where a mortgage was given by the wife upon her separate property to secure her husband's antecedent debt, without any new consideration received either by the husband or the wife, or moving from the creditor, the mortgage was held to be not obligatory. The court in that case said:

"It follows that, in the execution of this mortgage, the defendant Neotia Browne undertook to assume and secure her husband's antecedent debt. 'No new consideration was given at the time it was executed. The wife received nothing. The husband received nothing. The creditor parted with nothing. The instrument was therefore no more than a collateral security given for an old debt of the husband' (*Bayler v. Com.*, 40 Pa. St. 37), and was not obligatory in the absence of a new consideration (*Civ. Code*, §§ 2792, 2831, 2844; *Bohm v. Hoffer*, 2 Colo. App. 146, 29 Pac. 905)."

It is contended on the part of the complainant that the authority just referred to is inapplicable to that of the case at bar, for the reason that that was a case which involved the separate property of the

wife, while the case at bar concerns the homestead property selected, so it is conceded, from the community property. But I am unable to distinguish the two cases, upon principle, so far as the wife's interest in the property mortgaged and the want of consideration to pass that interest are concerned.

Nor can I, in this connection, assent to the position taken by counsel for complainant that section 1242 of the Civil Code was intended simply to prescribe certain formalities relating to the transfer or incumbrance of homestead property. That section provides:

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

It has been held repeatedly that the homestead can be conveyed or incumbered only in the manner prescribed by law. *Lies v. De Diablar*, 12 Cal. 327; *Gee v. Moore*, 14 Cal. 472; *Guiod v. Guiod*, Id. 506; *McQuade v. Whaley*, 31 Cal. 526; *Flege v. Garvey*, 47 Cal. 371; *Houghton v. Lee*, 50 Cal. 101; *Hershey v. Dennis*, 53 Cal. 77; *Gagliardo v. Dumont*, 54 Cal. 496; *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551. This statute relates not only to the form and manner in which the homestead is to be conveyed or incumbered, but, in my opinion, recognizes the interest which the wife has in it. Whatever the laws and decisions of other states may be, and in whatever light the joint interests of both spouses in the homestead property may be regarded, yet, under the law and decisions of this state, it is regarded as substantially a joint tenancy. *Barber v. Babel*, 36 Cal. 11. As was said by Mr. Justice Field (then chief justice of the supreme court of this state), referring to the act of 1860, "the act changes the estate of the parties into a joint tenancy." *Cohen v. Davis*, 20 Cal. 195. See, also, *Burkett v. Burkett*, 78 Cal. 312, 20 Pac. 715; *Gleason v. Spray*, 81 Cal. 219, 22 Pac. 551; *Campbell v. Babcock*, 27 Wis. 512; *Adams v. Beale*, 19 Iowa, 67, 68.

In the case of *Trust Co. v. Kauffman*, 108 Cal. 220, 223, 41 Pac. 467, 468, the wife's interest in the homestead is spoken of as an "estate," and the court said:

"A declaration of homestead properly executed and acknowledged by a married man, when filed for record, immediately inures to the benefit of his wife, whether she is ignorant thereof or is fully acquainted with the transaction; nor does the fact that she is insane deprive her of its benefits, or give to the husband any greater interest in the estate, or authorize him to incumber it, except in the mode prescribed by statute."

Her interest is such that she may sue alone to maintain her right or claim to the homestead property. Code Civ. Proc. § 370, subd. 1; *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908. In the event of the homestead having been selected from the community property, it vests, on the death of either spouse, in the survivor. Civ. Code, § 1265. The homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife. Id. § 1243.

Under the laws of this state and the decisions construing such, I am of the opinion that the wife has an interest in the homestead, which requires a consideration for her agreement to convey or incumber it,

and that, as the bill in this case does not show that she received any consideration for her interest in the homestead which was mortgaged, the demurrer should be sustained; and it is so ordered.

UNITED STATES v. SAUNDERS.

(Circuit Court of Appeals, First Circuit. March 23, 1897.)

No. 198.

1. SUITS AGAINST UNITED STATES—SET-OFF.

Under the act of March 3, 1887 (24 Stat. 505, 506), providing for the bringing of suits against the United States, the court has power to render judgment in favor of the United States for any balance which may be found due them upon a set-off or counterclaim.

2. RECOVERY BY UNITED STATES OF MONEY PAID BY MISTAKE.

The rule applied that the United States have the right to recover moneys paid by the errors of their disbursing officers, as much where the error is one of law as of fact, provided only the moneys belong to the United States *ex æquo et bono*.

Appeal from the District Court of the United States for the District of Maine.

Albert W. Bradbury, U. S. Atty.

Geo. E. Bird, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. The appellee, who had been a marshal of the United States for the district of Maine, brought his petition in the district court for that district against the United States for \$360, now admitted to be due him for sundry attendances before commissioners of the circuit court. Under Act March 3, 1887, c. 359, §§ 1, 6 (24 Stat. 505, 506), entitled "An act to provide for the bringing of suits against the government of the United States," the United States filed a set-off and counterclaim for sundry payments made the petitioner by their disbursing officers, amounting to \$504, which payments, under the rule in *U. S. v. McMahon*, 164 U. S. 81, 17 Sup. Ct. 28,—decided after the judgment of the district court in this case,—were unauthorized. The record shows that there is no dispute as to the amount of these payments. The statute cited not only authorizes, by section 6, this defense, but it also, in section 1, confers jurisdiction to "hear and determine" set-offs and counterclaims; so that, although it does not expressly direct a judgment for the United States for a surplus, if one be found in their favor, yet it is to be presumed that it adopts the usual practice with reference thereto. Indeed, in *McElrath v. U. S.*, 102 U. S. 426, a judgment of the court of claims for a balance found due the United States on a defense of set-off, under section 1061 of the Revised Statutes, and reported in 12 Ct. Cl. 201, was affirmed; and the Revised Statutes expressly authorized such a judgment. Although the provisions of the Revised Statutes in regard to the prosecution of claims against the United States were to some extent repealed

by the act of March 3, 1887, yet the latter statute provided as follows:

"Sec. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt."

Therefore, in any view of the matter, we have no doubt of the power to render judgment in favor of the United States for any balance which may be found due them. The validity of the provision conferring jurisdiction to hear and determine such set-offs and counterclaims was, in effect, settled in *McElrath v. U. S.*, 102 U. S. 426, already cited. Whatever doubt may have existed under the earlier decisions of the supreme court as to the general right of the United States to recover moneys paid by the errors of their disbursing officers, as much where the error is one of law as of fact, provided only the moneys belong to the United States *ex æquo et bono*, was removed by *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 190, 212, 17 Sup. Ct. 45. This decision applies fully to the claims made by the United States in the case at bar. Whether under *Chase v. U. S.*, 155 U. S. 489, 15 Sup. Ct. 174, and *U. S. v. Ady*, 22 C. C. A. 223, 76 Fed. 359, this case should have been brought up on error, instead of by appeal, we are not called on to determine. The judgment of the district court is reversed, and the case is remanded to that court, with directions to enter a judgment for the United States on its set-off and counterclaim for the balance of \$156, without costs for either party.

McCLASKEY et al. v. BARR et al.

(Circuit Court, S. D. Ohio, W. D. March 27, 1897.)

1. BOND FOR COSTS—SUMMARY REMEDIES.

A rule of court prescribing the form of a bond, and providing that, when costs become due by default or otherwise, a judgment or decree may be entered therefor against the surety on motion and ten days' notice, is valid, as a surety is supposed to know the law, and consent to the proceedings for summary remedies by signing the bond.

2. SAME—SURETIES CONCLUDED BY DECREE AGAINST PRINCIPAL.

The sureties become voluntary parties to the suit, and are concluded by the decree for costs entered against their principals.

3. SAME—LIABILITY FOR COSTS ACCRUING BEFORE DATE OF BOND.

The bond covers costs accrued before the date of the bond, as well as those accruing after its execution.

4. SAME—LIBERAL CONSTRUCTION OF STATUTE.

Statutes requiring security for costs, being remedial in their nature, are to be liberally construed to effectuate that object.

5. SAME—LIABILITY FOR COSTS ON APPEAL.

A bond executed in the trial court to secure "costs in this case" covers costs on appeal.

6. SAME—LIABILITY FOR COSTS ACCRUING AFTER SURETY'S DEATH.

Liability upon the bond does not terminate with the surety's death, but his estate continues liable for costs accruing after his death as well as before, though the language of the bond is, "I hereby acknowledge myself security for costs."

7. SAME—EFFECT OF EXECUTION OF NEW BOND.

The giving of an additional bond after the death of the surety in the original bond does not discharge the estate of the surety in the old bond.

8. ADMINISTRATORS—TERMINATION OF TRUST.

An administrator is not discharged from his trust until full administration is accomplished, and therefore an administrator was not discharged by filing in the probate court a written statement under oath that no assets had ever come into his hands as administrator, and that no claim of any kind had ever been presented to him, excepting such as had been fully paid by the widow, and that, having received no funds as administrator, and having paid out nothing, he filed the statement under oath as his final account as administrator and for the discharge of his trust.

9. ADMINISTRATOR OF SURETY IN COST BOND—PRESENTATION OF CLAIM FOR COSTS.

Before instituting summary proceedings against the administrator of a surety, it is not necessary to make presentation of the claim, as the surety, by executing the cost bond, became a party to the suit, and consented to the summary method of enforcing his liability.

10. LIMITATION—TIME WHEN LIABILITY UPON BOND FOR COSTS ACCRUES.

Liability upon a cost bond does not accrue until the decree for costs is entered, and limitation runs only from that date.

11. SAME—LIMITATION OF PROCEEDINGS AGAINST ADMINISTRATORS.

Under the Ohio statute fixing the limitation for suits against an administrator at four years from the giving of bond, with the proviso that "no cause of action against any executor or administrator shall be adjudged barred by lapse of time until the expiration of one year from the time of the accruing thereof," a proceeding against the administrator of a surety in a bond for costs, instituted within one year after the decree for costs was entered, was not barred.

12. SAME—PARTIES TO MOTION.

To a motion for judgment upon a bond for costs the surety in which was dead, it was proper to make the administrator of the surety, and the distributee and heir, parties, as the estate of the surety, although it had passed into the hands of the heir and distributee, had not been fully settled.

13. JUDGMENT AGAINST ADMINISTRATOR—COSTS.

Where the estate of an intestate, although it had passed into the hands of the heir and distributee, had not been fully settled, judgment against the administrator was the proper proceeding, and not judgment against the heir and distributee as provided by Rev. St. Ohio, §§ 6217, 6218.

14. COSTS—JOINT OBLIGORS—SURVIVORSHIP.

The surety in an original bond for costs, and an additional surety, who became bound after his death, were not joint obligors; and the claim that the death of the old surety terminated his liability at law by reason of the doctrine of survivorship, and that, the remedy at law being gone, equity would not afford relief against the surety, has no foundation in law or in fact.

15. SAME.

The doctrine of survivorship having been abolished in Ohio, the death of one of two joint obligors does not terminate his liability.

16. SURETIES—COST BOND.

The sureties in a bond for costs are liable to judgment without the property of the principal being first exhausted.

Charles W. Baker and John W. Herron, for sureties.

Bateman & Harper, and Stephens & Lincoln, for defendants in possession.

SAGE, District Judge. The defendants William Henry Elder and other defendants in possession move the court to enter up judgment against James S. White, Howard Ferris, administrator of Samuel Cooper, deceased, and Hannah Cooper Fewlass, sureties for

costs in the above-entitled cause. The obligations of these several parties are as follows:

On the 19th of October, 1889, James S. White, with Benjamin M. Stewart, signed upon the printed form of cost bond used in this court an obligation as follows: "I hereby acknowledge myself security for costs in this case, on behalf of Robert Eldridge, W. S. Thurston, and Arnold McMahon,"—at the same time qualifying in the sum of \$10,000. On the same day he signed another cost bond as follows: "I hereby acknowledge myself security for costs in this case on behalf of Samuel Barr, Robert Barr, et al." This, also, was signed with Benjamin M. Stewart, and accompanied by an affidavit that he was worth \$10,000 in real estate within the jurisdiction of the court, and subject to execution, levy, and sale.

Samuel Cooper, on the 15th of September, 1887, signed a cost bond as follows: "I hereby acknowledge myself security for costs in this case,"—and the same day qualified in the sum of \$10,000. Each one of these bonds was under the title and number of the case. Samuel Cooper died on or about the 30th day of August, 1888, intestate and without issue, leaving his widow, Hannah Cooper, now Hannah Cooper Fewlass, his sole heir and distributee. At the time of his death he was owner of a large amount of personal property and real estate in Hamilton county, Ohio. About September 11, 1888, Howard Ferris was duly appointed by the probate court of said county administrator of his estate, gave bond as required by law, and entered upon the discharge of his duties. He has never resigned or been discharged. All the personal property and real estate of which Samuel Cooper died seised passed into the possession of his widow, now Hannah Cooper Fewlass, and she is still possessed of the real estate. The claim of the moving parties is that the costs secured in this case are a lien upon the estate of Samuel Cooper, including all the real estate of which he died possessed.

James S. White and Benjamin M. Stewart, for plea to the citations served on them, admit that on the 19th of October, 1889, they became sureties,—on one bond on the cross petition filed at that date by Samuel Barr and Robert Barr et al., and on one bond on the cross petition filed on that date by Robert Eldridge, W. S. Thurston, and Arnold McMahon. They severally aver that their liability under said bonds covers only the actual costs accruing after the date of filing said cross petitions and made thereon, and not for the general costs incurred under the original bill. They also severally aver that the costs taxed and claimed against them embrace large items for which they are in no way liable.

They deny liability for the costs incurred in the circuit court of appeals, as they did not sign the bonds for appeal in said cause. Further, they severally aver that Robert Eldridge, W. S. Thurston, and Arnold McMahon, for whom they became sureties on one of said bonds, live within the jurisdiction of this court, and are solvent; that execution has been issued against them for said costs, and levied on real estate belonging to them; that Thurston has paid part of the costs for which he is liable, and is able to pay the en-

tire amount of the same, and said costs can be collected from him by the process of this court.

They further aver that the complainants on the cross petition of Samuel Barr and Robert Barr and others are, or some of them are, solvent, and the costs incurred on said cross petitions can be collected by proceedings against them. They therefore pray that the defendants be required first to exhaust the principals for whom they are sureties before any decree be rendered against them in this matter, and for other and proper relief in the premises.

Howard Ferris, for plea to the notice of said motion served upon him, denies that he is administrator of Samuel Cooper, deceased; avers that he ceased so to be on the 23d day of March, 1892, and that on that day the estate was settled, and on the 31st of March, 1892, the costs of the estate were paid, and that he then and from that time ceased to be the administrator of said estate, or to be in any way connected with it; that he fully accounted under the statute as administrator, fully executed his trust, and has no money or property in his hands belonging to the estate, nor has he had at any time since March 23, 1892.

He further pleads that no claim was presented to him for allowance because of costs or otherwise, and that more than four years have elapsed since he gave bond as administrator, and since due notice of his appointment as such was given to all parties interested in this case, and that the claim is barred by the statute of limitations.

Hannah Cooper Fewlass, for plea to the notice to her, sets up that the estate of Samuel Cooper was long since settled and the property distributed, that no claim concerning the subject-matter of said notice was ever presented to the estate, and that any such claim was long since barred by the statute of limitations. She further pleads that she never signed any such bond, and is not liable thereon, because she denies the jurisdiction of this court to in any way require her to answer or respond by reason of any of the matters set out in the notice, or to in any way authorize or permit any proceedings against her.

Howard Ferris, as administrator, pleads to the notice to surety served on him that he long since ceased to be the administrator of Samuel Cooper, deceased, having under the statute fully executed his trust and accounted for said estate; also, that the claim now made was never presented to him as administrator, and that it was long since barred by the statute of limitations.

The decree as to costs was entered October 24, 1895, nunc pro tunc as of October 25, 1894, at which date it was ordered. The entire amount is \$19,803, of which \$3,823.32 are costs in the United States circuit court of appeals, leaving \$15,979.68 as the costs of this court. Notices were issued to James S. White on the 8th day of April, 1896, that the motions for judgment would be called up for hearing on Tuesday, the 5th of May, 1896. Notices to Howard Ferris as administrator, and to Hannah Cooper Fewlass as sole heir of Samuel Cooper and sole distributee of his estate, were issued on the 13th day of April, 1896, that on Tuesday, the 12th day of May, the motions for judgment would be brought on for hearing. Executions were issued against

Benjamin S. Stewart on the 9th of May, 1896, judgments having been taken against him prior to that date. They were returned, "No goods, chattels, lands, or tenements found whereon to levy." Rule 9 of this court provides that in all cases the clerks shall require an indorsement for costs, and that the following form upon the præcipe shall be sufficient: "I, A. B., acknowledge myself security for all costs for which the plaintiff may be liable in this suit." The rule also provides that, when such costs shall become due by default or otherwise, a judgment or decree may be entered therefor against the surety on motion and 10 days' notice. This, with other rules, is printed in 2 Bond, 433,¹ and will be found upon page 82 of the printed rules of the court. The rules are authorized by Rev. St. U. S. § 918 and equity rule 89. It has been held that a surety is supposed to know the law, and consent to the proceedings for summary remedies by signing the bond. Also, that such regulations are valid. *Beall v. New Mexico*, 16 Wall. 535, 539, 540; *Moore v. Huntington*, 17 Wall. 417, 422, 423; *Johnson v. Elevator Co.*, 119 U. S. 388, 400, 401, 7 Sup. Ct. 254. It is not necessary to cite authorities in support of the right and duty of the court to proceed summarily in this case. Neither was denied on the hearing. The sole defense was upon the special facts relating to the case of each person sought to be charged.

Coming, then, first, to the case of *James S. White*, the plea for answer presents—First, the question whether his bonds cover costs accrued before the date of the bonds; second, whether they cover costs on appeal; third, whether they cover costs on the bill; fourth, whether the moving defendants must first exhaust all remedies against the principals. The decree for costs entered against *Samuel Barr et al.* on the 24th of October, 1895, amounted to \$18,248.58. The decree for costs against *Robert Eldridge et al.*, entered the same day, amounted to \$18,171.53. That those decrees are conclusive against the sureties as to the fact and the amount of their liability, and as to the questions that might have been raised or made by the principals, is fully attested by the following authorities:

In *Moore v. Huntington*, 17 Wall. 417, the supreme court said, at page 423, that sureties on an appeal bond, by the act of signing the bond, became voluntary parties to the suit, and thereby subjected themselves to the decree of the court. The general doctrine is stated in *Brandt on Suretyship* to be that the surety is concluded, in the absence of collusion or fraud, by the judgment against the principal, even as to the amount of the debt. This doctrine was referred to by the supreme court of Ohio in *Braiden v. Mercer*, 44 Ohio St. 339, 7 N. E. 155, as "an established principle," and in *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. 381, as "the settled law of the state"; the surety being in privity with the principal. It was applied in *Sted-*

¹ Rule 9 is as follows:

"Security for costs. In all cases, the clerk shall require an indorser for costs. The following form upon the præcipe, or writ, shall be sufficient: 'I, A. B., acknowledge myself security, for all costs for which the plaintiff may be liable in this suit.' And when such costs shall become due, by default or otherwise, a judgment or decree may be entered therefor against the security on motion and ten days' notice."

man v. Ingraham, 22 Vt. 346, to a surety for costs, and upheld in Parkhurst v. Sumner, 23 Vt. 539. In Nolly v. Squire, 1 Hill (S. C.) 41, the supreme court of South Carolina held that the surety for costs, by signing the bond, became a party to the record, and was as effectually bound by the judgment of the court as if he had been a party to the suit. Quite as distinct and emphatic is the ruling by the supreme court of Massachusetts in Way v. Lewis, 115 Mass. 26, and in Cutter v. Evans, Id. 27. In Gaines v. Travis, Abb. Adm. 422, Fed. Cas. No. 5,180, the district court of the Southern district of New York held that, under the rule promulgated by the supreme court (see rule 10, subd. 8), execution properly issues against stipulators, summarily, upon the decree rendered against their principals; the stipulation being regarded as a submission by the stipulator to such decree as may be rendered against the party for whom he is bound. This case is cited in U. S. v. Seven Barrels of Distilled Oil, Fed. Cas. No. 16,253. Equity rule 89 is sufficient authority for the rule of this court under which the cost bond was taken. See, also, admiralty rule 3. It results from these authorities that the sureties are concluded by the decree for costs entered against their principals.

The next question is whether the sureties are bound for costs accruing before the date of their bonds. The bonds were signed October 19, 1889. The case was removed from the state court to this court April 5, 1887. The bonds are "for costs in this case." In Sawyer v. Williams, 72 Fed. 296, where the surety was bound "for costs and fees in" the case, he was held liable, under the rules of the court, upon judgment rendered against his principal for the costs accrued in the state court before the removal, as well as for the costs in the federal court. The cost bond in that case was signed after the removal to the federal court. The rules referred to do not differ in substance, as to the surety, from the rule in this court. In Wilson v. Hudspeth, 3 Dev. 57, the condition of the bond was that the surety should pay "all the costs." It was held that he was liable for costs accrued before the date of the bond, as well as those subsequent. The addition of the word "all" makes no material difference. The cost bond includes costs prior to, as well as those subsequent to, the signing of the bond.

The next question is, do the bonds cover costs on the appeal? It was so held in Dunn v. Sutliff, 1 Mich. 24, where it was decided that the surety for costs in the justice's court was liable for costs in the appellate court. The court said that the surety, when he became such, was fully advised that the judgment of the justice was not conclusive, and that the case might be reviewed upon appeal, which was in the nature of a new trial; and that the same reasons which required security for costs in the justice's court applied with equal force to the costs recoverable upon the appeal. So in Robinson v. Plimpton, 25 N. Y. 484, the court of appeals made a similar ruling, citing several prior cases decided in New York. In Smith v. Lockwood, 34 Wis. 72, it was held that statutes requiring surety for costs are remedial, and to be liberally construed; also, that a surety for costs in a justice's court was liable for costs in the circuit court. Referring to the doctrine that the obligation of the surety is *strictissimi*

juris, which might be supposed to have led to a strict construction in favor of the surety, the court said that that point was explained by reason of the presence and operation of another rule or principle, which countervails that alluded to, which is that statutes requiring security to be given for costs, being remedial in their nature, are to be liberally construed to effectuate that object. The statute referred to required the plaintiff to give security "for the costs," and provided for the dismissal of the action upon his failure to do so. There was no provision defining the extent of the surety's liability. In *Martin v. Kelly*, 59 Miss. 664, 665, it was held that the surety for costs was liable for the costs accrued in the appellate court, "to which defendants below were compelled to resort to free themselves from the erroneous decree against them, which the complainant was enabled to obtain by means of the security for costs, but for which this case would have been dismissed." In *Hendricks v. Carson*, 97 Ind. 245, it was held that a bond for costs given in the court below covered the costs on appeal to the supreme court. The statute in that case required security "for the payment of all costs which may accrue in the action." The court held that the case in the supreme court was the same action that had been commenced in the circuit court; that the proceedings in the supreme court were a regular part of legal proceedings in the action, and the costs accruing thereon were a part of the costs legitimately accruing in the action; and that it was within the letter and spirit of the statute to hold that the bond of a nonresident plaintiff for costs, filed in the circuit court, covers costs that accrued in the supreme court on an appeal.

There is no substantial difference between the form of the bond in that case, and the bonds under consideration, for "costs in this case." The surety must be held liable for the costs upon appeal. The bond in one case is on behalf of Samuel Barr and Robert Barr et al.; in the other case, on behalf of Robert Eldridge et al. The decree entered against Samuel Barr et al. was for \$18,248.58, and the decree against Robert Eldridge et al. for costs was for \$18,171.53. These decrees cover in the main the same items, and the decree against White will be in accordance with the decrees made against his principals, as above stated.

We come, now, to the case of Samuel Cooper's estate and of Mrs. Fewlass. The liability upon the bond given by Samuel Cooper, which has already been referred to, did not terminate with his death, but his estate continued to be liable, after his death, for costs which accrued thereafter as well as theretofore. This was decided by the supreme court in *Broome v. U. S.*, 15 How. 143. There the surety upon the bond of a collector in Florida died upon the 24th of July, and the approval of the comptroller was not written upon the bond until the 31st of July. It was held that it was properly left to the jury to ascertain the time when the collector and his sureties parted with the bond, to be sent to Washington, and they were instructed that, before they could find a verdict for the surety, they must be satisfied from the evidence that the bond remained in the hands of the collector, or the surety, until after the 24th of July. In *U. S. v. Keiver*, 56 Fed. 422, the United States

circuit court for the Western district of Wisconsin held that the obligation of a surety on a bail bond is a continuing one, and binds his estate after his death. In *Lloyd's v. Harper*, 16 Ch. Div. 290, a father, on the occasion of the admission of his son as an underwriting member of Lloyd's, addressed to the managing committee of that body a letter by which he held himself responsible for all his son's engagements in that capacity. Held, that the guaranty was not determined by the death of the father, or by the notice of it, but that his estate was liable in respect of engagements contracted by the son after his death. Also, that a guaranty consideration, given once for all, cannot be determined by the guarantor, and does not cease on his death.

In *Green v. Young*, 8 Greenl. 14, it was held that the liability of a surety in a bond conditioned for the official good conduct of a deputy sheriff during his continuance in office extended as well to defaults committed after, as to those committed before, the death of the surety. The court, in answer to the plea of counsel for the defendant that the liability of the intestate was confined to breaches accruing in his lifetime, said that that limitation was not to be found in the instrument, that the plaintiff had the right to repose on the solvency and sufficiency of the surety, and that, if his security in regard to future breaches ceased upon the death of the surety, he might suffer, however vigilant, because he might incur severe responsibilities arising from subsequent breaches before he could be advised of the death of the surety. In *Voris v. State*, 47 Ind. 345, it was decided that the estate of a surety upon a guardian's bond is liable after the death of the guardian which occurred subsequent to the death of the surety. In *Moore v. Wallis*, 18 Ala. 458, the liability incurred by the surety on a guardianship bond is not discharged by his death, but continues for the full term of the guardianship. In *Turquand v. Kirby*, L. R. 4 Eq. 123, the question to be decided was, where stock was in the name of a deceased person, but was really the property of another, who was the beneficial owner? It was held that the estate of the deceased was liable for calls subsequent to his death. Lord Romilly said that it was true that the debt did not exist when the testator died, but in that respect it did not differ from the cases where a testator had in his lifetime become surety for the due performance of a covenant which was broken many years after his death.

It follows from these cases that the liability of Cooper's estate continued after his death. It appears that after his death additional security was given, but there was no step taken towards obtaining the release of the estate from the obligation of the bond, and the surety of the additional stipulation is insolvent. Moreover, he qualified for only half the amount for which Cooper qualified. It has been held that the court cannot release a surety for costs without the consent of the party for whose benefit he became surety. *Holder v. Jones*, 7 Ired. 191; *Publishing Co. v. Bartlett*, 5 Wkly. Law Bul. 501. It has been repeatedly held that the liability of a surety on a bond given by an employé to secure the faithful discharge of his debts cannot be terminated on notice by executor

of the surety after his death, although the employé was liable to discharge at any moment. *Calvert v. Gordon*, 3 Man. & R. 124. See, also, *Calvert v. Gordon*, 7 Barn. & C. 809, 812, and *Gordon v. Calvert*, 4 Russ. 581, before the chancellor on appeal. In this last case it appeared that, in consequence of the notice from the executrix of the surety that she would no longer be liable, the employers of the principal required him to give an additional bond; but the lord chancellor called attention to the fact that, as *Gordon's* executrix was only liable to the extent of assets, it was necessary to require additional security, and that the old surety was not thereby discharged. That ruling is exactly in point upon the facts in this case.

It appears from the transcript of proceedings of the probate court of Hamilton county in the matter of the estate of Samuel Cooper, that the administrator, on the 23d of March, 1892, filed a statement in writing under oath that no assets had ever come into his hands as administrator; that no claim of any kind had ever been presented to him, excepting such as had been fully paid by Cooper's widow; also, that, having received no funds as administrator, and having paid out nothing, he filed the statement under oath as his final account as administrator, and for the discharge of his trust. This was supported by the affidavit of Mrs. Fewlass. The filing of that statement was the last thing done in the matter of the estate. The record of proceedings in regard to the estate shows that, excepting the appointment of the administrator, his giving bond and notice, the taking of an inventory of the partnerships in which he was interested, and an inventory of his personal estate, the initiation of proceedings—never completed—to settle the affairs of the partnerships, and the filing of the sworn statement which is designated the "final account," nothing has been done. The probate court made no order upon the affidavit and statement filed on the 23d of March, 1892. Even if it had made the order for a discharge which was asked, it would have been ineffectual, as was held in *Weyer v. Watt*, 48 Ohio St. 545, 28 N. E. 670, where the supreme court said that they found no power conferred upon the probate court to discharge an executor or to extinguish his authority as trustee, and that, unless the authority of the executor or administrator be terminated according to the provisions of the statute, "it is his duty to continue the administration of the estate until it shall be entirely settled." Further on the court said:

"Full administration is accomplished only when all the assets have been converted into money, the proceeds applied to the payment of the debts, and the balance, if any, distributed to the legatees or other proper distributees, unless a different disposition of specific property is made by the will."

In *Farran v. Robinson*, 17 Ohio St. 242, it was held that:

"Where an administrator has made settlement, believed by him to be final, of the estate of his intestate, and the personality of the estate has been exhausted in the payment of debts, and of statutory allowances to the widow, and afterwards an action is brought against the administrator on a liability contracted by the intestate, resulting, though contested in good faith and with due diligence, in a judgment against the administrator, such judgment, remaining unreversed and unsatisfied, is conclusive evidence of indebtedness against

the estate, and cannot be collaterally impeached for mere error. In such case the administrator is entitled to an order for the sale of so much of the real estate of which the intestate died seised as may be necessary to satisfy the judgment, although such real estate may have been partitioned among the heirs of the intestate, and by them sold and conveyed wholly or in part to purchasers thereof."

Presentation to the administrator of the claim for costs now sought to be enforced is not necessary, for, when Cooper became surety for costs, he thereby consented to the summary method resorted to in this case of enforcing his liability. *Moore v. Huntington*, 17 Wall. 417, 422, 423; *Johnson v. Elevator Co.*, 119 U. S. 388-400, 401, 7 Sup. Ct. 254; Sup. Ct. Equity Rule 10; *Chappee v. Thomas*, 5 Mich. 53, 59, 60; *Davidson v. Farrell*, 8 Minn. 258, 262-264 (Gil. 225). Also, for the reason that the surety, by executing the cost bond, became a party to the suit. In *Moore v. Huntington*, 17 Wall. 422, 423, Mr. Justice Miller, announcing the opinion of the supreme court, said that sureties on appeal and writ of error bonds, by the act of signing the bonds, "become voluntarily parties to the suit, and subject themselves thereby to the decree of the court." See, also, *Blossom v. Railroad Co.*, 1 Wall. 655, 656; *Loh v. Judge*, 26 Mich. 186-188. It was held in *Musser's Ex'r v. Chase*, 29 Ohio St. 577-586, that bringing in the administrator is simply a revival of a pending suit, and prior presentation of a claim to him is unnecessary. See 6 Bac. Abr. p. 112 et seq., and *Gordon v. Bank*, 6 C. C. A. 125, 56 Fed. 790, 793, for authority that the proceeding is analogous to that of scire facias at common law. In *Gager v. Prout*, 48 Ohio St. 89, 26 N. E. 1013, additions had been made by the county auditor to the returns for taxation of a deceased person, on notice to the executor, and it was contended that there was no valid presentation of the claim by the treasurer to the executor for allowance. As to this the court answered that the treasurer to whom the return had been made was not required to formally present the amount of the taxes for allowance before bringing suit for the same.

It is further contended that the claim is barred by the statute of limitations. The statutory limitation for suits against an administrator, excepting in certain cases not pertinent to the question now before the court, is four years from the giving of bond, provided that any creditor whose cause of action shall accrue or shall have accrued after the expiration of the four years and before the estate is fully administered may commence and prosecute such action at any time within one year after the accruing thereof and before such estate shall have been fully administered, "and no cause of action against any executor or administrator shall be adjudged barred by lapse of time until the expiration of one year from the time of the accruing thereof." It has already been shown that the estate of Samuel Cooper has not yet been fully administered. The cause of action now asserted did not accrue until more than four years from the giving of bond; that is, not until the decree for costs was entered on October 24, 1895. Until then the liability of the complainants and cross complainants for costs was not ascertained or decreed,

and prior to such ascertainment or decree no proceeding could have been maintained upon Cooper's bonds. The supreme court of Ohio in *Newton v. Hammond*, 38 Ohio St. 430, decided that "a right of action on a guardian's bond to recover from the sureties the amount remaining in the hands of the guardian first accrues to the ward when such amount is ascertained by the probate court on the settlement of the guardian's final account." The supreme court of Wisconsin in *Mann v. Everts*, 64 Wis. 372, 25 N. W. 209, decided that a contingent claim against the estate of a decedent, which does not accrue and cannot be proven until after the administration is closed and the estate distributed, is not barred because not presented to the probate court for allowance. In that case the breach of the bond did not occur until nearly 10 years after the estate had been fully administered. This proceeding was instituted on the 13th of April, 1896, which was within six months of the decree for costs.

It was proper to make the administrator and the distributee and heir parties to this application. In *Moore v. Wallis*, 18 Ala. 458, it was held that where a ward, after the death and distribution of the estate of a surety on a guardian's bond, obtained a decree against the guardian upon which execution was issued and returned "No property," a court of equity would entertain jurisdiction of a bill filed by the ward against the personal and legal representatives of the deceased surety to enforce satisfaction of the demand. See, also, *Turquand v. Kirby*, hereinbefore cited and quoted from. A decree should be entered against the administrator, to be made out of the estate of the decedent.

The legislature of Ohio has provided, by sections 6217, 6218, for judgment in such a case as this against the distributees and heirs, after the settlement of an estate by an executor and administrator, for "an amount not exceeding the value whether of real or personal estate, that he or she shall have received under the will, or by the distribution of the estate of the deceased."

The judgment against the administrator would have the same effect, and is the proper proceeding in this case, inasmuch as the estate has not been fully settled, although it has passed into the possession of Mrs. Fewlass as sole heir and distributee.

The contention on her behalf that the estate is released from liability because Cooper and Nagel (the surety who became such after his death) were joint obligors, and that the death of Cooper terminated his liability at law by reason of the doctrine of survivorship, and, further, that, the remedy at law being gone, equity would not afford relief against the surety, has no foundation in law or in fact. They were not joint obligors, and, if they were, the doctrine of survivorship was abolished in Ohio by statute in 1840, and has never since been recognized. Section 210, *Swan's St. Ohio 1841*; *Burgoyne v. Trust Co.*, 5 Ohio St. 586.

The further contention that the terms of the obligation, "I hereby acknowledge myself security for costs," limited the obligation to Cooper's life, and that, if he had meant to extend its duration be-

yond that limitation, he would have added, after "myself," "my executors and administrators," is without foundation in law. In 3 Williams, Ex'rs, 224, the rule is thus stated:

"The executors or administrators so completely represent their testator or intestate, with respect to the liability above mentioned [bonds, etc.], that every bond or covenant or contract of the deceased includes them, although they are not named in the terms of it; for the executors or administrators of every person are implied in 'himself.'"

The language, "hereby hold myself responsible," was construed, in *Lloyd's v. Harper*, cited above, to cover defaults accruing after the surety's death.

Lastly, it was contended that the moving defendants were bound to exhaust their remedies against the principals before proceeding against the sureties. This proposition was negatived by the supreme court of the United States in *Babbitt v. Finn*, 101 U. S. 7-14, where a similar contention was made. "Without more, the condition of the bond is a sufficient answer to that defense, as it stipulates that if he, the principal, fails to make his plea good, the obligors, principal, and sureties shall answer all damages and costs, which is quite enough to show that it was not necessary that an execution should be sued out on the judgment before a right of action would accrue to the judgment creditors to enforce their remedy on the bond. As between the obligors and obligees, all the obligors are principal debtors, though as between each other they may have the rights and remedies resulting from the relation of principal and surety." In *Smith v. Gaines*, 93 U. S. 341, the supreme court declared that at common law the sureties on an appeal bond were liable to a suit without the first issuing of an execution against the principal. In *Davis v. Patrick*, 6 C. C. A. 632, 57 Fed. 909, the circuit court of appeals of the Eighth circuit held that sureties on a supersedeas bond were not entitled to have a suit on the bond stayed until the attached lands of the principal should be sold and such security exhausted. In *Woodward v. Peabody*, 39 N. H. 189, the supreme court of that state decided that, where a defendant obtains judgment for costs against the plaintiff, the indorser of the plaintiff's original writ becomes immediately liable to pay such costs, and scire facias may at once be maintained against him without suing out execution upon the judgment. To the same effect is the ruling in *Gaines v. Travis*, Abb. Adm. 422, Fed. Cas. No. 5,180. See page 1063, 9 Fed. Cas. There the court said that the surety, if admonished or cited by sci. fa., could not be permitted to invoke prior execution upon the property of his principal. In the light of these authorities it must be held that the sureties are liable to judgment without the property of the principal being first exhausted. The judgments will, in the several cases, be for the amount of costs adjudged against the principals.

UNION GUARANTY & TRUST CO. v. ROBINSON.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 855.

1. BONDS—SIGNATURE OF CORPORATION.

It makes no difference in what form an obligor signs a bond, if it appears that the purpose was to bind himself. And where the name of a corporation, the principal in a bond, appeared in full in the body of the bond, and its seal was impressed opposite the attestation clause, between the obligatory part and the condition, and at the close of the whole instrument the names of the president and secretary were signed, this being its customary method of executing sealed instruments, it is binding; and the surety cannot complain that the bond was not executed by the principal, especially where it recognized the signature as sufficient by signing right below it.

2. INSURANCE—INDEMNITY BOND—ACTION BY BENEFICIARY.

Under Sand. & H. Dig. Ark. § 4133, a bond executed by an insurance company to indemnify policy holders, though by its terms made to the state of Arkansas, is for the use and benefit of the beneficiaries in the policies of insurance issued in that state, and any such beneficiary can maintain an action for breach of the condition of the bond.

3. AGENTS—HARMLESS ERROR.

The authority of an agent cannot be shown by proof of his admissions, but such proof is not prejudicial where the agency in question is abundantly proved in other ways.

4. PRINCIPAL AND SURETY—EFFECT OF JUDGMENT AGAINST PRINCIPAL.

A judgment against an insurance company on a policy of insurance is, if not collusive, prima facie evidence against the surety in a bond executed by the company to indemnify policy holders.

5. INSURANCE—BOND TO INDEMNIFY POLICY HOLDERS—MEASURE OF DAMAGES.

Where the plaintiff in a judgment against an insurance company upon a policy of insurance sues on a bond executed by the company to indemnify policy holders, the proper measure of damages is the amount of the judgment, including the costs, and interest thereon.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action at law brought by Minnie Robinson against the Union Guaranty & Trust Company upon a bond executed by the United States Mutual Accident Association as principal, and the Union Guaranty & Trust Company as surety. In accordance with the verdict of a jury, judgment was entered for plaintiff, and defendant brought this writ of error.

On May 30, 1891, the United States Mutual Accident Association of the City of New York, by its policy of that date, under its seal, and signed by Charles B. Peet, president, and James R. Pitcher, secretary, of said association, in consideration of the membership fee and the warranties and agreements contained in his application for membership, accepted Emile O. Moore, of Helena, in the state of Arkansas, and insured him against personal bodily injuries from external, violent, and accidental means, subject to conditions attached to said policy, at specified rates as to the described injuries; and in case of death from such injuries alone, and within 90 days, said association agreed to pay \$5,000 to beneficiaries named in said policy. Said Emile O. Moore died at Helena, Ark., February 16, 1893, and the defendant in error here, claiming that she had been substituted as the beneficiary under said policy in case of the death of the assured, and that the assured came to his death by external, violent, and accidental means, commenced an action upon said policy against said United States Mutual Accident Association in the United States circuit court for the Eastern district of Missouri, in which action said association duly appeared and answered; and such proceedings were

duly had therein that upon the trial of such action, and on the 20th day of May, 1895, the said Minnie Robinson duly recovered judgment in said circuit court against the United States Mutual Accident Association of New York aforesaid for her damages, \$5,379.16, and costs, taxed at \$216.52. 68 Fed. 825. To enable the said United States Mutual Accident Association to transact any business in the state of Arkansas, and in compliance with the statutory enactment of that state, the said United States Mutual Accident Association, as principal, and the Union Guaranty & Trust Company, the plaintiff in error here, as surety, on the 4th day of June, 1893, executed their joint bond, whereby they became bound to the state of Arkansas in the sum of \$20,000, reciting that the said Mutual Accident Association proposed to transact the business of accident insurance in that state for one year from that date, and conditioned that it should promptly pay all claims arising and accruing to any person or persons during said term by virtue of any policy issued by the company, when the same should become due. Said bond was approved and filed with the auditor of said state of Arkansas. The said Mutual Accident Association failing to pay said judgment, the defendant in error commenced this action against the plaintiff in error, as surety upon said bond; and upon the trial, and in accordance with the verdict of the jury, judgment was rendered in favor of the defendant in error for the amount of said former judgment, interest, and costs.

John McClure, John W. Blackwood, and John E. Williams, for plaintiffs in error.

George H. Sanders, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The certified copy of the bond sued upon was properly admitted in evidence. Sand. & H. Dig. Ark. § 2881.

2. The execution of the bond by the surety, the plaintiff in error, was not disputed; but it was claimed that the bond was not executed by the principal, the United States Mutual Accident Association, and was therefore incomplete and not binding upon the surety. The claim of the plaintiff in error is that it could only have been executed by the principal by signing its corporate name at the foot of the bond. This is not true. It makes no difference in what form an obligor signs a bond, provided it appears that the purpose was to bind himself. *Hinsaman v. Hinsaman*, 7 Jones (N. C.) 510. Here the name of the principal, as well as that of the surety, was written in full in the body of the bond, and the seal of the principal was impressed opposite the attestation clause, between the obligatory part and the condition. At the close of the whole instrument it was signed: "Charles B. Peet, President. James R. Pitcher, Secretary." Right under these the corporate name of the plaintiff in error was signed: "By E. B. Leigh, President. L. W. Coy, Secretary,"—and the seal of the plaintiff in error is impressed opposite its signature. Each of these methods of execution is in customary use, and each is as binding as the other. That the principal followed in this case its customary method of executing sealed instruments is shown by comparison with its policy, which was executed in the same manner. It was not, like the instances cited by the plaintiff in error, a case where one signs a bond as surety, which is never signed by other

parties named in the body of the bond, and therefore appears on its face to be incomplete. Here the surety cannot claim that it expected the bond to be signed by the principal after being signed by the surety; for here the bond was signed by the principal before being signed by the surety, and the surety recognized such signing as sufficient by signing right below it.

3. The exemplification of the record of the judgment in favor of Minnie Robinson against the United States Mutual Accident Association was sufficient and properly certified.

4. Although the bond upon which the action was brought was, by its terms, made to the state of Arkansas, it was required and made for the use and benefit of the beneficiaries in the policies of insurance issued in that state, and any such beneficiary could maintain an action for breach of the condition of the bond. Such right of action in the beneficiary was expressly given by the act of March 26, 1887. Sand. & H. Dig. § 4133. Some of the provisions of this act were changed by the later acts of March 6, 1891, and March 24, 1893. Sand. & H. Dig. § 4124. But the provision above referred to in the earlier act was left untouched, and still remains.

5. The testimony of the witness Sanders to the effect that Charles B. Peet was the president and James R. Pitcher the secretary of the United States Mutual Accident Association, based upon their admissions of such facts in written correspondence, was incompetent; and its admission, against the objections of the plaintiff in error, was erroneous. The authority of an agent cannot be shown by proof of his admissions, and, besides, no foundation was laid to admit oral evidence of the contents of the writings, had the writings been competent. But the plaintiff in error was not prejudiced by the admission of this testimony, as the official character of Peet and Pitcher was abundantly proven by the policy of insurance, and by the recognition of their official character by the plaintiff in error in the execution with them of the bond sued upon.

6. The plaintiff below was not called upon to again establish on this trial her right to recover against the insurance company upon the policy. That right had been established by her judgment in her action against the insurance company; and such judgment against the principal upon the bond, not shown to have been collusive, was competent and sufficient evidence against the surety. In *City of Lowell v. Parker*, 10 Metc. (Mass.) 309, Chief Justice Shaw says:

"But it is objected that this judgment was not admissible, because the sureties were not notified, and therefore it was *res inter alios*. But we think this objection cannot be supported, under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside; but otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proof."

This exposition of the law has been adopted without dissent by courts and text writers, and covers this case. Here there was no evidence tending to show collusion, or to in any way impeach such

former judgment, or to disprove any of the matters determined by that judgment.

7. The court properly instructed the jury that under the evidence in the case the plaintiff below was entitled to recover from the defendant below the amount of the judgment aforesaid, which she had recovered against the United States Mutual Accident Association, including the costs and interest upon the same. This was the proper measure of the actual damages sustained by her because of the breach of the condition of said bond. There was no material error in the trial of the cause, and the judgment is affirmed.

COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA v. FULTON et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. APPEAL—EXCEPTIONS.

Exceptions to instructions taken after the jury had retired will not be considered on appeal. *Park Bros. & Co. v. Bushnell*, 9 C. C. A. 140, 60 Fed. 583, followed.

2. INSURANCE POLICY—CONSTRUCTION.

All ambiguities and obscurities in a policy of insurance are to be resolved against the insurer, and therefore the word "effected" in an accident policy will not, in order to relieve the insurer, be read "affected," although it be meaningless as written.

3. ACCIDENT INSURANCE—DISEASE CONTRIBUTING TO DEATH.

Under a policy of accident insurance which provides that it shall not extend to nor cover accidental injuries or death "resulting from or caused, directly or indirectly, wholly or in part, by disease in any form," there can be no recovery for the death of the insured if he had a disease but for which death would not have resulted from the accident; and, where the insured had a diseased heart, it was error to give an instruction allowing the jury to find for the plaintiffs if they believed the accident was sufficient to cause the death of a man with a diseased heart, although insufficient to kill one with a normally healthy heart.

This case comes here upon writ of error to the circuit court, Northern district of New York. The action was brought by the plaintiffs (who are defendants in error) to recover \$5,000 under a certificate of membership issued by defendant (which is plaintiff in error) to Thomas K. Fulton, and which, in effect, insured the plaintiffs, his beneficiaries, in the event of his death by accident. The jury found a verdict in favor of plaintiffs, upon which judgment was entered. The facts sufficiently appear in the opinion.

M. W. Van Auken, for plaintiff in error.

Chas. A. Talcott, for defendants in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The relevant parts of the policy, which is dated November 17, 1892, are as follows:

"The Commercial Travelers' Mutual Accident Association of America, by this certificate of membership, in consideration of the membership fee and the warranties and agreements contained in his application for membership, hereby accepts Thomas K. Fulton, * * * and hereby insures him, in the fol-

lowing manner, subject * * * to all conditions hereinafter contained, against personal, bodily injuries affected during the continuance of membership and this insurance, through external, violent, and accidental means, to wit: (1) In the sum of \$25 per week against loss of time * * * resulting from bodily injuries, effected through means as aforesaid, which shall, independently of all other causes, immediately, wholly, and continuously disable him. * * * (2) Or if such injuries alone shall immediately sever, above the wrist or ankle, one hand and foot," etc., "* * * the association will pay to the insured * * * \$5,000. (3) Or if such injuries alone shall in like manner immediately sever either hand or foot," etc., "* * * the association will pay to the insured * * * \$2,500. (4) Any member of this association who, during the continuance of his membership, sustains, through external, violent, and accidental means, an injury, which injury alone, in the judgment of the medical examiners, causes total disability, * * * the said member shall * * * receive \$2,500. (5) Or if such injuries alone shall immediately and entirely destroy one eye," etc., "* * * the association will pay * * * \$1,000. (6) Or if death shall result from such injuries alone, and within three calendar months, the association will pay \$5,000 to his sisters, Harriet and Anna Fulton. * * * The conditions under which this certificate is issued and accepted by the insured (member) are as follows: First. The insurance shall not extend to or cover disappearances, or injuries, whether fatal or disabling, of which there is no external, visible mark on the body of the insured; nor extend to or cover accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, vertigo, somnambulism or disease in any form, or while effected thereby; nor extend to cover injuries or death resulting from or caused by gas or poison," etc.

On January 1, 1895, the insured, a man weighing from 180 to 190 pounds, while on the sidewalk, waiting for a street car, suddenly fell. From the evidence the jury were entitled to infer that his fall was caused by an accidental slip upon snow or ice, and for the purposes of this appeal it must be assumed that the fall was the result of an accident. In falling he struck upon an iron water spout which projected a few inches above the sidewalk, and which left external, visible marks upon his head and face, in the form of abrasions or bruises not supposed at the time to be of a serious character. He died from 15 to 20 minutes after the accident, and was buried without any careful examination into the cause of death. Three months after interment the body was exhumed and an autopsy made. It then appeared that at the time of the accident the deceased was affected with a diseased condition of the aortic valves and calcification of both coronary arteries. Calcification is a deposit of lime salts in the walls of the tube, making it rigid and fragile, instead of elastic, as it is in health. There was dilation of the heart and hypertrophy. It is unnecessary to go into further details, since the plaintiffs' own expert, who was present at the autopsy, testified that "the conditions which [he] found in the heart would indicate that the heart was diseased." There was much dispute upon the testimony as to what the autopsy disclosed as to the condition of the brain, but on this appeal it must be assumed that there was evidence of injury to the brain, resulting from the blows which left the marks found after his fall.

Before proceeding to discuss the points which are raised by exceptions of the plaintiff in error seasonably taken, it seems appropriate to call attention to a point of practice. Eleven of the exceptions to the charge of the judge, which have been assigned as error, and to which argument has been addressed in the brief, were

not taken, as the record shows, until after the jury had retired in charge of a sworn bailiff. This practice has been expressly condemned by the supreme court in *Hickory v. U. S.*, 151 U. S. 316, 14 Sup. Ct. 334, and by this court (*Park Bros. & Co. v. Bushnell*, 9 C. C. A. 140, 60 Fed. 583), for reasons which may be found therein set forth. If, as plaintiff in error suggested on the oral argument, this was by the express direction of the trial judge, who thus deprived plaintiff in error of the opportunity to take its exceptions at the proper time, that fact should have been set forth in the record, and we might afford proper relief. But, in the absence of anything to indicate such a departure from the well-settled practice, we must assume that this case is in that respect on all fours with *Park Bros. v. Bushnell*, *supra*, and dispose of these 11 exceptions in the manner indicated in that case. Fortunately for plaintiff in error, the exceptions which were properly reserved sufficiently present the points it has argued in this court.

Inasmuch as it is conceded that Fulton was affected with a serious disease of the heart at the time of the accident, defendant contends that his beneficiaries were not entitled to recover, and that verdict should have been directed for defendant. It is insisted that the conditions of the policy were expressly designed to meet just such a case, and to avoid all controversy between medical experts as to the relative potency of external and internal conditions causing death; that it was designed to take the place of medical examinations into the physical condition of members, each member stipulating that if he was affected by a rotten heart, or Bright's disease, or an incipient cataract, or other disease which might be calculated to increase his risk of injury, or his risk of damage from injury, he would not call upon the association for relief. The language of the condition referred to is:

"The insurance under this contract shall not * * * extend to or cover accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, vertigo, somnambulism or disease in any form, or while effected thereby."

The sentence is ungrammatical, and the last clause meaningless, as may be seen from the following analysis:

Insurance under this contract shall not cover

A. Accidental injuries or death

resulting from or caused, directly or indirectly, wholly or in part, by

1. Hernia.
2. Fits.
3. Vertigo.
4. Somnambulism.
5. Disease in any form.

B. Accidental injuries or death

while effected by

1. Hernia.
2. Fits.
3. Vertigo.
4. Somnambulism.
5. Disease in any form.

If the word "while" were given the meaning it sometimes has, viz. "when," the word "effected" would qualify the antecedent "accidental injuries or death," and the whole sentence would be gram-

matically accurate; but, if so construed, clause B would mean no more than clause A. To give to the clause the meaning for which defendant contends, it would be necessary to change the word "effected" to another word, with a different meaning, viz. "affected." It may very well be that it was the intention of the defendant to print the latter word in its forms of policy, but that does not change the situation. This is an action at law upon the contract as it was made and executed, not a suit in equity to reform the contract, fortified with evidence appropriate to such a prayer for relief, and we must take the contract as we find it. Upon familiar principles, all its ambiguities and obscurities are to be resolved against the draftsman.

Although no meaning more favorable to the defendant can be spelled out of the last clause, the residue of the sentence contains a perfectly plain, unambiguous, and explicit statement, in harmony with all the other provisions of the policy. The insurer is not to respond when death is caused directly or indirectly by disease, nor when it is caused in part by disease. In other words, when the accident (such as a fall) which causes the death was itself caused by some disease, or when an existing disease co-operates with the accidental injuries to cause the death, or when the accidental injuries are of such a character that they would not cause the death of a person in normal health, but do kill the insured, because an existing disease, unknown to the insurer, unknown perhaps to the insured, has put him into such an abnormal condition that he is unable to resist the effects of the injuries as he would if in normal health,—in none of these cases is the insurer liable. The true construction of a clause providing that a policy shall not cover "death or disability resulting wholly or in part, directly or indirectly * * * from disease or bodily infirmity," is found admirably expressed in the opinion of the circuit court of appeals for the Eighth circuit in *Association v. Shryock*, 20 C. C. A. 5, 73 Fed. 775:

"If he sustained an accident, but at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused the death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of the insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident."

Much has been said in argument upon the question of proximate and remote cause. It may be well to refer to some of the cases cited on the briefs, in order the better to appreciate, when the evidence in this record is discussed, that such question plays no part here: In *Insurance Co. v. Melick* (also in the court of appeals for the Eighth circuit) 12 C. C. A. 544, 65 Fed. 178, the condition excluded "death * * * resulting wholly or partly * * * from disease or bodily infirmity, * * * intentional injuries (inflicted by the insured or any other person)." The insured accidentally shot himself in the foot. The wound resulted in tetanus or lockjaw, and on the eighteenth day after the accident he was found dead, with his throat cut and a scalpel in his hand; having also been in the em-

brace of tetanic spasm, causing intense agony, at the time of his death; the evidence leaving it an open question whether the spasm or the cut was the immediate cause of death. It was left to the jury to determine whether the accident was the approximate cause of the death. It will be noted that no independent disease had contributed in any way to the catastrophe. The spasm or the delirious impulse to end his tortures were both themselves caused solely by the accident. In *Freeman v. Association*, 156 Mass. 351, 30 N. E. 1013, the policy covered where "accidental injuries alone * * * shall have occasioned death," and did "not extend to any case * * * in which death or disability occurs in consequence of disease, * * * nor to any case except where the injury is the proximate cause of the disability or death." It was proved that the insured, Freeman, died of peritonitis localized in the region of the liver, and the evidence tended to show that it was induced by a fall. There was also evidence indicating that he had previously had peritonitis in the same part, and that the previous disease had produced effects which rendered him liable to a recurrence of it; but there was no evidence to show that he had peritonitis or any other disease at the time of the fall. The court gives a careful and elaborate definition and discussion of "proximate cause" within the meaning of the policy. That definition and discussion, however, were in criticism and disapproval of a contention of the defendant that the jury should have been charged that defendant was not liable in case of death from disease, even if the disease is caused by an accident,—a very different hypothesis from the one at bar, where there is no suggestion that the disease which defendant insists co-operated to produce death was itself caused by the accident. When the Massachusetts court, however, deals with the other branch of the case, it approves of the charge under review, which instructed the jury as follows:

"The question as to whether peritonitis, if that caused his death, is to be deemed a disease, within the meaning of this policy, and the proximate cause of death, within the meaning of this policy, so far as to prevent a recovery, depends upon the question whether or not, before the time of the fall and at the time of the fall, he had then the disease,—was then suffering with the disease. If he was, then, in the sense of the policy, although aggravated and made fatal by the fall, he cannot recover."

And the charge in the *Freeman Case* then proceeds to deal with a case where the insured had had peritonitis, but had recovered, leaving him predisposed to contract such disease again, but not actually affected with the disease at the time of the accident. In the case now under review there is no dispute but what the insured was actually affected with disease prior to and at the time of the accident. The medical witnesses called for the defendant testified that in their opinion the injuries to the head were not fatal in their tendency, nor sufficient to cause death. On the other hand, plaintiffs' experts, or, rather, one of them, ascribed death to a hemorrhage of the brain caused by a blow on the head; the witness, on cross-examination, stating that in his opinion the injuries, as they were described by those who conducted the autopsy, might

be sufficient to cause death; adding that he thought it "entirely possible that a healthy man would be killed by falling down and striking in the places where this man, as I am told, was struck." There was therefore a conflict of evidence as to whether the injuries to the head—injuries caused by the accident—were or were not such as to cause Fulton's death.

Defendant contends that the jury were not fully and fairly instructed as to the consideration to be given by them to the conceded heart disease, in view of the testimony of the medical experts. For the purposes of this appeal, the evidence of defendant's experts may be disregarded, and defendant's contention considered in the light of the concessions made by plaintiffs' experts. Dr. Rigg took part in the autopsy as a representative of plaintiffs. He testified that he found "a diseased condition of the aortic valves, and calcification of the coronary arteries, * * * one slightly; * * * that there was a very small amount of dilation of the heart, * * * and hypertrophy; that the conditions which he found in the heart would indicate that the heart was diseased,"—and added:

"I should certainly regard the diseased condition of the heart as the secondary cause of this man's death, but not the determining cause. * * * It would not take as much of a shock to cause death in a man whose heart was diseased as it would in the case of a man whose heart was in a healthy condition. * * * If Mr. Fulton's had been in a perfectly healthy condition, I think he would have been better able to have withstood this shock. That is the reason that leads me to say that the unhealthy condition of the heart was the secondary cause. * * * I don't think that the fall produced any change in the heart, other than withdrawing of the nerve force. As a result of that the circulation would be arrested. Because of the diseased condition of the heart, it would be arrested the more easily. The heart would be more easily affected. * * * If this man's heart had been perfectly healthy, so far as I can determine, he might have withstood this fall."

And upon recross-examination he said:

"To sum this up, I say, in my judgment, the primary cause of his death was the fall, and the secondary cause was the diseased condition of his heart."

The other medical expert called by plaintiffs, Dr. Ford, had never seen the deceased. He testified to opinions based upon the facts testified to by the other witnesses. He said:

"I think that the injuries in this case might be sufficient to cause death. I am not positive it is sufficient. I would say that it is my opinion that death came from these injuries. * * * And I should be very positive indeed. In coming to this conclusion, I consider the condition of the heart as found in the autopsy. My idea is that death was due to some lesion in the brain produced by the blow. I hadn't said anything about the heart. I will if you want me to. I think the man was much more likely to have died from a shock of that sort, because of his weakened circulation. And that weakened circulation enabled this violence to accomplish greater results than if the condition of the heart had not been a weakened one. I should say this condition of the heart made it more easy to kill the man. That is quite a different statement than that the condition of the heart assisted in causing death, or contributed to it. I should say that a perfectly sound man, with a normal, healthy heart, would have possibly been killed by the blows such as there is evidence of in this autopsy. I do not say that every man would have been. * * * I take into consideration, in determining the cause of this man's death, the condition of the heart. The condition of this man's heart was not

the primary cause of his death, according to the account that has been read to me. I did not give an opinion that the sole cause of death was this blow. I have not been asked what other causes of death there might have been. I have not heard of any. I have not thought about it. There might have been a thousand other causes. I have heard of heart disease in connection with this case. I would not tell the jury that this organic disease of this man's heart had nothing to do with his death. I have not said so. It did have something to do with it. It made the method of killing easier. In that sense, I do not think it was one of the causes. I do not think that was the cause of death. I think he was killed easier because he had this weakened circulation than if he had been perfectly sound. Of course, I cannot say that, if he had not had this fall, that he would not have died at some time with heart disease. The general condition of the heart entered into the effect of death. Not as its causation, however, but as to the result of an injury [sic in record]. I don't think it is what is called a 'secondary cause.' That is the cause of the man's weakness, and his want of resistance, and, perhaps, the cause of his slipping up. He might have slipped more easily than if he was twenty years younger, or more healthy, but it was not the cause of death. My idea is that the immediate cause of death was this shock. If his condition had been perfectly healthy, that shock might not necessarily have caused death. In that sense, the condition of the heart was not a secondary cause. It was a condition which made him more easy to succumb to an injury, but it could not have caused the injury. I think the injury would have caused the death. This made him less able to resist the shock of the blow or injury, but it did not cause the injury, it did not form the initiative. The blow was the initiative, more or less, and, on account of the heart as it was, this blow had this effect. I do not think you can call it a 'cause' either second, third, or fourth. Without that condition the blow might have and it might not have caused."

It is, to say the least, a somewhat doubtful question whether, in this state of the proof, it was proper to send the case to the jury. Disjointed phrases may be pieced together so as apparently to sustain the proposition that Fulton was killed by the blow alone, without the efficient co-operation of any other cause. It is, of course, easy to conceive of an accidental injury so manifestly destructive of life that the diseased condition of the individual would contribute in no wise to the catastrophe. But an examination of the extended quotations supra, and of the rest of the testimony, seems to indicate that what the experts meant was what the last witness has expressed, namely, that they reject the disease as a "cause" because it did not form the initiative, but that none of them are willing to assert, even as an opinion, that the heart disease had nothing to do with the death, while all concede that it made an injury, from which an individual in normal health might stand a fair chance of recovery, necessarily fatal. However, it is not now necessary to decide this question.

At the close of the charge defendant asked the court to instruct the jury:

"That if the condition of the deceased's heart contributed to his death, as plaintiff's witness Dr. Rigg testified, plaintiff cannot recover."

To this the court replied:

"I think I will charge that, however, with the qualification, as I have already said to the jury, that if the jury find that this blow was sufficient to cause the death of a man of his weight, age, and condition at that time, that their verdict may be for the plaintiffs, even though his condition at the time of the death might have made it more difficult for him to rally from the effects of this blow than a perfectly healthy man."

Exception was duly reserved. As qualified, this instruction, standing alone, allows the jury to find for the plaintiffs if they believe the blow was sufficient to cause the death of a man with a diseased heart (which was deceased's condition), although insufficient to kill one with a normally healthy heart, which is manifestly an erroneous instruction. The court had just charged, at defendant's request, that there could be no recovery "if the fall was caused by disease" or "if disease was a secondary cause of death," or "if disease was one of the causes of death," or "if disease contributed to his death." The next request might well have been refused on the ground that the subject of contributory cause had been sufficiently covered, and defendant contends with some force that the jury might fairly understand that the qualification added to it was applicable to the last four requests. Moreover, coming as the very last statement of the court to the jury, it was calculated to leave a stronger impress upon their minds than if it had formed a single sentence in the colloquial charge. An appellate court, however, should not be astute to reverse because, in the hurry of a trial, some single phrase of voluminous instructions to the jury may contain a misstatement as to the law of the case, especially when it is uttered in ruling upon a dozen requests, which appear to have been presented to the judge only after the colloquium, instead of before he began to instruct, as they should have been. In such a case it must be collated with the rest of the charge, in order to see if, taken as a whole, the instructions may have been calculated to mislead. The very qualification complained of is itself qualified with the phrase, "as I have already said to the jury," which expressly referred them to the more detailed discussion of the subject which they had already listened to. If, therefore, when the charge is examined as a whole, it appears that the jury, if attentive, must have understood that there could be no verdict for the plaintiffs if the diseased condition of the heart directly or indirectly contributed to cause the death of Fulton; no recovery if, by reason of Fulton's diseased condition, the blow was fatal to him, although a normally healthy man would in all probability have rallied from its effects,—then the verdict should not be set aside, although the phrasing of this particular qualification be erroneous. The charge, as a whole, however, did not, in our opinion, explicitly direct the attention of the jury to the controlling issue in the case. The defendant requested the court to charge that the burden of proof was upon the plaintiffs to show "that the injuries resulting from the fall alone caused death." To this the court replied: "I do charge that. It must be the proximate cause of death." This is the keynote of the whole charge, and, taken as a whole, it evidently directed the attention of the jury to deciding the question what was the "proximate cause" of death. The natural result would be that, having reached the conclusion that the injuries were the "proximate cause," they would neglect to inquire whether there was any other cause of death, not proximate, but efficiently contributing. As was said before, under this policy, and upon the facts in proof, there was no question of proximate or remote cause, but only whether there were

two co-operating causes, or only a sole cause. There are undoubtedly many passages in the charge which plainly indicate the correct rule that plaintiffs could not recover unless the jury were satisfied that the accidental injury was sufficient of itself to cause death to a healthy man; but upon the other hypothesis, which the evidence warranted, namely, that the fall produced a shock which called for responsive action from the heart, which it was too weak to give efficiently, the general effect of the charge failed, in our opinion, sufficiently to impress upon the jury that, if the disease thus contributed to cause death, plaintiffs could not recover. In other words, having reached the conclusion that the injury was the "active, efficient, procuring cause"; that the blow was, as plaintiffs' expert said, "the initiative,"—the jury, under the instructions given them, would be likely to trouble themselves with no further question as to any subsidiary cause. It will be sufficient to cite two passages from the charge. After setting forth the issues and the contract, the court began its statement of the "law as applicable to such a condition of affairs as exists here" by reading from the opinion in *Freeman v. Association*, supra, which he informed the jury was "a clear statement of the law." The passage thus read and given to the jury in this case as the headlight to their deliberation is as follows:

*"The principal question * * * is, what kind of cause is to be deemed proximate, within the meaning of the policy? Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and in dealing with such cases the maxim, 'Causa proxima non remota spectatur,' is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the approximate cause. It means that the law will not go further back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence in view of the existing circumstances and conditions. The law does not consider the cause or causes, beyond seeking the efficient, predominant cause, which, following it no further than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes."*

The italicized portions illustrate the criticism above expressed. Subsequently in the charge, making a more specific application to the facts in this case, the court instructed the jury as follows:

"The accident must be the actual, immediate, and proximate cause of the death; and, if the proof convinces you that the accident caused Fulton's death; then the law is that the policy would not be avoided, even though it be possible that the man was suffering from some other disease, which, to a certain extent, might have rendered his system less able to throw off the effects of the blow than if he had been a younger and more healthy man."

Neither of these passages from the charge are covered by exceptions taken at the proper time, but the qualification to the request above quoted is thus covered. Inasmuch as that qualification

is manifestly erroneous, and the passages last above quoted show that the charge as a whole was not such as to warrant a holding that the erroneous qualification could have worked no injury to the defendant, the judgment must be reversed and the case remanded for a new trial.

NATIONAL MACH. CO. v. WHEELER & WILSON MANUF'G CO.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. PATENTS—CONSTRUCTION OF CLAIMS—BUTTONHOLE MACHINES.

In the Osterhout patent, No. 447,791, for an improvement in machines for cutting and stitching buttonholes, claims 21 and 22 are only sustainable by reading into them the jogging or sidewise movement of the stitch mechanism for the purpose of operating the cutter; and neither these claims nor claims 1, 2, 4, 5, 7, 15, and 28 are infringed by a machine made in accordance with the Tebbetts & Doggett patent, No. 438,655, in which the cutter is operated by other means, without any use of the jogging movement. 72 Fed. 185, reversed.

2. SAME—INTERFERENCE PROCEEDINGS—ACQUIESCENCE.

Failure of a party to move for dissolution of an interference in the patent office is not an acquiescence in the ruling that the inventions, as limited by the prior art there shown, were identical and patentable. While the decision on interference may be *res judicata* as to priority, it does not preclude either party from raising other questions.

Appeals from the Circuit Court of the United States for the Southern District of New York.

These are cross appeals from a decree of the circuit court, Southern district of New York, which sustained the validity of United States patent No. 447,791, granted March 10, 1891, to James B. Osterhout, and found infringement of two claims and noninfringement of seven others. The patent is for a machine for cutting and stitching button holes. The specification states that: "One general object of this invention is to provide buttonhole sewing machines with practically successful cutting mechanisms, which shall automatically cut a buttonhole only when the machine is stitching at a predetermined portion, part, or point in the periphery of the buttonhole."

The claims in question are as follows:

"(1) In a buttonhole sewing machine, the combination, with its stitch-forming and work-moving mechanism, of a work-cutter and its carrier normally elevated; a depressor, which ordinarily does not depress the cutter-carrier and cutter; a cutter-controller connected to and moving with the said work-moving mechanism; and connections between the said cutter-controller, cutter-carrier, and depressor, whereby the latter is temporarily caused to depress the cutter-carrier and cutter,—substantially as set forth.

"(2) In a buttonhole sewing machine, the combination, with its stitch-forming and work-moving mechanism, of a work-cutter and its carrier normally elevated; a depressor which is operated by the needle-actuating mechanism of the sewing machine, and which ordinarily does not depress the cutter-carrier and cutter; a cutter-controller connected to and moving with the said work-moving mechanism; and connections between the said cutter-controller, cutter-carrier, and depressor, whereby the latter is temporarily caused to depress the cutter-carrier and cutter,—substantially as set forth."

"(4) In a buttonhole sewing machine, the combination, with its stitch-forming mechanism, work-clamp, and mechanism, including a rotary feed device for operating the work-clamp, of a work-cutter and its carrier normally elevated; a depressor which ordinarily does not depress the cutter-carrier and cutter; a cutter-controller connected to and rotating with the said rotary feed device; and connections between the said cutter-controller, cutter-carrier, and depressor, whereby the said depressor is temporarily caused to depress the cutter-carrier and cutter,—substantially as set forth.

"(5) In a buttonhole sewing machine, the combination, with a stitch-forming mechanism, a work-clamp and mechanism, including a rotary feed device for operating the work-clamp, of a work-cutter and its carrier normally elevated; a depressor operated by the needle-actuating mechanism of the sewing machine; a cutter-controller connected to and rotating with the said rotary feed device; and connections between the said cutter-controller, cutter-carrier, and depressor, whereby the cutter-carrier and cutter are temporarily depressed by the said depressor,—substantially as set forth."

"(7) In a buttonhole sewing machine, the combination, with a stitch-forming mechanism, a work-clamp, and mechanism for operating the work-clamp, of a depressor operated by the actuating mechanism of the sewing machine; a work-cutter, its carrier, means to elevate the cutter-carrier, and means to support it when elevated and disconnected from said depressor; a cutter-controller connected to and moving with the mechanism operating the work-clamp; and connections between the said cutter-controller, cutter-carrier, and depressor, whereby the cutter-carrier is temporarily connected with and depressed by the said depressor, and is thereupon elevated and disconnected from the depressor,—substantially as described."

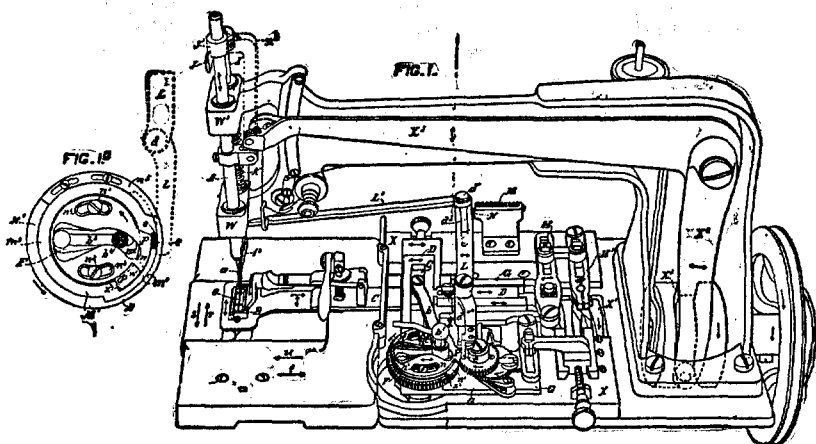
"(15) In a buttonhole sewing machine, the combination, with a stitch-forming mechanism, a work-clamp, and mechanism for operating the work-clamp, of a cutter-carrier normally elevated, and an attached cutter of suitable length to cut a buttonhole at one insertion; a depressor, operated by actuating mechanism of the sewing machine; a cutter-controller connected to and moving with the mechanism for operating the work-clamp; and connections between the said cutter-controller, cutter-carrier, and depressor, the same being constructed and arranged so as to cause the cutter-carrier and cutter to be depressed by the said depressor to cut a buttonhole when the sewing machine is stitching at or near one end part of one side of the buttonhole,—substantially as set forth."

"(21) In a machine for stitching buttonholes, the combination, with a stitch-forming mechanism, a work-clamp, and mechanism for operating the latter, of a cutter, a cutter-carrier or bar, a depressor operated by the needle-bar actuating mechanism, a cam or device rotating in unison with the clamp-operating cam or disk, and connections between the said rotating cam or device and depressor, whereby the cutter is thrown into action.

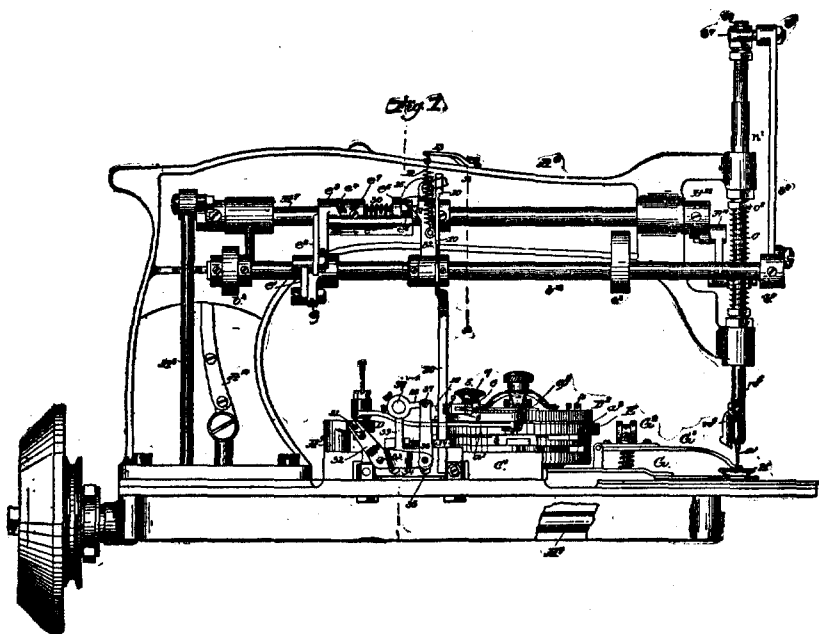
"(22) In a machine for stitching buttonholes, the combination, with a stitch-forming mechanism, a work-clamp, and mechanism for operating the latter, of a cutter-bar, sliding vertically in the head of the machine, and entirely disconnected from the needle-bar thereof; a cutter of suitable length to cut an entire buttonhole at a single stroke; a slotted throat-plate, through which the said cutter can descend; a depressor operated by the needle-bar actuating mechanism, to cause a descent of the cutter-bar and cutter as a buttonhole is being completed; a cam or device rotating in unison with the feed cam or disk for the clamp; and connections between the said rotating cam or device and depressor, whereby the latter is thrown into action to operate the cutter."

"(28) The combination, with a buttonhole sewing machine, of a cutter, a cutter-carrier, a cam from which motion is transmitted to the cutter-carrier to depress the cutter, and mechanism whereby the depression of the cutter from the cam will be produced but once, and after the stitching of the greater part of a button-hole, substantially as specified."

The circuit court held that defendant's machine infringed claims 21 and 22, but did not infringe claims 1, 2, 4, 5, 7, 15, and 28.



Osterhout Patent.



Defendant's Machine.

Edwin H. Brown, for complainant.

James H. Lange and Livingston Gifford, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). Machines of this general character comprise work-moving mechanism, stitching mechanism, and cutting mechanism. With the cutting mechanism only is this suit concerned. The threads which surround and reinforce the sides of a buttonhole extend from the edge of the buttonhole backward into the cloth, being inserted in the cloth by a succession of alternate stitches, known as "edge stitch" and "depth stitch." The machines that make these stitches operate in one of two ways: either the cloth feeds forward lengthwise of the buttonhole, without any sidewise to and fro motion, and the needle is itself jogged sidewise to or fro after each stitch, or else the needle reciprocates vertically without any lateral motion, and the clamp which holds the work is given the jogging motion, so that the needle will stitch alternately "edge" and "depth." The patent in suit is concerned with this latter class of machines, and it provides for cutting mechanism whereby the buttonhole may be cut while it is being stitched. The work clamp which holds the cloth has two motions; a forward motion, or forward feed, which pushes it along in the direction of the length of the buttonhole without retrogression; and a to and fro or jogging motion at right angles to the length of the buttonhole. The succession of movements in forming the stitches are these, a starting point being taken when the work-clamp is jogged out so that the edge-stitch line is under the needle: (1) The needle descends, and then (2) it ascends, making an edge stitch. (3) The work-clamp jogs in, bringing the depth-stitch line under the needle. (4) The needle descends, and then (5) it ascends, making a depth-stitch. (6) The work-clamp jogs out, bringing the edge-stitch line under the needle, and (7) either simultaneously with 6, or afterwards, and before 8, the work-clamp moves forward so far as may be necessary to secure the predetermined distance between the pair of stitches already formed and the next pair. (8) The needle descends, and then (9) it ascends, forming another edge-stitch. And so on in the order set forth. The cutter is fixed to a cutter-carrier, which reciprocates vertically as the needle does, when thrown into engagement with the needle-carrier. When not thus operated upon by the depressor of the needle-carrier, it is inoperative. The cutter may be of width equal to the length of the buttonhole, in which case it will be necessary only to provide means for making it descend once; or it may be narrow, in which case successive plunges must be provided for. Of course, it does not descend in the same plane as that which contains either line of edge stitches, and therefore not in the same plane as the needle. The plane of its operations lies between the two lines of edge-stitches. And it is manifest that whether it be a broad knife or a narrow one, and on whichever side of the needle it plays, it must be so arranged that it will descend only in its own proper plane. If, for instance, it is in such proper plane when the needle

is in edge-stitch position, it will be out of its proper plane when the needle is in depth-stitch position; and if it descends there it will cut the cloth in such wise as to ruin the buttonhole. And the patentee states in his specification that he so arranges and adjusts "the cutter and its carrier that they will be depressed to cut the middle line or slit of the buttonhole when the needle descends in or nearly in that line as in making the edge-stitches, or when the needle penetrates the work at a distance from that line, as in making the depth-stitches." The combination of parts by which this is accomplished is, briefly stated, thus: A cutter-bar, sliding in guides at one side of the needle-bar, and normally detached from other parts, is adapted to be thrown into engagement with a depressor on the needle-carrier, which, when the needle descends, will carry down the cutter-carrier with it. When the needle-carrier ascends, the cutter-carrier is, by means of a spring or similar device, elevated with it, and thrown out of engagement with the depressor. Engagement is effected by means of connections between the cutter-bar and a so-called "cutter-controller," located on the work-clamp mechanism. The following excerpt from the opinion below correctly describes this part of the apparatus:

"P of the patent drawings represents the cutter-controller, a laterally-projecting finger attached by means of screws to the feed-wheel disk, F, arranged to be operated by means of teeth in said wheel engaging a ratchet or pawl, motion to which is imparted by the motion of the main shaft of the machine. [This disk revolves, without retrogression, in the direction of the hands of a watch, and it moves synchronously with the forward feed of the work-clamp. When that forward feed ceases temporarily to allow the needle to make an edge and a depth stitch, the disk for a like period suspends its revolution.] As this disk revolves, it brings the projecting point of the cutter-controller into engagement with a vertical finger on the arm, L, of a lever, which so moves the arm, L¹, of said lever, acting by means of hinges upon the vertical cutter-carrier, I, as to cause the cutter-bar to slightly rotate, and to bring the clutch, J, on the cutter-carrier, and the clutch, J¹, on the needle carrier, A, into engagement. Thereupon the downward movement of the needle-arm depresses the cutter-carrier, and the cutter passes through the fabric. Upon the upward movement of the needle-carrier, a spring causes the clutches to be disengaged, and another spring, K, upon the cutter-carrier, elevates the cutter."

Moreover, as this rotary disk, with its projecting finger, P, is mounted on the work-clamp mechanism, it has, besides its rotary motion, the same to and fro or jogging motion which the work-clamp has.

The patent is long and complicated. It covers 14 pages, contains 30 claims, and is accompanied with 59 drawings. The evidence is voluminous, and the judge who heard the cause in the circuit court has elaborately discussed the patent, the defendant's machine, and the prior state of the art. It will not be necessary here to go over all the ground so carefully covered. In most of his conclusions as to the prior art, the invention of Osterhout, and the relative dates of other inventions, we concur. The case has been much simplified here by concessions made upon the argument. The defendant concedes that invention was exercised on the part of Osterhout in his solution of the problem how to connect a cutter mechanism with the feed-wheel so that it would be automatically operated during a portion only of the stitching period, and so oper-

ated as to cut when making the edge-stitch, and not to cut when making the depth-stitch, in a buttonhole sewing machine of the type in which the cloth clamp has a jogging movement to make the edge and depth stitch, and a cycle of feed movement to lay the stitches about the buttonhole. The complainant has also upon the argument made concessions as to his utilization of the jogging movement to effect this result, which will be referred to in more detail after stating the conclusion arrived at in the circuit court, in the following quotations: "The device of defendant is so constructed that it is not dependent upon the jogging motion of the feed-wheel mechanism for the determination of the number of strokes of the cutter." "The complainant's device is thus dependent." Therefore it is "necessary to limit certain claims of the patent [1, 2, 4, 5, 7, 15, and 28] to a cutter-controller which determines the duration of the cutting period." "Claims 21 and 22, however, cover the finger device used as a starter, and nothing more." "The original application covered a construction whereby the cutter might be put in engagement independent of the jogging motion." "The original application described an operative device actuated by a cam working in harmony with the progressing movement [i. e. the feed-disk rotary movement] of the work-carrier, and not necessarily limited to a construction dependent upon the combined rotary and jogging motion for causing a depression." "Claims 21 and 22 are not limited to a construction moving upon the clamp-feed mechanism, or located on the rotary feed-wheel, * * * but cover broadly a construction actuated by a cam or device rotating in unison with the clamp-operating cam or disk for throwing the cutter or depressor into action." "Inasmuch as the specification describes, and claims 21 and 23 broadly cover, such combination used as a starter, and nothing more, I think these claims are infringed by defendant," which "uses the cutter-controller as a starter." It is manifest that the circuit court was of the opinion that claims 21 and 22 covered a subcombination of the general combinations covered by the other claims, and that complainant's specifications disclosed an embodiment of such subcombination which would be operative as a starter without the co-operation of any jogging movement. The specifications and drawings describe not only a primary type of machine, but also modified forms of the same. Two of these are shown in Fig. 7,—one in solid, the other in dotted, lines,—the latter being referred to in the record as illustrative machine C. Of this complainant's expert testified: "The lever, L, may have the whole of its rocking motion imparted to it by the rotary movement of the cutter-controller." Of still another form, shown in Fig. 23, the same witness said: "[It shows] a cutter-controller performing its controlling function solely by its rotary motion." No doubt this evidence was in the mind of the court when the above-quoted conclusion was expressed. A large part of the expert testimony is concerned with this question of the extent to which the jogging motion imparted by the work-clamp enters into the various devices of the patent, and the briefs are filled with quotations from the patent itself, and from the file wrapper and contents, which are believed to support one or other contention. All this may be

eliminated from this opinion in view of complainant's concessions upon the argument. In the primary form of machine, if the work-clamp is jogged out, the rotary feed disk may be revolved indefinitely, and the finger or controller, P, will not come into engagement with the lever which starts connection between cutter and depressor. The jogging movement is essential to bring it into such engagement. Engagement and consequent starting is impossible until the work-clamp jogs in carrying the feed disk and finger, P, with it. This the complainant now concedes. In the form shown in Fig. 7, dotted line, the controller jogs, and this jog of the controller is necessary to bring it into position for operating upon the adjacent lever, by which the cutter-bar is shifted into engagement with the depressor. After the cutting has been done, the jogging movement of the controller moves it away from the lever, so that it may pass by the lever. This, too, the complainant now concedes. In the form shown in Fig. 23 the controller itself has no jogging motion, but the mechanism which effects the connection with the cutter-carrier is more complex than in the other forms. The fact is that the projecting finger, P, shifts the part g^2 into position to be operated upon by a projection, g^3 , on the lever, H, which has a jogging movement, and that the jogging movement of this lever completes the movement of the cutter-carrier necessary for engaging the latter with the depressor. The jogging of this lever in the other direction permits the cutter-carrier to be released by the depressor. This also is now conceded by the complainant. Here the controller is really a compound one, to whose efficient action jogging motion is essential. As to the general form of Osterhout's machine as shown in Fig. 2, complainant also concedes that the jogging movement would be necessary for disengaging the parts if a multiple cutter was used; but insists that this would not be so when a single-stroke cutter is employed. It is unnecessary, so far as claims 21 and 22 are concerned, to review the facts or the arguments by which defendant controverts this last proposition. The above concessions, which cover the starting of the cutter in each form of machine, are sufficient. Certainly it is essential to an automatic cutting device embodied in a sewing machine that it shall at least begin to cut. That function is quite as important as it is that it should cease cutting at some appropriate time. In view of these concessions, it is a sound contention of defendant that Osterhout, so far as this record shows, "never invented any cutter mechanism except one having a controller, the fulfillment of whose function necessarily depended upon the jogging movement of some part of the work-moving mechanism; that he never illustrated or described any other cutter mechanism; and that he therefore failed to show how any cutter mechanism could be operated otherwise than through the jogging of some part in the work-moving mechanism."

The next question is whether the jogging motion is to be considered a part of these several claims. In some of them, where the cutter-controller is described as "connected to and moving with the said work-moving mechanism," the language of the claim plainly includes the jogging motion, for when the work-moving mechanism

has a jogging motion whatever "moves with it" has the same. But in others, such as claim 21, where the controller is described as "a cam * * * rotating in unison with the * * * disk," the language does not specifically include the jogging motion. But is it any the less a part of the claim? The specifications point out methods whereby the "intermittent to and fro movements" may be availed of to insure cutting at the proper time and in the proper place. "To cause the cutter-carrier," says the patentee, "to be engaged with the needle-carrier, and depressed by it, to cut the work at one descent of the needle-carrier, and to be not engaged with the needle-carrier, nor thus depressed by it, at its next descent, or to cause the cutter-carrier to be engaged with the needle-carrier, and depressed by it to cut the work only when the work-carrier is at one end only of its momentary to and fro movement (what I have called the 'zig-zag movement'), I suitably connect the clutch for temporarily engaging the cutter-carrier with the needle-carrier with a suitable part of the mechanism of the sewing machine, such as the part B, C, D, F, G, H, or H¹, which has a movement in one direction, * * * at the momentary movement of the work carrier in one lateral direction, and which has a movement in the opposite direction at * * * the next lateral momentary movement of the work-carrier in the reversed direction." Without making use of this lateral movement or jog, the subcombination of claims 21 and 22, and, indeed, the combination of each of the claims, would remain inoperative. If it were inoperative, it would be without utility, and therefore unpatentable. The claims in question, therefore, can only be sustained by reading into them the jogging motion, without which the combination set forth in the claims will perform no function.

The only question then remaining in the case is whether defendant's machine infringes. Defendant starts engagement by means of a projecting finger on the rotary feed-disk, which engages with a finger on the connecting lever, which is mounted on a tubular rock-shaft, and which moves the cutter-bar into proper position to begin to cut; but the use of a finger or trip on the feed-wheel to start other mechanism was old in the art. By reference to the statement supra as to sequence of movements, it will be observed that we have a forward move, followed by a jog in and by a jog out, and then another forward movement. There are thus two jog movements to one forward movement, and the three movements of each group come always in the same order. The machine being arranged so that the jog immediately succeeding a forward move leaves the work-clamp in proper position for the descent of the needle, the trip or finger may be located anywhere upon the periphery of the feed-disk, because, wherever placed, it can only start the cutter at a time when the work is in proper position to be cut. The defendant's machine is a single plunger, using a broad knife, and it is, of course, necessary that, having once descended, the cutter shall not descend again. It will be remembered that complainant has conceded that when his machine is arranged as a multiple cutter the jogging motion is essential for disengaging the parts.

We are satisfied that it is also essential for disengaging when a single cutter is used, for these reasons: The engagement between the projecting finger, P, and the lever not only rocks the cutter-carrier into proper position to be caught by the depressor, but holds it in that position as long as the engagement of P and the lever continues. Therefore, so long as such engagement continues, each descent of the needle-carrier (to which the depressor is attached) will bring down the cutter-carrier. If that engagement is left to be broken only by the forward movement of the finger, P, moving rotarily with the feed-wheel, there would be two descents of the needle and cutter, since, after each forward movement, and before the next one, there are always two jog movements. And one of these descents would take place when the work was not in proper position, and the cloth would be cut somewhere on the line of stitches. In complainant's machine it is the jog out which saves this catastrophe. The same jog which puts the work in wrong position for cutting invariably puts the projecting finger in such position that the engagement with the lever which sets or keeps the cutter in action becomes impossible. In the machine of the patent, therefore, the jogging motion is essential to both engagement and disengagement. In defendant's machine, however, it is utilized for neither. As the circuit court found, defendant has "demonstrated that its machine did not use jogging motion at all in connection with the action of the cutter-operating mechanism, and only used the rotary motion to start the cutter device by a pin, and did not depend on any contact surface to determine the cutting operation." The manner in which defendant starts its cutter devices has already been shown. It stops their action as follows: Engagement of the pin or finger on the feed-disk with the finger on the tubular rock-shaft (which takes the place of complainant's lever connection) causes a clutch on the cutter-actuating rock-shaft to be engaged with a shoulder on the needle-actuating rock-shaft. As long as the clutch is held by this shoulder, both shafts will rock together, causing both needle and cutter to descend. The shoulder is the equivalent of complainant's depressor. And so long as the engagement of finger with finger keeps the tubular (or lever) shaft rocked so as to retain the clutch in position to be caught by the shoulder, the hold of the shoulder will not be broken by the spring, which would otherwise throw the clutch out of engagement. If the machine depended only upon the further rotary movement of the feed-disk to carry its finger out of engagement with the tubular shaft finger, it would be useless, for the reason already pointed out, viz. there would be two descents, and therefore two cuts; one necessarily when the cloth was in improper position, before the forward feed motion could effect disengagement. To break engagement, defendant places on the cutter rock-shaft a snail-cam, which is so located relative to the tubular or lever shaft that, as the cutter-shaft rocks, the snail-cam depresses the tubular shaft, and breaks the engagement with its finger with the finger on the feed-disk. In consequence, the rocking motion of the cutter-shaft, which causes the first descent, at the same time absolutely prevents a second descent by removing from engagement one of the two fin-

gers whose engagement alone makes a descent of the cutter possible. Complainant's expert admits that it is the snail or "scroll cam on the cutter shaft that produces the disengagement of the controller, so that the disengagement cannot possibly take place before the cutter descends once, and the engagement cannot possibly continue after the cutter has descended once, no matter what the fineness or coarseness of the stitch." Having once started the connections which put the cutter mechanism into operation, the feed-disk finger has no further control over them; the cutter mechanism itself contains devices which, independent in every way of the starting pin, effect a breaking of the engagement, and a stoppage of the cutter mechanism; and which do this with no assistance in any way from the jogging movement. We concur, therefore, with the judge who heard the cause at circuit that defendant's machine does not infringe claims 1, 2, 4, 5, 7, 15, and 28, for the reason that it has not the cutter-controller, which determines engagement by the utilization of the jogging movement, but a different mechanical device, which does not at all avail of that jogging movement. And, as already pointed out, we do not think claims 21 and 22 can be differentiated on any theory that they cover the finger only as a starter operating solely by rotary feed motion, since the jogging motion is essential to start complainant's cutting devices, and defendant makes no use of such jogging movement, even as a starter.

An interference was declared in the patent office between Osterhout's application for this patent and an application of Tebbetts & Doggett. The cutter-actuating mechanism of defendant is substantially that of Tebbetts & Doggett. The issues in interference were framed on claims contained in Tebbetts & Doggett's application. They are textually the same as 21 and 22 of this patent. Default was made on the part of Tebbetts & Doggett, and upon such default priority of invention was awarded to Osterhout. It is contended by complainant that not only is the question of priority res adjudicata between the parties to the suit, but that defendant is also precluded from contesting the validity and scope of claims 21 and 22 of the patent in suit, and infringement of the claims by defendant's machine. The theory of this contention is that under the rules and practice of the patent office either party has a right to move to dissolve an interference on the ground that, in view of the state of the art, the issue framed therein could not be based upon his invention as described and claimed; that failure to move for such dissolution amounted to an acquiescence in the holding of the patent office that the inventions of the two parties as limited by the prior art there shown were identical; that they were patentable despite the prior art, and that either might properly be the basis for claims corresponding to the interference issues. And therefore, that, although it now appears that the original Tebbetts & Doggett claims—now claims 21 and 22—correctly cover defendant's machine, but do not cover complainant's unless an unexpressed element is read into them, defendant cannot now avail of that fact to limit these two claims of the patent. We are referred to no authority in support of this contention. It has not been the tendency of the decisions either

of the supreme court or of the circuit courts or courts of appeal to extend the effect of interference decisions as final adjudications, and we concur with the circuit court in the conclusion that, "while the decision in interference may be res adjudicata as to priority, it does not preclude defendant from raising other questions not in issue in said proceedings." The decree of the circuit court is reversed, with costs, and cause remitted with instructions to dismiss the bill.

EXCELSIOR ELEVATOR GUARD & HATCH COVER CO. v. FOOTE et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

PATENTS—INVENTION—MECHANICAL SKILL—HOISTWAY COVERS.

The Fraser patent, No. 278,528, for means for closing and controlling hoistway covers, consisting of a combination of a number of doors, a cord or chain, a number of catches, and a connection between the catch of one door and an adjacent door, so that the closing of the latter will release the former, and admit of its closing, is void, as showing mere mechanical skill in modifying the pre-existing Hackett devices (patent No. 260,675).

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from the circuit court, Southern district of New York, dismissing complainant's bill. 74 Fed. 792. The suit is brought for infringement of the first claims of United States patent 278,528, dated May 29, 1883, to Daniel Fraser, for "means for closing and controlling hoistway covers."

Clifton V. Edwards, for appellant.

S. O. Edmonds, for appellees.

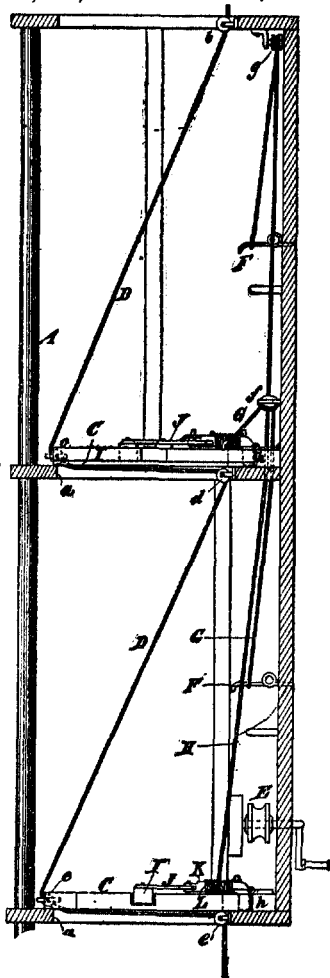
Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The specification sets forth that the improvement, so far as it is relevant to the issue in this suit, "consists in the combination with a number of hinged doors and a cord or chain for opening and closing them of a number of catches for engaging with the doors when opened, and serving to hold them open independently of the cord or chain, and a connection between the catch of one door and an adjacent door, so that the closing of the last-mentioned door will effect the release of the other door from its catch, and admit of its closing." The mechanism is intended for use in buildings where there are hatchways one above the other for several successive stories. All the doors of these hatchways may thus be opened or closed without it being necessary for the operator to leave the one floor, top or bottom, on which the operating windlass is located. The doors are opened or closed not all at the same time, but successively, thus avoiding excessive strain upon the operating rope. The catches hold the doors when open, so as also to relieve that rope of strain. The release of each catch only by the closing of the door ahead of it insures the certainty that when the last door of the series closes all the doors ahead of it in the series have also closed. The claim reads as follows:

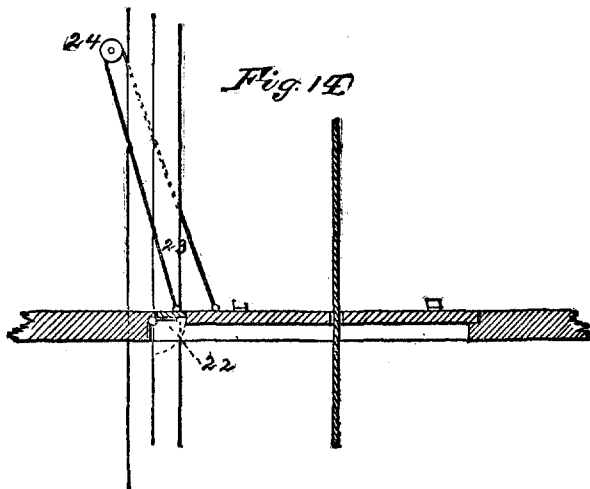
"(1) The combination with a number of hinged doors and a cord or chain for opening and closing them of a number of catches for engaging with the doors when opened, and serving to hold them open independently of the cord or chain, and a connection between the catch of one door and an adjacent door, so that the closing of the last-mentioned door will effect the release of the other door from its catch, and admit of its closing, substantially as specified."

The operation of a series of hatchway doors by a single cord or chain, so that the operator need not leave the windlass on top or bottom floor, was old. It was old to so arrange the mechanism that the doors would open and close successively and relieve strain. It was old to hold the doors, when opened, by engaging catches independently of the chain. It was old to release the catches by a pull upon a cord which was convenient to the hand of the operator. All this is disclosed in a patent to Sinclair,—No. 84,387, November 24, 1868, reissue No. 5,387, April 29, 1873,—and it is conceded that the only novel feature which the patentee introduced in the structure is the "connection between the catch of one door and an adjacent door." This particular device is thus described in the patent:

"F designates catches arranged on the back of the hoistway, adapted to engage with projections on the front edges of the doors when the latter are raised, so as to secure them in upright positions, and relieve the chain or rope, D, of strain. These catches may be pivoted in place, and impelled downward at the forward end by springs or by weight; or they may have resilient shanks, as shown. To the upper catch is attached a cord, H, which passes around a pulley, g, arranged on the back of the hoistway above, and thence down the hoistway, where it is secured to the door below, forward of its hinges. When it is desired to release the upper door, C, this cord, H, is pulled, so as to disengage its catch from it, and then the windlass, E, is turned, so as to pay out the chain or cord, and allow of the descent of the said door. To the catch of the lower door is attached a cord, G, which passes up the hoistway, around a pulley, f, arranged on the back of the hoistway, above the upper door, and thence to the upper door, forward of the hinges, where it is fastened. This cord, G, is so short that, just before the upper door closes, it pulls the cord sufficiently to effect the disengagement of the catch of the lower door from it. If, then, the windlass is turned so as to pay out the chain or rope, D, the lower door may be closed. The cord, H, is connected to the lower door, and operated by the closing of said door."



Connections between different members of a mechanical series, whereby some movement of one member will induce or permit a like movement in some other like member, are very old in the mechanic arts generally. The record here shows that such connections had been used in this particular art. (See Fig. 14 of United States patent to Hackett, No. 260,675, July 4, 1882.) The desirability of opening the catches of hatchway doors successively had also been made manifest. The device of the Sinclair patent opened them all simultaneously by a pull on a single rope. It was, therefore, modified in practice before the patent in suit by attaching a separate rope to each catch, and running the rope down through the several floors below the catch to which it was attached, so that the ends of all these ropes were convenient to the operator at the windlass. When he had lowered one door, he pulled the catch of the next, and lowered that, and so on till all were down. In view of the state of the art, we concur with the judge who heard the cause in the circuit court that there was no invention in turning each one of these ropes over one or more pulleys, and connecting it with a descending door, so that, as the latter closed, it would pull upon and lift the catch. The device in the Hackett patent, above referred to, was one whereby the opening and closing of a small door which covered that part of a hatchway that was located in the jamb between the vertical guide posts was effected by the opening or closing of the large door covering the main hatchway. The device is thus described:



"In some places this small door must of necessity open downward instead of upward; for instance, when a passageway is to be had on the level of the floor directly into the elevator from the side on which the small door is placed. In Fig. 14 will be seen a slight modification of the construction shown in the other figures, to meet this necessity. 22 is the small door. 23 is a small rope leading from its upper surface over a pulley, 24, placed at the side or rear of one of the guide posts, and down to the top side of the large door. When the

large door is closed, the rope, 23, is taut, and holds up the door, 22, in a horizontal position. When the large door is raised upward, the cord, 23, slackening, permits the small door, 22, to pass downward out of the path of the elevator car."

The only criticism complainant's expert makes upon this device is that there is no indication in Hackett's patent that all the doors are down when the lowermost door is closed; and that it does not contain all the elements of the first claim of the Fraser patent, since "the catches and the connection between one door and the catch of an adjacent door, so that the closing of the last-mentioned door will effect the release of the other from its catch and admit of its closing, are lacking." Undoubtedly Hackett's device is no anticipation of Fraser's, but it is a part of the art, which must be assumed to be familiar to every one who subsequent to 1882 undertook to modify or improve hatchway door closing devices. The modified form of Sinclair's mechanism pointed out the desirability of opening the catches successively. The advantages of doing this automatically instead of by successive pulls by the operator on a number of different cords was surely self-evident, and, that being the problem, it certainly did not require more than the ordinary skill of the mechanic to adapt Hackett's connection between two doors to serve as a connection between door and catch. The decree of the circuit court is affirmed, with costs.

THE GLADIATOR.

NEW BEDFORD STEAM COASTING CORP. v. NICKERSON.

(Circuit Court of Appeals, First Circuit. March 23, 1897.)

1. COLLISION—TUG AND TOWS IN NARROW CHANNEL—COLLISION WITH LIGHTSHIP.

A tug, with several tows on long hawsers, the whole fleet being about 2,490 feet long, bound from Boston to New York, *held* in fault in going to the northward of the Pollock Rip lightship, though this is the usual course of tugs with tows, where she was compelled to attempt a long swing of her tow under adverse wind and tide through a channel much narrower than the length of her tow, so that the last tow was brought in collision with the lightship, it appearing that there was abundant room and water for passing to the southward of the lightship. *Held*, further, that the tow was also in fault in failing to put her helm hard to port until within nearly a length from the lightship.

2. SAME—CONSEQUENCE OF COLLISION—BURDEN OF PROOF.

It is the duty of a vessel injured through the fault of another to use reasonable diligence to diminish the consequences of the injury; but the party in fault has the burden of showing that the actual results of his fault, as they in fact occurred, might have been diminished by such diligence. If it appear, however, that no efforts were made to mitigate the loss, when there was a reasonable probability that it might have been mitigated, this omission, under some circumstances, raises such a presumption as relieves the original wrongdoer from showing by strict proof that the ultimate result could in fact have been avoided.

Appeal from the District Court of the United States for the District of Massachusetts.

James E. Carpenter, Samuel Park, and Edward S. Dodge, for appellant.

Eugene P. Carver and Edward E. Blodgett, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is a libel against the tug *Gladiator* for so negligently towing the schooner *Florence Nowell* that she collided with the *Pollock Rip* lightship. The tow was made up at Boston, October 24, 1891, and was bound for New York. It consisted of the barge *L. B. Gilchrist*, about 180 feet long, and light, the barge *Charter Oak*, about 168 feet long, and light, and the schooner, of 211 tons, and deeply laden, in the order named. The whole fleet was about 2,490 feet in length. The collision with the lightship occurred about half past 6 o'clock in the evening. It is conceded that the tug had sufficient power. She was running from 6 to 6½ knots. It is also conceded by the libel that the night was clear. There was a heavy northwest wind. The answer of the tug says "the wind was stiff northwest, with quite a heavy sea running." The northerly edge of the channel north of the lightship was marked by buoy No. 4, distant from the lightship, as the answer says, from one-quarter to three-eighths of a mile, and the tug proceeded with her tow through this channel. There is a dispute as to the direction of the set of the tide, which was running quite strong. Allen, the captain of the lightship, says it was west-southwest. However it was, the lightship headed northeast, tailing southwest, and the combined effect of the tide and wind, under the maneuvers of the tug, tended to set the schooner strongly towards the lightship. The last buoy passed by the tug and tow on their starboard, before reaching buoy No. 4, was buoy No. 2, about half a mile from No. 4, in a northeasterly direction. The tug, at No. 2 buoy, changed her course from southwest by south to westsouthwest, and at No. 4 to northwest by west,—eight points in all. Though the turn was said to have been a gradual one, yet the result was an attempted long swing of a tow over which the tug had little control, under adverse wind and tide, through a channel of much less width than the length of the tow. Consequently, while the tug hugged buoy No. 4 closely, and ran, as her captain says, within 150 feet of it, the *Charter Oak*, according to the testimony of her master, ran within her own length of the lightship, and the schooner came into collision with it. It is admitted that there were abundant sea room and water south of the lightship. It is also shown that tows usually pass north of it, and the testimony is that it is safe to do so. This is undoubtedly all true under ordinary circumstances, and it is also true that we must regard the usages of navigation, as was said by us in *The Berkshire*, 21 C. C. A. 169, 74 Fed. 906, 910; but, as applied to the facts and peculiar conditions of this case, the attempt to pass to the north of the lightship was, it is clear, extremely hazardous. And, as there was no emergency requiring it, the tug was in fault on this account, as was determined by the district court. While, as said in *The Berkshire*, we cannot condemn a tow of the character of that in this case as absolutely unlawful, yet we must hold tugs which navigate this coast with

such long and essentially hazardous fleets to the use of the extremest care in the interests of common safety. But the conditions were apparent to the master of the schooner, and he must have perceived that they required great vigilance from him, especially in keeping under a port helm, and that they forbade the omission of any effort to prevent injurious results from the error of the tug. We think he failed in this respect. The preponderance of the evidence shows clearly that he did not put his helm hard to port till he was within about the length of his vessel from the lightship. That he had steerageway is apparent, because it is plain from the evidence of the captain of the lightship that the schooner commenced to swing to starboard so soon as her wheel was put hard to port. It therefore follows that, though the position was hazardous, vigilant action on the part of the schooner, her officers and crew, would probably have averted any collision.

The schooner sunk after the collision, and became a total loss. It is claimed by the tug that this could have been prevented by reasonable efforts on the part of her officers and crew. It is plain, however, that, except for some intercepting cause, she would have sunk as the result of the collision, and that in fact her total loss was the physical consequence thereof. Under these circumstances, the collision must answer for the entire loss unless reasonable diligence would have prevented or diminished it. The general rule is stated in *The Baltimore*, 8 Wall. 377, 387, as follows:

"Persons injured in their property by collision are entitled to full indemnity for their loss, but the respondents are not liable for such damages as might have been reasonably avoided by the exercise of ordinary skill and diligence, after the collision, on the part of those in charge of the injured ship."

This rule does not seem to be questioned, but the parties are apparently at issue with reference to the burden of proof in regard to the claim that the schooner might have been saved. Expressions of the admiralty courts are cited as bearing on this issue, which, apparently, are not in all respects consistent with each other. We perceive no difficulty on this point. These varying expressions arise mainly in the application of the law to peculiar states of facts, by courts who do not hold so strictly to the technical rules relating to the burden of proof as those of the common law. Notwithstanding such expressions, the general rule of law remains everywhere to the effect that it is always the duty of a party injured to use reasonable diligence to diminish the consequences of the injury, and that it remains with the party in fault to show that the actual results of his fault, as they in fact occurred, might have been diminished by such use. The common law is so stated by Sedg. Meas. Dam. (8th Ed.) § 227, and the same rule is given as that of the admiralty courts in *Mars. Mar. Coll.* p. 112, as follows:

"Where the ship is damaged, but not sunk, in the collision, and she afterwards receives further injury, or is totally lost, the presumption ordinarily is that the subsequent injury or loss was caused by the defendant's negligence, and the burden is upon the wrongdoer in the collision to prove that it was not so caused."

It is nevertheless true that a presumption of fact sometimes arises against an injured person who makes no effort to diminish the effects

of the tort. This, for very apparent reasons, is emphatically so with reference to maritime disasters; so that, if no efforts are made to mitigate a loss where there is a reasonable probability that it might have been mitigated, this omission, under some circumstances, raises such a presumption as relieves the original tort-feasor from showing by strict proof that the ultimate result could, in fact, have been avoided. There is much in the circumstances of this case calling for the application of this presumption; but the *Gladiator* was a powerful coast tug, with all the appliances and crew which the expression implies. She was inexcusable if she did not have them, and did not use them for the relief of the schooner so far as it was practicable to do so. Yet she voluntarily abstained from doing anything, or else was unable to save the schooner. It may be that, in view of the age of the *Florence Nowell* and of the character of her cargo, and of the locality, and of the consequently probable disproportionate cost of beaching, discharging, and repairing, the salvage would necessarily have been so small as not to have justified the apparent exertions and hazards involved in saving her. We must also consider that, in view of the circumstances we have just stated, the tug may have foreseen the chances that, under the rule, "*Restitutio in integrum*," with no allowance on account of new for old, and with the considerable demurrage which might ensue, and with, also, the probability of a substantial total loss of the cargo of paving stone with which the *Florence Nowell* was laden, the pecuniary loss to the tug might have been greater if the schooner had been beached than if she sunk. Therefore, while, of course, we do not say that it was impossible to accomplish the rescue of the *Florence Nowell*, and rarely could say this under like circumstances, yet, on the whole, we must, according to the well-settled rules applicable to maritime emergencies presenting sudden and difficult conditions, accept the practical judgment rendered on the spot by those who were there, as shown by what was in fact done or not done.

The *Gladiator* claims that the *Florence Nowell* was unseaworthy for the voyage from Boston to New York. There is ground for holding that the *Gladiator* was chargeable with knowledge of this, and that she understood that it was on this account that the schooner asked a tow. However, even if this contributed to the result, it is enough to say that it did not relieve the tug from her obligation to exercise proper care and skill, nor excuse her for running north of the lightship, and its consequences are covered by the fact that the schooner is required, by reason of her fault in other respects, to share the loss. The decree of the district court is reversed, and the case is remanded to that court, with directions to proceed on the theory that both vessels were in fault; and the appellant is adjudged the costs of appeal.

McCORNICK v. WESTERN UNION TEL. CO.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 824.

1. REMOVAL OF CAUSES—ADMISSION OF TERRITORY AS STATE.

The right to remove into the federal courts causes which were pending in the territorial courts of Utah at the time of its admission into the Union did not depend on the judiciary act of March 3, 1887, but rested entirely on the provisions of the enabling act, and of the state constitution adopted pursuant thereto, for the special purpose of removing into the federal courts causes pending in the territorial courts, when such courts should cease to exist. And while the constitution of Utah provides that causes of which the United States courts would not have had exclusive jurisdiction shall be removed only upon petition or motion made under and in accordance with the act or acts of congress of the United States, this does not mean that the application for removal must be made before pleading by the defendant, or at any specified time before trial.

2. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.

The provision in the Utah enabling act empowering the constitutional convention to provide by ordinance for the transfer of causes pending in the territorial courts to the proper state and federal courts, respectively, was not an unconstitutional delegation of legislative power by congress. The provision made for this purpose in the state constitution is, in any event, valid, as the constitution was accepted and ratified by the act of congress admitting the state.

3. TELEGRAPH COMPANIES.

While a telegraph company owes a duty to the person to whom a telegram is addressed, and to whom it is delivered to be acted upon, to exercise care that it shall be authentic and accurate, it is not liable to a stranger to the company and to the telegram merely because he has seen the telegram, and acted upon it to his injury.

In Error to the Circuit Court of the United States for the District of Utah.

On October 18, 1892, George L. Frink, manager of the Glencoe Mining Company of the territory of Utah, applied to the plaintiff, a banker of Salt Lake City, in said territory, with whom said mining company had an account, for a loan by way of overdrafts, to the amount of \$7,500, which was declined, but with the statement that plaintiff would so loan such sum as one D. E. Soule, of New Milford, Conn., would authorize said Frink to draw for upon the said Soule. Thereafter, on the same day, said Soule, in the city of New York, delivered to defendant a message, signed by him, to be telegraphed to said George S. Frink at Salt Lake City, to whom it was addressed, of the following purport: "May draw twenty-five hundred dollars at sight." By some error or mistake in transmission, the message, when delivered to Frink in Salt Lake City by the defendant's messenger, purporting to come from, and to be signed with the name of, said D. E. Soule, read: "May draw seventy-five hundred dollars at sight." Thereupon said Frink made on the same day a sight draft in favor of McCornick & Co. upon said D. E. Soule for the sum of \$7,500, and upon the delivery thereof to the plaintiff, and the exhibition to said plaintiff of said telegram as received by said Frink, the plaintiff advanced and loaned to said Frink, by placing the same to the credit of said mining company, the sum of \$7,500. Soule paid on said draft \$2,500, and no more, and the draft was protested. In the meantime the mining company had obtained from plaintiff \$7,276.68 of such loan. Frink and said mining company are insolvent, and the plaintiff seeks in this action to recover of the defendant \$4,776.68, as his damage because of the negligence and carelessness of defendant and its agents in the transmission and delivery of said telegram. The complaint was filed July 20, 1893, in the district court of the Third Judicial

district of the territory of Utah, county of Salt Lake, and the answer of the defendant was filed in the same court September 23, 1893, and the cause was pending in that court when, on January 4, 1896, the state of Utah was admitted into the Union. On February 1, 1896, the defendant filed in the district court of the Third judicial district of the state of Utah, county of Salt Lake, its petition for the removal of this cause to the circuit court of the United States for the district of Utah, on the ground that the amount in dispute, exclusive of interest and costs, exceeded \$2,000, and that defendant was a citizen and resident of the state of New York, and the plaintiff a citizen and resident of the state of Utah. Defendant filed at the same time a proper bond for the removal of said cause, and thereupon, on the 21st day of February, 1896, by the order of the judge of said state court, said cause was removed for trial to said circuit court of the United States for the district of Utah, which last-named court afterwards denied the plaintiff's motion to remand said cause to the state court. Afterwards the said cause came on for trial at a regular term of said United States circuit court, and at the close of the evidence, the jury, in obedience to the direction of the court, returned their verdict in favor of the defendant, and judgment was thereupon rendered in favor of the defendant for its costs.

Arthur Brown (Henry P. Henderson and William H. King with him on brief), for plaintiff in error.

David Evans and Eleneious Smith (George H. Fearons, L. R. Rogers, and Joseph Dickson with them on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The cause was properly removed to the United States circuit court. The right of removal in this case did not depend on the act of March 3, 1887, in relation to the removal of causes from the state to the federal courts, which is inapplicable to suits pending in the courts of a territory. Such right of removal rested entirely on the provision made by congress for the special purpose of removing into the federal courts such causes pending in the territorial courts of Utah, when such courts should cease to exist, on the admission of the new state, as might, conformably to the constitution of the United States, be removed to the federal courts for trial. By the act of congress enabling the people of Utah to form a constitution and state government, the convention provided for was empowered to provide by ordinance "for the transfer of actions, cases and proceedings, and such matters pending in the supreme or district courts of the territory of Utah, at the time of the admission of the said state into the Union, to such courts as shall be established under the constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah, and no indictment, action or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts, according to the laws thereof respectively." Pursuant to this authority, the convention, in the seventh section of article 24 of the constitution of Utah, ordained:

"All actions, cases, proceedings and matters which shall be pending in the district courts of the territory of Utah, at the time of the admission of the

state into the Union, whereof the United States district or circuit courts might have had jurisdiction, had there been a state government at the commencement thereof respectively, shall be transferred to the proper United States circuit and district courts respectively; and all records, indictments and proceedings relating thereto, shall be transferred to the said United States courts. Provided, that no civil action, other than causes and proceedings of which the said United States courts shall have exclusive jurisdiction, shall be transferred to either of said United States courts, except upon motion or petition by one of the parties thereto, made under and in accordance with the act or acts of congress of the United States; and such motion not being made, all such cases shall be proceeded with in the proper state courts."

Under these provisions, civil actions pending in the territorial district courts when the state was admitted, of which the United States courts had not exclusive jurisdiction, would remain in the state courts, unless a party thereto should move or petition for the removal, and the motion or petition was to be made under and in accordance with the acts of congress. This means that the application and proceedings should, in form, conform to similar proceedings under the acts of congress, and show the jurisdictional facts which would warrant the assumption of jurisdiction by the federal court. It does not mean that the application for removal must be made before pleading by the defendant, or at any specified time before trial. The language used covers all cases so pending in the territorial courts "whereof the United States circuit or district courts might have had jurisdiction, had there been a state government at the time of the commencement thereof respectively." The provision should be so construed as to give effect both to the intention of congress and the convention. *Koenigsberger v. Mining Co.*, 158 U. S. 41, 15 Sup. Ct. 751. To hold that no case pending in the courts of the territory of Utah could be removed, except such as came entirely under the removal act of 1887, is to hold that the congressional provision in the enabling act, and the provision in the Utah constitution, are alike futile and meaningless, and that nothing but the act of 1887 has any force in respect to the subject. It is argued that congress cannot delegate its legislative power to any other body, and therefore the provision in the Utah constitution is void. It may be admitted that congress may not delegate its general powers of legislation on subjects affecting the whole people. But it has never been doubted that congress may, in respect to any designated district or territory outside of all the states, and therefore within its absolute control, create a local legislative body, and invest it with legislative powers. This has been done in respect to all of the organized territories, although the power of congress remains complete over them, so that it can disorganize them, or abrogate any law passed by the local legislature, or make enactments for a territory as if it had no legislature. The constitutional convention of Utah was a governmental body, which congress could properly provide for, to aid in preparing for the change from territorial existence to statehood, and could properly invest it with authority to provide for all the details incident to such change. One of these unavoidable details was the proper distribution and placing of the causes depending in the territorial courts, which would go out of existence with the change. The argument, however, has

no foundation. The act of congress which admitted Utah as a state accepted and ratified its constitution, and invested all its provisions with all authority conferred by any act of congress.

2. The defendant telegraph company, by its contract with the sender of the telegram, made in consideration of payment for the service, was bound to him to transmit his message correctly, and would be liable to him for any damage he might sustain as the direct result of failure to perform such contract, except in so far as such liability had been lawfully limited by the terms of the contract. It also owed a duty to the person to whom the telegram was addressed, and to whom it was delivered by the telegraph company to be acted upon, to exercise care that the telegram so delivered should be authentic and accurate. The cases of *May v. Telegraph Co.*, 112 Mass. 90, and *Elwood v. Telegraph Co.*, 45 N. Y. 549, sustain the right of a person to whom a telegram is addressed and to whom it is delivered by the telegraph company, to recover for damage caused by negligence of the character indicated. But a telegraph company cannot be liable to a stranger to the company and to the telegram,—one to whom it has never delivered the message, and to whom it owes no duty whatever,—merely because he has seen the telegram, and acted upon it to his injury. *Telegraph Co. v. Wood*, 6 C. C. A. 432, 57 Fed. 471; *Bank v. Ward*, 100 U. S. 195. The direction to the jury was correct, and the judgment is affirmed.

HAWKINS v. PEIRCE.

(Circuit Court, D. Indiana. April 12, 1897.)

1. APPEARANCE—WHAT CONSTITUTES—PETITION FOR REMOVAL.

The filing, by defendant, of a petition to remove the cause into a federal court, disclaiming any intention to submit to the jurisdiction of the state court, is not an appearance in the action waiving defects in the service or return of summons.

PROCESS—DEFECTIVE RETURN—AMENDMENT.

The sheriff cannot amend his return on a summons after the cause has been removed into a federal court.

Palmer & Palmer, for plaintiff.

Charles Schmettau, for defendant.

BAKER, District Judge. On February 12, 1897, the plaintiff filed his complaint in the circuit court of Clinton county, Ind., against the defendant, for the purpose of recovering damages for a personal injury alleged to have been received upon the railroad under the control and management of the defendant as receiver. On the same day a summons in due form was issued upon said complaint, and was delivered on February 13, 1897, to the sheriff of Clinton county, who made return thereon in words and figures following:

"Came to hand Feb. 13, 1897, at 9 o'clock a. m.

"I have served the within summons as commanded, by reading the same to and within the hearing of ———, and by leaving a true and certified copy of

the within summons at the last or usual place of residence of 'Served, leaving a copy with Harry S. McLeod, Agent for Co., Feb. 13,' 1897.

"Jerome Clark, Sheriff of Clinton County."

Said summons was made returnable on March 1, 1897. On that day the defendant, by his attorney, filed a petition, accompanied by a proper bond, for the removal of the cause into the circuit court of the United States for the district of Indiana. In the petition for removal the defendant protested that the state court had acquired no jurisdiction over his person, and disclaimed any and all intent of entering his appearance to said cause in said state court. Upon such petition and bond the state court ordered that the cause should be removed for trial into the circuit court of the United States for the district of Indiana, and that no further proceedings should be had in the state court. The transcript of the record was filed in this court on the 3d day of April, 1897, and on the same day the defendant, by counsel, moved the court in writing to set aside the sheriff's return of service, and to dismiss the action for want of jurisdiction over the defendant, for the reason that the sheriff's return of service showed that no service whatever was had upon the defendant. Counsel for the plaintiff admit that the return of the sheriff is insufficient to confer jurisdiction on the state court, but contend that the defendant's appearance in filing his petition for removal without raising any question as to service or return of service of the summons in the state court was a full appearance to the action, and waived any and all defects in the service of the summons or in the return thereof. This contention of counsel for the plaintiff is unfounded. The supreme court of the United States in a recent case have held that the filing by a defendant in an action in a state court of a petition for its removal to the proper circuit court of the United States does not prevent the defendant, after the case is removed, from moving in the federal court to dismiss it for want of jurisdiction of the person of the defendant in the state court or in the federal court. *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126. And in the later case of *Society v. Spiro*, 164 U. S. 281, 17 Sup. Ct. 996, it is held that a defendant, by filing a petition in a state court for removal of a cause to the United States court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, does not thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons. But in the present case, in the petition for removal the defendant expressly protested against the jurisdiction of the state court, and disclaimed any purpose or intention of appearing in said cause, and submitting to the jurisdiction of the state court; so that, irrespective of the principle announced in the two preceding cases, there is no ground in this case for the contention that by filing the petition for removal in the terms in which it was filed the defendant submitted himself to the jurisdiction of the state court. It is suggested by counsel for the plaintiff that McLeod, upon whom process was served, was, in point of fact, the agent of the defendant, and that, therefore, a valid service was made upon

the defendant, and that the only defect is in the sheriff's return; and it is claimed that the sheriff of Clinton county can amend the return so as to show a legal service in point of fact. The jurisdiction of the state court over this cause was terminated by the filing of the petition for removal with the accompanying bond, and this court can issue no order to, nor confer any authority upon, any officer of the state court in respect to any matter or proceeding in this cause in this court. The jurisdiction of this court over the person of the defendant depends exclusively upon the jurisdiction of the state court, and, inasmuch as the state court had acquired no jurisdiction over the person of the defendant before the filing of the petition for removal, nothing can be done in this court in aid of the jurisdiction of the state court. *Tallman v. Railroad Co.*, 45 Fed. 156. It follows that the action must be dismissed.

PUTNAM et al. v. TIMOTHY DRY-GOODS & CARPET CO. et al.

(Circuit Court, E. D. Tennessee. January 16, 1897.)

1. FEDERAL COURTS—JURISDICTIONAL AMOUNT—ASSIGNMENT FOR CREDITORS.
In a suit, brought in behalf of all creditors, to administer a trust fund, the amount of the fund to be administered determines the question of jurisdiction.
2. SAME—PARTIES TO ACTION—CITIZENSHIP.
A creditor may in some cases maintain an action to enforce execution of an assignment for the benefit of creditors without making the other creditors parties, either plaintiff or defendant, though their names are set out in the assignment. And the court has jurisdiction although the effect would be to oust it of jurisdiction if they were made parties. *Hotel Co. v. Wade*, 97 U. S. 13, applied.
3. EQUITY JURISDICTION—ASSIGNMENT FOR CREDITORS.
Any creditor secured by an assignment may maintain a bill for the purpose of enforcing due and proper execution of the trust.
4. SAME—REMOVAL OF TRUSTEE.
The court should be cautious in removing an assignee for creditors upon the ground of misconduct; and where his conduct complained of proceeds from a misunderstanding of his duty or from mistake, and not from any dishonest, selfish, or improper motives, and the safety of the property is not imperiled, the court generally will not remove him.

This was a suit in equity, brought by Putnam, Hooker & Co. and others against Timothy Dry-Goods & Carpet Company and others, to enforce the execution of an assignment for creditors executed by the Timothy Dry-Goods & Carpet Company to E. A. Metz, in which there was a motion to remove the trustee.

Pritchard & Sizer and Andrews & Andrews, for plaintiffs.
R. P. Woodard, for defendants.

CLARK, District Judge. The bill is brought in this case primarily for the purpose of enforcing due and proper execution of the trust assignment. It is well settled, of course, that any creditor secured by the assignment, and a beneficiary thereunder, may maintain such a bill. The first question which presents itself is that of jurisdiction

of the case. This question relates to federal as distinguished from state jurisdiction, and not to equitable as distinguished from legal jurisdiction. The objection to jurisdiction of this court is based upon two grounds, namely, the want of jurisdictional amount, and the lack of proper citizenship. As the bill is brought to administer a trust fund, and on behalf of all creditors, I think the cases fully establish the proposition that the fund to be administered determines the question of jurisdiction; and, besides, one of these complainants claims an amount which exceeds the jurisdictional limit. The question which gave me most trouble on first reading the bill was that of citizenship, and this difficulty did not grow out of the case, so far as the parties actually named on the record are concerned. The court was disposed to think that the plaintiff could not maintain the bill without making the other creditors parties, either plaintiff or defendant, so far as their names were actually known to him; and these names a copy of the assignment, which is made an exhibit to the bill, distinctly sets forth. The difficulty which thus suggested itself seems to be met by the principle of the case of *Hotel Co. v. Wade*, 97 U. S. 13, and other cases, both state and federal, which need not be here referred to. I am satisfied that, as the case is presented, the court has jurisdiction.

It remains then to determine whether or not a case for equitable relief is presented under the bill. It may be of service at this point to restate certain propositions which are now fully established and no longer open to question. Speaking broadly, the whole subject of trust, including trust assignments for the benefit of creditors, and the proper execution of such trust, with directions and instructions to trustees in regard to their duties, is an original and familiar head of equity jurisdiction. It has been repeatedly decided that either the assignee, or a creditor under the assignment, may make application to a court of chancery either to restrain the assignee from acts which would constitute mismanagement or waste, and to have such orders and decrees as will cause a due and legal execution of the trust, or the assignee may himself, in case of doubt or difficulty, apply to the court for instructions and directions in the execution of his trust. Such bill may be maintained not only when the trust is not being properly executed, but whenever there is danger of a loss or waste to the trust fund. When such bill is brought by a creditor under the assignment, the rule only requires that it shall be brought against the assignee, and that it shall be brought on behalf of all other creditors who choose to come in on the usual terms. These and other propositions relating to the subject will be found fully stated and sustained by the following authorities: *Weir v. Tannehill*, 2 Yerg. 57; *Shyer v. Lockhard*, 2 Tenn. Ch. 365; *Burrill, Assignm.* § 419; 2 *Perry, Trusts*, §§ 595, 817; 1 *Am. & Eng. Enc. Law*; 2 *Story, Eq. Jur.* 1287.

I may first dispose of the motion to remove the present assignee, E. A. Metz. The grounds of objection to Mr. Metz are, so far as they are material to be now noticed: (1) That he declines to bring suit to collect certain alleged stock subscriptions due to the Timothy Dry-Goods Company; (2) that he has failed and refused to make a proper inventory of the stock of goods, in that he refused to mark the invoice

price of the goods, or sufficiently describe the lot and character of the different items of the stock; (3) that there is a debt of \$5,000 purporting to be due George Metz, a brother of E. A. Metz, and secured by the assignment, and that \$7,500 of stock in a real-estate and building association was transferred to E. A. Metz, as trustee for his brother, to secure this \$5,000. The bill questions the validity of this debt of \$5,000. This \$5,000 is due by note, which appears to have been given by the corporation upon his retirement therefrom, and presumably for his stock therein; and the point is made that this is a transaction that the corporation could not make,—in a word, that it was *ultra vires*. In regard to the failure of the assignee, Metz, to institute suit for any supposed stock subscription, it is only necessary to say I am clearly of the opinion that upon proper legal advice he should do so, as he could maintain no such suit in the present condition of things. A question of that kind could not be raised except in a bill to wind up the corporation. The failure of Metz to furnish a fuller inventory may be due to overcaution on his part, in the apprehension that the goods might be put at a figure higher than could be realized from them in a sale, and a question of liability for the difference be made. The force of this fact of failure to make satisfactory invoice is much weakened by other circumstances in the case. It appears, for example, that a representative of the creditors, as well as the creditors' solicitors, has applied to the assignee, and has been allowed free access to the invoice books of the company, and free personal examination of the goods, and that a second inventory was made out at the instance of a representative of creditors, to which it is certain no serious objection was made, except the failure to state the invoice price of the goods; and although it does appear that the cost-price tag, or slip of paper, which is usually found on packages of goods, has been taken from many of them, Mr. Metz denies that it was with his knowledge and consent, and there is no proof that it was. It must be stated also that, beyond this objection to the invoice, it is not alleged or intimated that Mr. Metz has done anything unfair or partial in the matter. He is shown to be a young man of high character, good business qualifications, and has given a bond for the discharge of his duty, the amount and solvency of which are not put in question. It is a somewhat serious matter to remove an assignee upon the ground of misconduct, and the court should certainly be cautious in doing so, except upon satisfactory grounds. A trust position like this is one of the most responsible and delicate ones known in business relations, and misconduct in his office, or a breach of his trust duty, would operate as a most serious injury to Mr. Metz, who is now a young man. I do not think there is any ground sufficient to sustain the motion to remove. The most serious objection, in my opinion, to continuing Mr. Metz in office, is the antagonistic relation which he now occupies towards the creditors and towards his brother in relation to the disputed debt of \$5,000. And in regard to this it must be observed that it is not charged that the debt is fictitious or fraudulent in fact. The attack made upon the debt is, as before stated, that it is one beyond the scope and power of the corporation to create, and that it is for that reason legally in-

valid. The distinction between a debt which is invalid by reason of a want of power in the corporation to create the debt, and a pretended or fictitious debt, which has no existence in fact, and for which the corporation received no consideration, is a distinction easily understood. It is not at all difficult to suppose that Mr. Metz did not know the facts connected with this transaction, or, what is more probable, that both himself and the officers of the company supposed that they might buy out George Metz's interest in the company, and give the company's note therefor, just as an individual might do. The fact that very intelligent business men, in control of corporations, do not observe this distinction in the power between a corporation and a natural person, is a thing of almost daily occurrence. There is no charge that Mr. Metz is not thoroughly competent to execute the trust; no charge that in doing so, up to this date, he has been guilty of any mismanagement, waste, or extravagance. There is, in short, no charge which connects him with anything which could be considered prejudicial to the creditors secured by the assignment. Upon this subject of directions to, and the control or removal of, assignees and trustees, by a court of chancery, the result of the adjudged cases is well stated by Mr. Perry in his work on Trusts, as follows:

"(817) The cestuis que trustent may bring a bill or petition for removal, and the court may remove the trustees from office, and appoint others in their place, when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of trust, or any danger to the trust fund; but if the conduct of the trustee proceeds from a misunderstanding of his duty, or from mistake or from long-continued practice by himself and other trustee, and not from any dishonest, selfish, or improper motives, and the safety of the property is not imperiled, the court generally will not remove him. (818) Proceedings for the removal of trustees and the appointment of others require some little time, as trustees have the right to file answers to the charges against them, and to a regular and full hearing; and, as the cestuis que trustent are entitled to have the fund properly protected, and managed in the meantime, the court may appoint receivers. Thus, if it can be shown that the trustees have been guilty of misconduct, waste, or an improper disposition of the estate; or that they have an undue leaning towards one of two conflicting interests; or that the fund is in danger from their insolvency or bankruptcy; or that one of the trustees has been guilty of misconduct, and the other trustees desire a receiver; or that they are incapacitated from acting; or that they are of bad character, drunken habits, and great poverty; or that the trustees are out of the jurisdiction; or that they so disagree among themselves that the estate cannot be properly administered,—receivers will be appointed; and so where the trustee was a married woman, and her husband was out of the jurisdiction. In all cases the court will appoint a receiver if the trustees and cestuis que trust agree or concur in the appointment. But the court will require security. (819) The court will not appoint a receiver, and take the administration out of the hands of the trustees, upon slight grounds. It is not a sufficient ground, of itself, for a receiver, that one trustee has disclaimed, another is inactive, and another has gone abroad, if there is still a trustee capable and willing to execute the trust; nor that the trustees are poor, if they are not insolvent; nor that trustees for sale have let the purchaser into possession before the purchase money is paid. There must be good reason to fear that the property will not be forthcoming at the end of the litigation, or the court will not appoint a receiver." 2 Perry, Trusts, §§ 817-819.

It is to be borne in mind that the plaintiffs in this suit make no attack upon the validity of the assignment, but bring the bill to have

the trust executed; thereby affirming the validity of the assignment, and accepting the same. It is the duty of the court to so exercise its confessedly rightful jurisdiction over this subject as that the creditors will be fully protected in the due execution of the trust, and so, at the same time, as to avoid operating the fund with any cost or expense not absolutely necessary to protect the just rights of creditors. As the cause must be retained to allow the question made on the \$5,000 debt to George Metz to be litigated and determined, I have concluded to retain the case, in order that the trust may be executed by the assignee, in a general way, under the orders of the court, and so that, if just ground of complaint against the assignee should arise in the execution of his further duties, such application may hereafter be made to the court as the facts may be thought to require. Mr. Metz will be required not to pay or recognize the debt to George Metz until the question of its validity shall be determined in this case. He will proceed as heretofore to execute the trust assignment according to the directions and provisions of the trust deed, and will make and file in this court monthly reports of his action under the trust deed, showing his sales, expenses, and the proceeds realized. He will make no disposition of the property at private sale, except upon five days' notice to such representatives as creditors may designate for that purpose, which they are required to do within five days, and furnish the name of such representatives to the assignee. The assignee will continue to sell goods as directed in the trust assignment, according to the usual course of business during the six months, as heretofore; the intent of this direction being that if such assignee should deem it best to sell the goods otherwise than according to the usual course of business, by selling the goods in lots, or other parts of the property, the creditors shall have notice of such disposition five days before an actual sale. The trustee is required within ten days to furnish and file in the court an inventory showing the original cost price of the goods embraced in the assignment, so far as this can be done from the books of the company or otherwise, and also such brief description of the kind or quality of goods as may be reasonably furnished. In case there are any goods, the cost price of which cannot be ascertained, the assignee will so state, and point out the goods of this kind, and will, upon application, allow the representatives of the creditors to examine the quality and character of such goods in the presence of the assignee, in order that the cost price may be agreed upon, and, in case it cannot, in order that a representative of the creditors may himself determine the cost value or price of the goods. The assignee will make affidavit to the inventory hereby required, in which affidavit he shall state that he is unable to give the cost price of goods where the same is not given in the inventory. To avoid misapprehension, I wish to repeat that the assignee will proceed with the discharge of his duties distinctly as provided by the trust deed; the only provision herein requiring that, in case certain sales are made under the power of the trust deed, the creditors shall have due notice thereof. It need not be added, of course, that the motion to remove the assignee is overruled.

ADDISON v. PACIFIC COAST MILLING CO. et al.

(Circuit Court, D. Washington, N. D. March 26, 1897.)

1. CORPORATIONS—LIABILITY OF STOCKHOLDERS.

Each stockholder in a corporation is liable to its creditors for the full amount of stock issued to him which has not been actually paid into the treasury of the corporation in money or money's worth.

2. SAME—STOCKHOLDER'S LIEN FOR WAGES.

The claim of a stockholder in an insolvent corporation to a statutory lien for wages will not be allowed where his liability for stock not fully paid far exceeds the amount of his claim.

3. SAME.

Where the manual labor performed by one who was employed by a corporation as a general manager and employer of labor was merely incidental to his connection with the company, and the incentive thereto was his interest as a sharer in expected profits, the labor does not come within the intent or scope of the statutes of the state of Washington creating liens for wages.

In Equity. Hearing on a petition by Evelyn Ayerst, as assignee of E. A. Ayerst, to establish a lien upon lumber in the custody of a receiver of an insolvent corporation. Petition denied.

Fairchild & Bruce, for petitioner.

Kerr & McCord, for receiver.

HANFORD, District Judge. Having considered the evidence and arguments for and against the claim of Evelyn Ayerst, to establish a preference right against the assets of the insolvent corporation, the Pacific Coast Milling Company, as the assignee of her father, E. A. Ayerst, which petition sets up a lien upon the lumber and manufactured product of the company's mill, for wages alleged to have been earned by E. A. Ayerst during a period of eight months immediately preceding the appointment of a receiver herein, I find that the assignor, E. A. Ayerst, is the real party in interest in prosecuting this claim. Whatever their respective rights may be as between themselves, the petitioner cannot claim, against creditors of the insolvent corporation, any rights superior to or different from those which her father himself might assert. The testimony is altogether too vague and indefinite, as to any actual consideration for the assignment of the claim, to entitle this petitioner to any particular favor as a bona fide purchaser of the claim.

Touching the merits of the claim, the facts, as disclosed by the evidence, are that E. A. Ayerst was one of the principal promoters of the milling company, and, upon the incorporation of the company, he received one-half of its capital stock, of the par value of \$25,000, and that his entire contribution to the capital of the corporation, other than his services as an officer and manager, was only \$5,000. It is claimed that the stock was issued as full paid-up stock, in consideration for the mill and manufacturing plant, the title to which was transferred to the company. As against creditors, however, that transaction cannot be sustained in a court of equity. The mill was purchased from the Pacific Coast Trading

Company for \$13,500, and paid for by a first mortgage to the Bennett National Bank, for \$8,500, and a second mortgage to the vendor, for \$5,000; and the only payments on account of these several mortgages were made out of the earnings of the mill. It is shown that a large amount has been expended in betterments and repairs and the acquisition of new machinery, but the testimony fails to show that Mr. Ayerst made any contribution towards payment for the betterments, repairs, and new machinery, other than the \$5,000 above mentioned, and his services. The capital of a corporation is a trust fund for the payment of debts of the corporation, and each shareholder is liable to its creditors for the full amount of stock issued to him, which has not been actually paid into the treasury of the corporation in money or money's worth. The corporation is insolvent, and its debts exceed by a large amount its total assets, and for the deficit Mr. Ayerst is liable to the creditors to the extent of the difference between the par value of his stock, and the aggregate amount of money which he has put in, and all sums of money due to him as a creditor on account of services and cash payments. After giving him credit for all that he can possibly claim, the amount of his liability greatly exceeds the credits in his favor. In view of this state of affairs, it would not be according to equity to allow this preference claim to diminish the assets available to pay the debts of the corporation.

The validity of the lien is assailed on various other grounds, all more or less substantial. I will refer to but one. There was no contract to pay Mr. Ayerst the salary which he claims. His testimony, to the effect that there was an understanding between the trustees and himself that his salary should be \$100 per month, is insufficient to establish a contract, for there was no definite assent by the trustees as a board, nor by any authorized agent of the corporation, to any such understanding. In so far as the testimony tends to prove a contract fixing the amount of his salary, it is contradicted by the notice and claim of lien, which Mr. Ayerst verified and placed on record, in which he sets forth, as one of the terms of his contract, that the corporation agreed to pay him what his services should be reasonably worth. In his account on the books of the corporation there are no credits for salary, and statements were at different times rendered to creditors, which failed to show any indebtedness to him for salary. There being no express contract, it is next in order to inquire whether there is an implied contract upon which a valid claim can be founded. Mr. Ayerst was a general manager and employer of labor for the corporation. Whatever actual manual labor he may have rendered in assisting in the production of shingles or lumber was merely incidental to his connection with the company, and the incentive thereto was his interest as a sharer in expected profits. Such labor does not come within the intent or scope of the statutes of this state creating liens for wages. *Campbell v. Manufacturing Co.*, 11 Wash. 204-207, 39 Pac. 451. The testimony fails to show the time given to manual labor, or any data upon which an estimate of its value can be made. Hence there can be no implied contract

to pay any definite rate of wages. An order will be entered denying the petition, and awarding to the receiver the costs made upon the petition.

KNIGHTS TEMPLARS & MASONIC MUT. AID ASS'N v. GREENE et al.

(Circuit Court, S. D. Ohio, W. D. March 29, 1897.)

1. CONSTRUCTION OF LIFE INSURANCE POLICY—CONFLICT OF LAWS.

Language in a life insurance policy designating the beneficiary must, subject to limitations of the statute or charter as to who may be designated, be regarded as the language of the insured alone, and is to be treated as of a testamentary character, and should receive as nearly as possible the same construction as if used in a will under the same circumstances. Therefore, under a policy, issued in Ohio, payable to the heirs of the insured, who was domiciled in New York, and all the possible objects of whose bounty lived there, the court must determine by the law of New York who are his heirs.

2. LIFE INSURANCE POLICY PAYABLE TO "HEIRS."

Under the New York decisions the meaning and scope of the word "heirs," when used to designate those who are to take personal property, either in a will or in any document having the same effect as a testament, as in a life insurance policy, are to be determined from the context and the circumstances.

3. SAME.

In New York the proceeds of a policy of life insurance payable to the "heirs" of the insured are to be distributed to those who would take his personal estate in case of intestacy, where it appears from the context and circumstances that such was his intention.

This suit was begun by the Knights Templars & Masonic Mutual Aid Association by filing its petition in the nature of an interpleader in the superior court of Cincinnati against Sarah L. Greene, the widow of John G. Greene, Mary Greene, the mother of John G. Greene, and John G. Greene's brothers and sisters. The defendants removed the case to this court, where the pleadings were not reframed to conform to the equity practice of this court as they should have been.

The petition was filed to determine who among the defendants should be paid the amount of an insurance policy issued by the plaintiff association in the year 1879 on the life of John G. Greene for the sum of \$5,000. He died in 1894. His widow made proof of loss, and claimed the entire amount of the policy as the beneficiary named therein. The association paid her \$1,000. The mother and the brothers and sisters of John G. Greene also made proof of loss, and claimed that the fund was due to them as beneficiaries named in the policy.

The Knights Templars & Masonic Mutual Aid Association was created under section 3630 of the Revised Statutes of Ohio. That section provides that "a company or association may be organized to transact the business of life or accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association." Article 16 of the by-laws of the association provides as follows: "Every application for a certificate of membership shall be accompanied by a membership fee (see article 14), by an assessment for the payment of one death loss, and a certificate of medical examination as prescribed by the forms of this association. If the application shall be rejected, all moneys paid shall be returned to the applicant, except so much as may be required to pay for the medical examination. If the application is recommended by the medical

director, and approved by the president and secretary, a certificate shall be issued to the applicant. No certificate shall be in force until it is paid for. Certificates can only be made payable to the families or heirs of the member, or some one or more of them. (a) Any member may make any change in the beneficiaries under his certificate, from those named therein to any others of his family, or heirs, upon petition therefor on a form to be provided for that purpose, and paying therefor the sum of fifty cents. Such change shall be by indorsement on the original certificate, duly signed by the officers of the association and by the member."

The evidence shows that in 1879 Marsh & Fulton were the agents of the association in Cleveland, Ohio, and that Marsh visited the state of New York for the purpose of there soliciting applications for insurance; that the insured, John G. Greene, was a resident of Schenectady, N. Y., and that there the application for membership was signed, and with the necessary fee delivered, by him, on October 29, 1879, to Marsh; that Marsh sent the application and fee to the home office at Cincinnati for approval and acceptance; that the proper officers at Cincinnati accepted the application, and issued a policy or certificate of membership, and mailed the same on November 12, 1879, to Marsh & Fulton in Cleveland; that Greene received the policy at Schenectady; and that, as Marsh was in Schenectady at the time, he presumably delivered the policy to Greene at that place. Shortly after this, a regular agency of the association was established at Schenectady, from which Greene received all notices of assessment, and where he paid them. It further appears that the policy, as originally issued in 1879, was made payable to Sarah L. Greene, wife of John G. Greene. On November 23, 1889, John G. Greene wrote to the secretary of the association, inclosing his policy, as follows:

"Schenectady, N. Y., Nov. 23rd, 1889.

"Charles Brown, Esq., Sec. K. T. and M. M. A. A.—Dear Sir: Please find inclosed my policy No. 2,177. Please have it changed, and made payable to my heirs, executors, administrators, or assigns, and tell me how much the expense is, and I will send you a money order for the amt. Please have this attended at once, and return my policy.

"Yours, truly,

J. G. Greene."

To which the secretary answered as follows:

"Cincinnati, November 26th, 1889.

"John G. Greene, Esq., Schenectady, N. Y.—Dear Sir: Your letter of the 23d inst., inclosing cert. and requesting change in beneficiary of same, to hand this morning. According to your direction we have made indorsement upon your certificate, making the beneficiary payable to your heirs. It could not be made payable to yourself, your estate, assigns, or administrators, or executors, as this, according to the laws of Ohio, would make it void. When you have signed this indorsement, send your certificate to us with the sum of 50 cts., when the change will be recorded, and your certificate of membership returned to you.

"Very respectfully, yours,

Chas. Brown, Sec."

To which Greene answered:

"Schenectady, N. Y., Nov. 28, 1889.

"Mr. Chas. Brown, Esq.—Dear Sir: Please find inclosed 50 cts. P. O. stamps for amt. asked for.

"Yours, truly,

J. G. Greene."

On receipt of which the secretary replied as follows:

"Cincinnati, Nov. 30th, '89.

"John G. Greene, Esq., Schenectady, N. Y.—Dear Sir: Having recorded change in beneficiary of your certificate as directed by you, we herewith return your certificate.

"Very respectfully, yours,

Chas. Brown, Sec."

Subsequent to the indorsement of the change of the beneficiary on the original policy, Greene lost his policy, and thereupon a new and duplicate policy was issued to him, as follows:

"Knights Templars and Masonic Mutual Aid Association.

"The Knights Templars and Masonic Mutual Aid Association, in consideration of the representations made to it in the application for this certificate and the sum of sixteen dollars to it paid by John G. Greene, of Schenectady, N. Y., and such further sum or sums, in assessments to be made and paid as provided in the by-laws of the association, hereby promises and agrees with him to well and truly pay to the heirs of the said John G. Greene the sum of five thousand dollars, or such proportion thereof as is provided for in said by-laws. Payment to be made at the office of the association in the city of Cincinnati, O., within sixty days after due notice and satisfactory proof of the death (during the continuance of this contract) of the said John G. Greene. * * *

"In witness whereof, the said Knights Templars and Masonic Mutual Aid Association has caused these presents to be signed by its president and secretary, and its seal to be attached hereto, in the city of Cincinnati, state of Ohio, this 11th day of November, A. D. 1879.

"E. T. Carson, President.

"Chas. Brown, Secretary."

There are eight conditions printed on the face of the policy, of which the fifth condition is as follows: "All receipts, to be binding on the association, shall be signed by the president, vice president, or secretary, and if any assessment shall not be paid within 10 days after notice, as provided in the by-laws, at the office of the association in the city of Cincinnati, Ohio (unless otherwise expressly agreed in writing), or to the collectors when they produce receipts, properly signed, then and in every such case this association shall not be liable for the payment of said sum, nor any part thereof, and this certificate shall be null, void, and of no effect." The seventh condition is: "Agents of the association are not authorized to make, alter, or discharge contracts, or waive forfeitures. Inasmuch as only the officers at the home office of the association, in the city of Cincinnati, have authority to determine whether or not a certificate shall issue on any application, and as they act on the written statements and representations hereinabove referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking the application for this certificate, or to any other person, shall be binding on the association, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing, and presented to the officers of the association, at the home office, in the application referred to." The eighth condition is: "The by-laws of the association constitute a part of this certificate."

Article 25 of the by-laws of the association provided for an annual meeting in the state of New York, as follows: "A stated annual meeting of the members of this association shall be held within the county, in the state of New York, in which the principal office of the association in said state is located, on the second Monday in February in each year. Notice of every such meeting shall be given to each director, member, and policy holder, not less than five days before the meeting, by notice, by mail, or by advertisements inserted in two newspapers of general circulation,—one published in the city of Cincinnati, the other in said county in the state of New York. At such meeting a full and specific report of all the association's receipts and expenditures of the preceding year shall be submitted, together with a report of the proceedings of the members' annual meeting held at the home office. No other business shall be transacted at said meeting."

The evidence shows that John G. Greene died insolvent, and that his widow received or is likely to receive nothing from the estate except the widow's allowance of household furniture under the New York statute and a possible dower interest in one-third of some wild land in South Carolina, which is worth little, if anything. Greene's brothers and sisters numbered six, and all but two lived with his mother at Gloversville, N. Y. The remaining two lived in California. Greene, during his life, contributed to the support of his mother. Greene had no children, though he and his wife had been married some 20 years. At the time of his death he was about 58 years of age, and

his wife was about 49. He dabbled in patents, and has engaged in other speculative enterprises. He had given to his wife a house in Schenectady in which they lived, and upon which there were two mortgages, aggregating about \$3,700 at the time of his death. He owned real estate in New York, but it was mortgaged to its full value, and, when sold, left nothing over the amount due on the mortgage. He made no will, though he executed a paper on November 10, 1892, in the form of a will, but not legally witnessed, in which he left all his property to his beloved wife, if she survived him; if not, then to his mother, and, in case of her dying before him, to his unmarried sisters.

T. M. Hinkle, for plaintiff.

C. D. Robertson and M. L. Buchwalter, for the widow of John G. Greene.

N. J. Davidson, for the mother, brothers and sisters of John G. Greene.

TAFT, Circuit Judge (after stating the facts). It is contended on behalf of the widow of John G. Greene, the insured, that the word "heirs" should be construed according to the laws of Ohio. If so, it is conceded that, as the insured left no children, she would take the entire fund, whether the word "heirs" is to be construed strictly as meaning those who at his death would inherit real estate from the insured, or is to be taken as meaning those to whom personal property of the insured would be distributed if he died intestate. The administrator of Mary Greene, the mother of the insured (she having died since the beginning of this suit), and the brothers and sisters of the insured, contend that the word "heirs" is to be construed under the law of New York, and that, whether it is to be interpreted technically as those inheriting real estate, or only as next of kin, in either case, by the New York law, the widow, Sarah L. Greene, takes nothing. It is contended by the association (which has paid \$1,000 to the widow) and by the widow that, even if the New York law is to control the meaning of "heirs," the court must construe the word in accordance with that law to mean those to whom the proceeds of the policy would have gone had it been part of his estate and he had died intestate, and in that case by the intestate statutes of New York the widow would receive a moiety of the proceeds of the policy.

The application was made and delivered to the agent of the company in New York, and the certificate or policy was delivered by an agent of the company in New York to the insured. All payments were made in New York by the insured to an agent of the company, both those accompanying the original application and all subsequent ones. These circumstances, under the decision in *Assurance Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, might seem to justify the conclusion that the contract, having been made in New York, should be construed by the New York law, and thus that the word "heirs," within the intention of the parties, should be construed to be "heirs" as interpreted by the New York law, rather than as interpreted by that of Ohio. I do not propose, however, to rest the decision in this case on its likeness to the case of *Assurance Soc. v. Clements*. There are some additional circumstances in this case which may, perhaps, distinguish this case from that. The policy

was to be approved and issued in Ohio. The policy was to be payable there. In cases where both parties are interested in the construction of the insurance contracts, these circumstances are sometimes regarded as important.

But I do not think this a case for construing the terms of a contract to reach the common intent of two parties, and it does not seem to me that the same rules apply. What we are construing here is language of the insured designating the beneficiary of his bounty after his death. By the by-laws of the association he was given power to change this designation at any time before his death. The association reserved no right or power to object to any designation or change of designation, provided the beneficiary named was within those classes of persons to whom, by statute, charter, and its own by-laws, the association was permitted to pay policies. Now, it must be conceded that, as those classes are limited by the law of Ohio, the terms used to describe them in the law must be construed according to the law of the state. Therefore the association had no power to agree to pay policies to any person not a member of the family of the insured or not an heir of the insured, as "family" and "heir" are defined by the law of Ohio. Within these classes, however, the association was entirely indifferent who the designated beneficiary might be. It is conceded that each of the claimants at the bar is within the requirement of the statute of Ohio. Subject to the limitation of the statute, the construction of the language of the designation becomes solely a matter of determining the intent of the insured. In other words, the language is to be treated as of a testamentary character, and is to receive, as nearly as possible, the same construction as if used in a will under the same circumstances. *Bolton v. Bolton*, 73 Me. 299; *Duvall v. Goodson*, 79 Ky. 224-228; *Mutual Ass'n v. Montgomery*, 70 Mich. 587, 38 N. W. 588; *Silvers v. Association*, 94 Mich. 39, 53 N. W. 935; *Chartrand v. Brace*, 16 Colo. 19, 26 Pac. 152; *Phillips v. Carpenter* (Iowa) 44 N. W. 898.

This designation was made in New York, by one domiciled in New York, for distribution to his family, most of whom lived in New York. If we were construing this language as a clause in a will, whether the money bequeathed were payable in New York or Ohio, there can be no doubt that the word "heirs" would be construed under the New York law, because that of the domicile of the testator. *Harrison v. Nixon*, 9 Pet. 483; *Anstruther v. Chalmer*, 2 Sim. 1; *Yates v. Thompson*, 3 Clark & F. 544; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Wilson's Trusts* (*Shaw v. Gould*) L. R. 3 H. L. 55; *Parsons v. Lyman*, 20 N. Y. 103; *Freeman's Appeal*, 68 Pa. St. 151. Following this testamentary rule of construction, I have little difficulty in concluding that Greene intended that the language he used should be construed by the law of New York. Indeed, without the aid of authority, I should reach the same decision. Greene lived in New York, and all the possible objects of his bounty lived there. Is it reasonable to suppose that he would use language to describe them, intending it to be interpreted by the law of some other state? I cannot think so. Nor is there anything in the circumstances of his change of the beneficiary to lead to a different result. If the

correspondence between the insured and the association at the time the beneficiary was changed is competent, it shows that he wished the proceeds of the policy to go to his estate, for he used the words "heirs, administrators, executors, and assigns." To this the association responded that the law of its creation forbade a designation to his "estate," but that he might designate his "heirs," which he did. This shows that his purpose was to leave it to those to whom it would go, were it part of his estate and he were to die intestate, and he used the word "heirs" as most nearly accomplishing that purpose. Had he been permitted to designate his estate as the payee, certainly the proceeds of the policy would have been distributed under the New York law. May we not presume that, with the same purpose in view, he intended that the designation he was permitted to make should receive a New York construction? The mere fact that he was cautioned that the Ohio law did not permit him to direct payment to his estate does not, it seems to me, show that he intended the words he used to receive an Ohio construction. He knew that the association did business outside of the state of Ohio. He knew that, so large was the number of New York certificate holders, the annual meeting of the association was held in New York. Was it not most natural for him to think that, so long as he designated persons within the limitation permitted by the Ohio law, the particular individuals named by him should be determined by giving to his language the meaning it would have at his home, where the money was ultimately to come and where the beneficiaries lived? We can be certain that Greene regarded the proceeds of this policy as part of his estate which he was leaving to be distributed at his death; and we may be sure that he did not distinguish between language used in the designation and that which he would have used in a will concerning his personal estate.

In *Mayo v. Assurance Soc.*, 71 Miss. 590, 15 South. 791, it was held that the proceeds of a policy of life insurance issued in New York, and payable to the heirs of the insured, who was domiciled in Virginia, were to be distributed under the laws of the latter state. In *Association v. Jones*, 154 Pa. St. 107, 26 Atl. 255, an association of Ohio, organized under exactly the same law as the complainant, issued a policy payable to the legal heirs of the insured, who was domiciled in Pennsylvania. It was held that the court must determine who the legal heirs of the insured were by the law of his domicile, to wit, Pennsylvania. The court said (page 108, 154 Pa. St., and page 255, 26 Atl.):

"This contract is made with William D. Jones, of Philadelphia, and it fixes his domicile, and promises to pay the fund to his legal heirs. His domicile being thus here, a promise to pay to his legal heirs must be such as are determined by the intestate laws of such domicile."

In *Association v. Jones*, 154 Pa. St. 99, 26 Atl. 253, a policy was payable "to the devisees, or, if no will, to the heirs, of the said William Jones." The association was organized under the laws of Illinois. It was held that there was no disposition of the proceeds of the policy by the will. It was held that the word "heirs" meant those distributees to whom personal property of the insured

would go if he died intestate. It was contended that the words should be given effect according to the law of Illinois, and as, by those laws, the husband's personal property would go to the widow in case of his intestacy, she was entitled to the whole fund. The court held that, as the policy was issued to Jones as a citizen of Pennsylvania, the promise to pay to his heirs must be treated as a promise to pay according to the intestate law of his domicile, and that it was a case for the application of the common-law rule "that personal property has no situs, but follows the person of the owner, and is distributed according to the intestate laws of such owner's domicile."

There are other cases in which the same result was reached, though no question seems to have been raised on the point by counsel or considered by the court. *Gauch v. Insurance Co.*, 88 Ill. 251; *Britton v. Supreme Council*, 46 N. J. Eq. 102, 18 Atl. 675. It may be noted, in connection with the two Pennsylvania cases just cited, that the policy in this case expressly insures the life of John G. Greene, of Schenectady, N. Y. I conclude, both on reason and authority, that the word "heirs," as used in the certificate or policy in the case at bar, is to be construed according to New York law.

And what does the word "heirs" mean, according to the New York law, used in a policy of life insurance? It is well settled in many states that where "heirs" is used, in a will or other document having a testamentary effect, to designate persons who are to receive personal property, it shall be held to mean those persons to whom the personalty of the giver would be distributed if he were to die intestate. Of course, as already said, technically it means those who would inherit the giver's real estate in case of his intestacy. But courts recognize that the word is given in common parlance—"ut loquitur vulgus"—a much wider meaning, and includes all those who would succeed, under the intestate laws of the state, to the enjoyment of the property in question. *Association v. Jones*, supra; *McGill's Appeal*, 61 Pa. St. 46; *Eby's Appeal*, 84 Pa. St. 241; *Sweet v. Dutton*, 109 Mass. 589; *Welsh v. Crater*, 32 N. J. Eq. 177; *Freeman v. Knight*, 2 Ired. Eq. 72; *Croom v. Herring*, 4 Hawks, 393; *Corbitt v. Corbitt*, 1 Jones, Eq. 114; *Henderson v. Henderson*, 1 Jones (N. C.) 221; *Alexander v. Wallace*, 8 Lea, 569; *Collier v. Collier's Ex'rs*, 3 Ohio St. 369; *Doody v. Higgins*, 2 Kay & J. 729.

In the case of *Tillman v. Davis*, 95 N. Y. 17, a testatrix directed that the residuum of her estate should be divided into seven equal parts, and she devised and bequeathed the parts to seven persons (naming them), respectively; "the heirs of any or either of the foregoing persons who may die before my said husband to take the share which the person or persons so dying would have taken if living." It was held by the court of appeals that "heirs" here meant next of kin, but that it did not include the widow. The reasoning of Judge Earl, who delivered the opinion of the court, is avowedly at variance with that of the authorities cited above, but there are certain features of the case which distinguish it from that at bar. One is that the testatrix was using the word "heirs" to describe, not

her own next of kin, but those of one of her beneficiaries, and hence the court might justly say, as it did: "It is presumable that she was attached to the legatees named in those clauses by ties of affection or blood, and hence that she desired that the persons of the same blood, who might also be relatives of her blood, should succeed to the property,"—and thus intended to exclude mere connections by marriage of the beneficiaries of her bounty. Again, the court points out that in this case, when the testatrix was writing her will, she was dealing with both real and personal property, "and she undoubtedly used the word 'heirs' to designate blood relatives, and in the same sense, whether applied to real or to personal estate." Still, in spite of these distinctions, it must be conceded that, but for the later New York decisions, the broad language of this opinion in other parts would fix the law of New York as excluding from the meaning of the word "heirs," used to describe legatees of personal property, the widow of the testator.

There are several earlier cases in New York which are relied on by counsel for the mother's administrator and the brothers and sisters. In *Keteltas v. Keteltas*, 72 N. Y. 312, it was held that a residuary bequest to his "next of kin according to the statute of the state of New York concerning the distribution of personal estates of intestates," in a will made before the testator was married, did not include his widow. In *Luce v. Dunham*, 69 N. Y. 37, a testator gave all his real estate and \$100,000 to his wife, and then gave the residuum of his estate to be divided among his heirs and next of kin as provided by statute in cases of intestacy; and it was held that the word "heirs" was used with technical correctness, having regard to a possible acquisition of real estate before his death, and that the words "next of kin" did not include the widow. In *Murdock v. Ward*, 67 N. Y. 387, the testator bequeathed the residuum of his estate to his sons when they became of age, and, in case they did not live to take, then "to be equally divided among and paid to the persons entitled thereto as their or either of their next of kin according to the laws of the state of New York, and as if the same were personal property and they or either of them had died intestate." It was held that under this the widow of a deceased son could not take any part of his share. The effect of these earlier decisions is to limit the meaning of "next of kin" to blood relations, and not to allow it to be enlarged to include the widow by accompanying directions to follow the statute of distribution in case of intestacy; but they none of them deal with the meaning of the word "heirs," when accompanied by such directions, and used to indicate legatees of personal property. Still, the conclusion in *Tillman v. Davis* is based on these earlier cases, and they certainly indicate a tendency on the part of the New York court of appeals at that time to avoid giving the statute of intestacy full effect when there are any limiting words.

The first indication of a disposition to relax the strict rule adopted in the prior cases is found in *Woodward v. James*, 115 N. Y. 346, 22 N. E. 150. There the testator left a brother; two half-sisters; nine nephews and nieces, children of a deceased brother, half-

brother, and half-sister; and plaintiff, who was a grandchild of a deceased brother. After the death of his wife, the testator gave the residuum to "his legal heirs." It was held that these words meant those who would take in case of intestacy, and in the proportions described, and that the remainder-men took per stirpes and not per capita, and that, as under the New York statute of distributions representation goes no further than brothers' and sisters' children, and the rule of intestacy applied to the quantity of interest to be taken, the plaintiff had no interest in the estate. This case certainly gave full effect to the statute of distribution, though the only words used were "legal heirs." The next case in New York was *Lawton v. Corlies*, 127 N. Y. 100, 27 N. E. 847. In this case the testator had nothing but personalty when he made his will, and left nothing else on his death. His will directed that his estate should be divided among his "heirs at law, in accordance with the laws of the state of New York applicable to persons who die intestate." It was held that the words "heirs at law" were not used in their strict legal sense, but to indicate persons who would succeed to the property in case of intestacy; that it was the testator's intention that his real estate, if any, should be divided according to the statute of descents, and his personal property according to the statute of distributions; and, therefore, that the grand nieces and nephews were not entitled to share in the distribution of the estate. The court say (page 105, 127 N. Y., and page 848, 27 N. E.):

"While technical words in a will, when uncontrolled by the context, are presumed to have been used in their technical sense, still the context may overcome the presumption, when it appears thereby and from extraneous facts of the kind already alluded to, that the testator used the words in their common and popular sense. The context in the case in hand shows that the estate was to be divided in accordance with the laws of the state of New York applicable to persons who die intestate. The use of the word 'heirs at law,' in such a connection, indicates, as we think, the 'legal heirs,' in the sense of the persons who would legally succeed to the property in case of intestacy according to its nature or quality; the heirs at law taking the realty and the next of kin the personalty. The cardinal idea seems to be that the division should be made in accordance with the statute in case of intestacy."

The court distinguishes *Luce v. Dunham*, *Keteltas v. Keteltas*, and *Tillman v. Davis*, and then uses this language:

"All these cases recognize the principle that, where the context of the will shows that the testator used the word 'heirs,' or the expression 'heirs at law' or 'next of kin,' in a sense other than the primary legal sense, the actual intention must prevail over the use of technical language. In every case, the aim was to get at the intention, and, when that was found, not by conjecture, but by careful study of all the provisions of the will, it was blindly followed. So in this case, after giving due force to the term 'heirs at law,' we think that the testator meant, as he said, that his property should be divided according to law, the same as if he had not made a will."

The last case in New York, and the one more nearly like the one at bar, is that of *Walsh v. Walsh*, 143 N. Y. 662, 39 N. E. 21, where the court of appeals agreed to affirm the judgment of the supreme court in general term on the opinion of that court. The

opinion of the general term is found in 66 Hun, 297, 20 N. Y. Supp. 933. In that case, a by-law of a mutual aid society, like the complainant at bar, provided, in respect to the proceeds of the policy of a deceased member, that "in case of a failure of, or imperfect, designation, then the amount shall be paid to the legal heirs of the deceased member." The question was whether the widow could take under this provision. The court held, following *Lawton v. Corlies* and *Woodward v. James*, that "legal heirs" included all those who would take such property in case of intestacy, and that, considering the purposes of the association, they could not be limited in meaning to "next of kin."

From this review of the New York cases, it is apparent that, whatever some of the language of the earlier cases, the meaning and scope of the word "heirs," when used to designate those who are to take personal property, either in a will or in any document having the same effect as a testament, are to be determined from the context and the circumstances. In the case at bar those guides leave no doubt in my mind that it was the intention of the insured to secure by his designation that distribution of the proceeds of his policy which would take place in case of his intestacy, were it part of his estate. The circumstances of the change in the designation, instead of showing a desire to exclude the widow from sharing in the proceeds of the policy, confirm me in the view that he wished her, if living, to take under the statute of distribution in New York, rather than by special designation. His will (so called) is not competent evidence, but the correspondence between him and the association in regard to the designation seems to me to be clearly so. It is the correspondence which really contains the designation. What he wished was to make the policy part of his estate, probably for his own use during life, and, failing that, he used the word which came nearest to his purpose, and which would, as he supposed, make the proceeds take the course after his death which they would have taken were they his during his life.

With this construction, we must refer to the statute of distribution of New York to determine how the money in this case must go. Paragraph 2, § 75, tit. 3, of chapter 6 of the statutes of New York on wills and decedents' estates (4 Rev. St. [8th Ed.] p. 2565) provides as follows:

"That if the deceased leave no children the widow shall take a moiety of the personal estate."

Paragraph 6 provides:

"If the deceased shall leave no children and no representatives of them, and no father and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother, and brothers and sisters, or the representatives of such brothers and sisters."

The decree of the court must be, therefore, an order distributing the proceeds of the policy, one-half to the widow, Sarah L. Greene, and one-half to be equally divided between the administrator of Mary Greene, the mother, and the brothers and sisters of John L. Greene, including, as one of the equally sharing distributees, the

son of his deceased sister. The widow, Sarah L. Greene, will, of course, be charged with the \$1,000 already paid her by the complainant. The costs will be paid out of the fund.

VEATCH et al. v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 832.

1. RAILROAD MORTGAGES—RECEIVERS—PREFERENTIAL CLAIMS.

A claim for damages for death by the negligence of a railroad company, occurring before the appointment of a receiver, is not a preferential claim, which is entitled to be paid out of the income or the corpus of the mortgaged property, to the exclusion of the mortgage debt.

2. SAME—EXPENDITURES BY RECEIVERS.

Where a railroad mortgage authorizes an expenditure of the income by the trustee, when he should take possession, to such extent as he deems proper in improvements, and in purchases of rolling stock and other necessary equipment and materials, a court appointing a receiver in foreclosure proceedings may authorize the receiver to make similar expenditures; and, where the plaintiffs in judgments against the company for deaths by negligence are claiming the right to a preference out of current income because of such alleged diversion of income by the receiver, it will be presumed, in the absence of a showing to the contrary, that the expenditures complained of were sanctioned by the court.

3. SAME.

Where a contract under which the railroad of one company was controlled by another company bound the controlling company to apply the income first to the payment of operating expenses, it only lies in the mouth of the owner of the road to complain of a breach of that provision; and such a breach does not constitute a diversion of funds that will entitle the plaintiffs in a judgment for death by negligence, against the company owning the road, to a preference out of current income as against mortgagees.

4. SAME.

Where the plaintiffs in judgments against a railroad company for deaths by negligence are claiming a preference out of current income as against mortgage bondholders, on the ground that, when the accident occurred, the road was being operated by a company acting as the agent of the bondholders, the latter assertion being a mere conclusion of the pleader, and the facts on which it was based being too vague and general to show with sufficient certainty that it was well founded, the claim to a preference on that ground must be denied.

5. SAME.

General judgment creditors, whether their claims arose out of contract or tort, are as much entitled as the mortgage bondholders to participate in the distribution of surplus income accumulating in the hands of a receiver appointed at the instance of stockholders, before the income has been impounded by the mortgage bondholders; and, if there are equitable considerations giving the bondholders a better right, they must be shown by proper averment.

Appeal from the Circuit Court of the United States for the District of Colorado.

W. H. Bryant (C. S. Thomas and H. H. Lee with him on the brief), for appellants.

E. E. Whitted (Henry W. Hobson with him on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This is an appeal from an order sustaining a demurrer to an intervening petition in an equity suit, and directing a dismissal of the same, on the ground that the averments thereof did not entitle the interveners to the relief prayed for. The facts disclosed by the intervening petition (hereafter termed the "complaint") are substantially these: Addie Veatch and Emma Henderson, who are the appellants and interveners, respectively recovered judgments against the Union Pacific, Denver & Gulf Railway Company (hereafter termed the "Denver & Gulf Company"), on June 1, 1895, each judgment being for the sum of \$5,000. The suits in which the judgments were obtained were brought to recover the damages sustained on account of the death of two persons, to wit, William E. Nye, who was the son of Addie Veatch, and Harry Henderson, who was the husband of Emma Henderson, both of whom were employes of the Denver & Gulf Company, the one being a fireman, and the other an engineer, and both of whom were killed on or about July 27, 1893, in a railroad accident which occurred on the railroad of said Denver & Gulf Company, through its fault and negligence, by reason of the fall of a defective railroad bridge or trestle. The railroad of the Denver & Gulf Company was controlled by the Union Pacific Railway Company, under a contract with the former company, the terms of which are not shown. On or about October 12, 1893, succeeding the accident, receivers were appointed for the Union Pacific Railway Company, who forthwith assumed charge of the Denver & Gulf Railroad, as a part of the Union Pacific System, and operated it until December 18, 1893. At the latter date, in a suit which had been brought by John Evans, a stockholder of the Denver & Gulf Company, against said company, in the circuit court of the United States for the district of Colorado, Frank Trumbull was appointed receiver of the latter company, and forthwith took possession of all its property, and thereafter operated its road under said appointment until October 31, 1894, when he was further appointed receiver of the same property in a suit brought by the American Loan & Trust Company, as trustee of certain mortgage bondholders, against the Denver & Gulf Company, to foreclose the consolidated mortgage on its road. After the latter suit was brought, and on October 31, 1894, an order was entered in said suit consolidating it with the previous suit which had been brought by John Evans, as a stockholder of the Denver & Gulf Company.

The interveners based their right to an order directing Frank Trumbull, the receiver, to pay their judgments out of the funds in his hands, on five different grounds, which were stated in detail in the complaint. The first was, in substance, that, as the claims on which the judgments were founded accrued within a period of 90 days before the Denver & Gulf Railway first passed into the hands of a receiver, the claims should be treated as ordinary operating expenses, and paid in preference to the mortgage bonds, which the

American Loan & Trust Company was seeking to collect in its suit for foreclosure. The second ground was that the holders of mortgage bonds, whose mortgage was being foreclosed by the American Loan & Trust Company, were, in legal effect, operating the Denver & Gulf Railway when the injuries complained of were sustained. In this behalf it was alleged, in substance, that the Denver & Gulf Company had issued stock to an amount exceeding \$32,000,000, and mortgage bonds in the sum of \$15,801,000, for the purpose of defrauding the public, inasmuch as the aggregate value of its corporate property at the date of such issue did not exceed \$15,000,000; that the Union Pacific Railway Company had guaranteed the payment of said bonds, and had become the purchaser of said bonds to an amount exceeding \$12,000,000, and an owner of said stock to an amount exceeding \$13,000,000, and had assumed the management and control of the railroad of the Denver & Gulf Company, with full knowledge that it could never pay operating expenses and the interest on its bonds. In view of the premises, the interveners charged that from the date of its organization, in the year 1890, until October, 1893, when receivers were first appointed, the Denver & Gulf Railway was operated by the Union Pacific Railway Company for and in behalf of the mortgage bondholders of the Denver & Gulf Company, and that said bondholders were responsible for whatever liabilities, whether for negligent acts or otherwise, had been incurred in the meantime. The third alleged ground of recovery was that between October 12, 1893, when receivers first took charge of the Denver & Gulf Railway, and October 31, 1894, when a receiver was appointed in the bondholders' suit, a large sum of income had been received by the receiver from the operation of the road, which, in equity, ought to be appropriated to the payment of the interveners' claims. In this behalf the allegations were, in substance, that the consolidated mortgage in which the American Loan & Trust Company was named as trustee did not pledge, or attempt to pledge, the income of the mortgaged property for the payment of the bonds issued by the Denver & Gulf Company; that the bondholders had no claim on the income of the mortgaged property until they had actually taken possession of the property for a default, either in the payment of interest or principal of the mortgage debt; that prior to October 31, 1894, when such possession was first taken, the said Frank Trumbull, acting as receiver in the stockholders' suit brought by John Evans, had realized from the operation of the railroad of the Denver & Gulf Company a sum exceeding \$400,000, in excess of operating expenses, on which the bondholders had no claim; and that this sum should be devoted to the payment of the claims of general creditors, and particularly to the payment of the interveners' judgments. The fourth ground of recovery stated in the complaint alleged a diversion of funds by the receiver, Frank Trumbull, to the prejudice of the interveners. In this behalf it was charged, in substance, that while the said receiver had been in charge of the mortgaged property, as receiver in the bondholders' suit, he had expended the surplus income, not in paying the in-

terest and principal of the mortgage debt, but in making permanent and costly improvements on the mortgaged property, and in the purchase of rolling stock. Because of such alleged diversion of funds, the interveners claimed that their judgments should be paid out of current income. The fifth and last ground of recovery alleged a wrongful diversion of funds by the Union Pacific Railway Company during the period of its alleged operation of the Denver & Gulf Railroad, prior to the appointment of receivers, on October 12, 1893. In this behalf, the allegations were, in substance, that, under the contract between the Union Pacific Railway Company and the Denver & Gulf Company for the operation of its road, the former company was in duty bound to apply the income from its operation—First, to the payment of operating expenses, and, second, to the payment of interest on bonds; that, instead of doing so, it had appropriated income, which should have been used for paying operating expenses, to making permanent improvements on the Denver & Gulf Railroad, and to the payment of interest charges on bonds; that during the 90 days succeeding July 27, 1893, when the accident occurred, it had thus appropriated about \$103,000, of which sum \$93,000 had been expended in paying interest on bonds that were secured by an underlying mortgage on a part of the Denver & Gulf road, which was executed by a corporation known as the Colorado Central Railroad Company, and \$10,000 in making permanent improvements on the road. Because of such alleged diversion of income by the Union Pacific Railway Company, the interveners claimed that they were entitled to an order for the payment of their judgments out of current income.

In so far as the interveners' claims for allowances against funds in the hands of the receiver are based on the first ground above stated, they are concluded by the decision of this court in *Trust Co. v. Riley*, 36 U. S. App. 100, 16 C. C. A. 610, and 70 Fed. 32, and the order applied for must be refused. We held in that case, after a review of all the decisions, that a claim for damages for personal injuries which were the result of a negligent act of the mortgagor company, committed before the appointment of a receiver in a suit brought to foreclose a mortgage, is not a preferential claim, which is entitled to be paid out of the income or the corpus of the mortgaged property, to the exclusion of the mortgage debt. We are satisfied that the views expressed in that decision are sound, and fully sustained by the authorities cited. Without indulging in further discussion of the subject, therefore, we shall content ourselves with what was said in that case.

Neither are we able to decide that the interveners showed that they were entitled to the relief prayed for by reason of the alleged diversion of income, described in the fourth and fifth paragraphs of the complaint. It appears from the allegations of the complaint that under the provisions of the consolidated mortgage, in which the American Loan & Trust Company was named as trustee, the trustee was authorized, in case of a default occurring under the mortgage, to take possession of the mortgaged property; and, in the event of so doing, it was empowered, among other things, "to make

from time to time, at the expense of the trust estate, such repairs, alterations, additions, and improvements, as well in respect of the rolling stock and equipment as in respect of the railway, and to do all such other things, as the trustee shall think proper to promote the interests which the holders of the bonds hereby secured have under this mortgage." The mortgage clearly authorized an expenditure of the income of the mortgaged property by the trustee when he should have taken possession of the property, to such extent as the trustee deemed proper in improving the property and in purchasing rolling stock and other necessary equipment and materials; and we perceive no reason why the court by whom the receiver was appointed might not authorize him to make similar expenditures, if it deemed the same necessary and proper. The complaint does not show that the expenditures alleged to have been made by the receiver subsequent to October 31, 1894, were unauthorized by the court under whose orders he acted; and, in the absence of such an averment, we must presume that they were duly sanctioned and approved. Expenditures of income thus made cannot be regarded as a wrongful diversion of funds, such as will entitle the interveners to the payment of their judgments out of the current income of the property, inasmuch as the claims upon which the judgments are founded were in no sense of a preferential character.

There is even less reason, we think, for holding that the alleged expenditures of income by the Union Pacific Railway Company prior to October 12, 1893, constitute a diversion of funds, which would have authorized the circuit court to direct the payment of the interveners' judgments out of current income. If no contract had existed between the Union Pacific Railway Company and the Denver & Gulf Company relative to the operation of the road of the latter company, it is obvious that the Denver & Gulf Company would have been at liberty to expend its income in improving and extending its road-bed, purchasing rolling stock, and paying its fixed charges. It could not have been said that it was guilty of any wrong in making such use of its income, in place of using it to discharge liabilities for injuries to persons or property. The Denver & Gulf Company is not here complaining that the Union Pacific Railway Company has violated that provision of its contract for the operation of the Denver & Gulf Railroad which required the appropriation of the gross income, first, to the payment of operating expenses; and we think that it only lies in the mouth of that company to make such a complaint. We are unable to hold, therefore, that the breach of the provision of the alleged agreement in the respects stated in the complaint constitutes a diversion of funds, which entitles the interveners to relief in this proceeding.

The second ground of recovery stated in the complaint, as heretofore explained, seems to be that, when the injuries were sustained on which the interveners' claims are founded, the Denver & Gulf Railroad was being operated by the Union Pacific Railway Company as the agent of the bondholders, who are represented in this proceeding by the American Loan & Trust Company. It is charged, in effect, that, because of such operation of the road by an

agent of the bondholders, the latter are personally liable for the injuries in question, and cannot complain if the judgments are paid out of the income of the mortgaged property as it is realized by the receiver. But this charge that the Denver & Gulf Railroad was being operated by the bondholders at the date above mentioned is a conclusion of the pleader, and the facts on which that conclusion is based do not warrant it, or, at least, they do not show with sufficient certainty that it is well founded. The facts alleged are that the Denver & Gulf Company was over capitalized; that it issued more stock and bonds than it was entitled to under the laws of Colorado; that the Union Pacific Railway Company guarantied the payment of the bonds, and purchased a large part of the same, and also became the owner of a large part of the stock of the Denver & Gulf Company; that a contract of some sort, the precise nature of which is not stated, was thereupon entered into between the Union Pacific Railway Company and the Denver & Gulf Company, under which the former company practically controlled the management of the Denver & Gulf System; and that such contract was made by the Union Pacific Railway Company knowing that the road of the Denver & Gulf Company could not be made to pay operating expenses and fixed charges; and that the stockholders of the road could not hope for any return from their investment in the stock. The complaint does not show, however, that the bonds secured by the consolidated mortgage were or are void, because the Union Pacific Railway Company is alleged to have purchased said bonds to an amount exceeding \$12,000,000, which implies that it paid value therefor to the mortgagor company. Neither does the complaint show that, at the date of the injuries complained of, the Union Pacific Railway Company continued to own the bonds which it had purchased and guarantied. The fair and reasonable inference is, we think, that, when the foreclosure suit was instituted, many, if not all, of the bonds, had passed into the possession of innocent purchasers for value, who are now represented by the American Loan & Trust Company. Moreover, as the interveners' judgments were recovered against the Denver & Gulf Company, and not against the Union Pacific Railway Company, they must have alleged and shown, in the suits in which the judgments were recovered, that the Denver & Gulf Company was operating its road when the injuries complained of were sustained. In view of these considerations, we think that the allegations found in what is termed the second cause of action stated in the complaint are altogether insufficient to warrant us in holding that the bondholders under the consolidated mortgage were in fact operating the Denver & Gulf Railroad when the injuries complained of were sustained, and that for such reason the interveners' judgments ought to be paid out of the current income of the mortgaged property. In our opinion, the complaint is too vague and general, and does not state the necessary facts to justify such a conclusion.

While we entertain the views heretofore expressed concerning the first, second, fourth, and fifth grounds of recovery or causes of action stated in the intervening complaint, yet we have not been able

to concur in the view which seems to have been entertained by the circuit court respecting the third cause of action. In that paragraph of the complaint it was averred, as we have before said, that while the receiver operated the Denver & Gulf Railroad under his appointment in the stockholders' suit brought by John Evans, and prior to the filing of the bill of foreclosure by the American Loan & Trust Company, he realized of net income, over and above operating expenses, a sum exceeding \$400,000, to which the lien of the consolidated mortgage did not attach. If this be so (and for the purposes of this case the allegation must be taken as true), we perceive no reason why the interveners are not equitably entitled to have the whole or a part of their judgments paid out of the surplus income in question. It cannot be admitted that the mortgage bondholders, having no lien on the fund in question, are entitled to absorb the entire amount, to the exclusion of general creditors. The claims of general creditors whose demands, whether arising out of contract or tort, have been reduced to judgment, would seem to be as meritorious as the claims of the mortgage bondholders, and as much entitled as theirs to participate in the distribution of the surplus income which accumulated while the road was being operated by the receiver, at the instance of stockholders, before the income had been impounded by the mortgage bondholders. *Sage v. Railroad Co.*, 125 U. S. 361, 378, 379, 8 Sup. Ct. 887. It may be that there are equitable considerations not disclosed by this record, which would alter the existing aspect of the case, and warrant the court in rejecting the interveners' claims, even as against the surplus income which was realized by the receiver prior to October 31, 1894. If such considerations exist, they should be shown by the appellees by proper averment. We think that the demurrer was not properly sustained to the entire complaint, but that the appellees should have been required to answer as to the facts averred in the third cause of action. The order sustaining the demurrer to the intervening petition, and directing a dismissal thereof, is therefore reversed, and the cause is remanded to the circuit court for further proceedings therein, not inconsistent with this opinion.

JONES et al. v. GREAT SOUTHERN FIREPROOF HOTEL CO. et al.

(Circuit Court, S. D. Ohio. April 6, 1897.)

1. FEDERAL COURTS—BINDING EFFECT OF STATE DECISIONS.

The rule that the decision of the highest court of a state passing upon the validity of a state statute under the state constitution is binding upon the federal courts will not be applied in cases involving rights which arose under the statute prior to the decision of the state court; and the federal court will exercise an independent judgment.

2. CONSTITUTIONAL LAW—STATUTORY LIEN OF SUBCONTRACTOR.

A state statute (Rev. St. Ohio, § 3185a) giving subcontractors a lien without regard to the state of the account between the owner of the building and the principal contractor, and which, in effect, requires the owner to pay to the subcontractor in money, in order to discharge his lien, although he may have contracted with the principal to pay him by the trans-

fer of property, interferes with the right of the owner to make his own contracts, and is unconstitutional.

3. FEDERAL COURTS—CONFLICTING STATE DECISIONS.

The rule that, where there are conflicting decisions of a state court as to the construction or validity of a state statute, the early decisions will be followed by the federal courts as to all rights accruing under them before the last decision, has no application where the later decision is under an amendment of the statute, constituting it a radical departure from previous legislation.

This was a suit in equity brought by Benjamin F. Jones and others against the Great Southern Fireproof Hotel Company and others to foreclose a mechanic's lien asserted by the complainants as subcontractors.

Outhwaite & Linn, for plaintiffs.

Ricketts, Black, Souffer, Mash & Lenz and Booth, Keating & Curtis, for defendants.

SAGE, District Judge. The complainants sue to foreclose a mechanic's lien asserted by them, as subcontractors, upon the hotel building of the respondent the Great Southern Fireproof Hotel Company, for certain materials furnished towards the erection of said building between the 16th of April, 1895, and the 29th of January, 1896, under and by virtue of a written contract by and between them and William J. McClain, principal contractor for said company in the erection of its building. The lien is asserted under and by virtue of section 3184, St. Ohio, as amended, and section 3185 of the Revised Statutes as supplemented, April 13, 1894 (91 Ohio Laws, 135). Section 3184 provides that "a person who performs labor, or furnishes machinery or material for constructing, altering or repairing" any structure mentioned in the section, including a house, mill, manufactory, or other building, "by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the payment of the same upon such" house, mill, manufactory or other building, "and upon the interest, lease-hold or otherwise, of the owner in the lot or land, on which the same may stand or to which it may be removed."

The supplement to section 3185, designated as 3185a, provides that "in all cases where the labor, material or machinery referred to in sections 3184 and 3185, shall be furnished by any person other than the original contractor with such owner, or his agent, or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding sub-contractors, material-men, or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section 3184, the court

shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such sub-contractors and material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

Section 3185 provides that "such person, in order to obtain such lien, shall, within four months from the time of performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material," and other items and particulars not necessary to be here quoted, "and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter."

The respondents demur to the bill for insufficiency. The demurrer was argued solely upon the question of the constitutionality of the act of April 13, 1894; there being no objection to the bill on other grounds. The supreme court of Ohio, in *Young v. Hardware Co.*, 45 N. E. 313, held that the act of April 13, 1894, "in so far as it gives a lien on the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner." Much time in the argument was given to the discussion of the proposition that this court should follow that decision, without examining into the merits of the question, and that proposition is elaborately presented in the brief for the respondents. The material was furnished and delivered by complainants, and used in the construction of the hotel of respondents, before the decision of *Young v. Hardware Co.* was announced. In *Burgess v. Seligman*, 107 U. S. 32, 2 Sup. Ct. 21, the supreme court of the United States said:

"When contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with well-considered decisions of the state

courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states, in controversies between citizens of different states, was to constitute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, the supreme court said:

"That the decision of the highest court of a state, construing the constitution of the state, is not binding upon this court, as affecting the rights of citizens of other states in litigation here, when it is in conflict with previous decisions of this court, and when the rights which it affects here were acquired before it was made."

To the same effect is *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. 413. In *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296, the circuit court of appeals of this circuit held that:

"Where a contract or obligation has been entered upon before there has been any judicial construction of the state statute upon which the contract or obligation depends, by the highest court of the state, a federal court, obtaining jurisdiction of the question touching the validity, effect, or obligation of such a contract, will, while leaning to an agreement with the state court, exercise an independent judgment as to the validity and meaning of such contract, and will not necessarily follow opinions of the state court construing such statute, if such decisions be rendered after the rights involved in the controversy originated."

Counsel for respondents attempt to distinguish these cases, and especially *Louisville Trust Co. v. City of Cincinnati*, from the case now under consideration, but I am not able to see that there is any material difference. It is true that in *Louisville Trust Co. v. City of Cincinnati* the question was whether the statute was applicable, and not whether it was valid. The gist of the federal cases cited is that, under the circumstances stated, the federal courts will not apply the ordinary rule that the decision of the highest court of a state, construing or passing upon the validity of a state statute, is binding. It will be necessary, therefore, to look into the question of the constitutionality of the statutory provisions involved, independently of the decisions made by the supreme court of Ohio.

Section 3184, as amended, purports to give to a subcontractor a lien on the house, mill, manufactory, or building, to secure the payment of his claim for labor, machinery, or material. By section 3185a this lien is not to exceed the actual value of such labor, machinery, or material; and the aggregate amount of liens is not, in the absence of fraud or collusion between the owner and original contractor, to exceed the amount of the price agreed upon between them for the performing of such labor and the furnishing of such material or machinery. These provisions are made irrespective of the state of the account between the owner of the building and the principal contractor. The owner may have paid in advance according to the terms of his contract, and, if so, he must, according to the statute, pay in addition the amount of the subcontractor's lien. If his contract with the principal contractor provide for payment, not in

money, but by the transfer of property, as land, he must nevertheless pay in money to the subcontractor, in order to discharge his lien, the full amount thereof. It is my opinion that the supreme court of Ohio rightly held that this provision is an interference with the vested right of the owner to contract for his building upon the best terms possible, and that "if he can, by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in its enjoyment; and it is not within the power of the general assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishers with whom he has no contractual relation." This view is supported by the statement of the law in *Overt. Liens*, § 553, and by the following authorities: The supreme court of Pennsylvania, in *Waters v. Wolf*, 162 Pa. St. 153, 29 Atl. 646, held that a statutory provision which made the written consent of the subcontractor necessary, in order to bind him by a stipulation in the contract between the original contractor and the owner that no mechanics' liens should be filed, was unconstitutional, in that it attempted to create a debt and give a lien therefor, against the express covenant in the contract; also, that a provision that the contractor should be the agent of the owner in ordering work or materials, and that any subcontractor doing work or furnishing materials should be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulation should be consented to by the subcontractor, was unconstitutional, because it attempted to frame a new contract and substitute it for the one made by the parties. The court said that the indefeasible right to acquire and possess property, and the right of freedom of contract in the acquisition and protection of property, necessarily included the right to make reasonable contracts for the improvement of property, and that a contract that no mechanics' liens should be filed was not unreasonable, as to either contractor or subcontractor. In *Stewart v. Wright*, 52 Iowa, 335, 3 N. W. 144, the court said:

"If one should contract with a builder to erect a house, and agree to pay him in advance, and comply with his contract by making the payments, we very much question whether it is within the power of the legislature to require that he shall be liable to pay for his building twice, by paying off claims of subcontractors who may assert liens after the payments have been made."

To the same effect, see *John Spry Lumber Co. v. Sault Sav. Bank, Loan & Trust Co.*, 77 Mich. 199, 43 N. W. 778, where the court said:

"That a mechanic's lien law enacted for the sole purpose of enabling strangers to the title to land to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever, is unconstitutional, and leaves the law as it was before its passage."

That decision was quoted and followed in *Mellis v. Race*, 78 Mich. 80, 43 N. W. 1033; *Snell v. Race*, 78 Mich. 334, 44 N. W. 286. The supreme court of Minnesota, in *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, declared that, as liens are incumbrances upon the owner's property—

"It is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent, except by due process of law. The basis of the right to enforce a claim as a lien against property is the consent of the owner, and it is upon this principle alone that laws giving liens to subcontractors are sustained."

It is true that in *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 182, 49 N. W. 1071, a statute similar to the Ohio statute under consideration was, by a divided court, held constitutional; but I am forced to the conclusion that the dissenting opinion in that case is the better statement of the law. See, also, *Henry v. Rice*, 18 Mo. App. 512; *Renton v. Conley*, 49 Cal. 187, where a statute similar to the Ohio statute was held invalid because it sought to hold the property for more than the contract price. There are decisions to the contrary, as cited in brief for complainants, but they only serve to emphasize the statement of the court in *Burgess v. Seligman*, *Anderson v. Santa Anna Tp.*, and *Louisville Trust Co. v. City of Cincinnati*, supra, that it is the duty of the federal court to lean to an agreement with the state court, especially in cases of doubt. The reasoning of the cases which declare statutes of the same character as the Ohio statutes invalid is, in my judgment, to be preferred to that of the courts which uphold such laws.

Counsel for the complainants cite *Winder v. Caldwell*, 14 How. 434, and *Purinton v. Hull of a New Ship*, 2 Curt. 416, Fed. Cas. No. 11,472, as federal decisions where a statute similar to the one complained of in this case was enforced. Those cases were decided on other points. In neither of them was the constitutionality of the act questioned by counsel or considered by the court. Cases are also cited for complainants which sustain the proposition that statutory liens may be created in favor of subcontractors. This proposition, generally stated, is undeniable. So long as such a statute does not interfere with the right of the owner to make contracts, there can be no question as to its validity. A lien law which only provides a statutory subrogation, and protects the same by a lien, only enacts and secures an equity, and to such an enactment the owner of the property covered by the lien can make no valid objection. But in the case now under consideration the objection is that the owner's right to make his own contracts is interfered with, and the objection is well taken.

Reference is made by counsel for complainants to decisions by the supreme court of Ohio prior to that announced in *Young v. Hardware Co.*, in cases which they claim involved the same principle of constitutional construction, and which are in conflict with that opinion. They urge that under these decisions, and under the law as understood and adjudicated then and until after the complainants' materials herein were furnished, the act complained of must necessarily have been held constitutional. Their proposition is that under such circumstances the rule is clear, not only that the United States court, in a case within its jurisdiction, will act independently, but that, if it finds that decisions do so conflict, it will follow the early decisions as to all rights accruing under them before the last decision. In support of this proposition, they cite *Douglass v. Pike Co.*, 101 U. S. 677. But in that case the prior decisions were made

under the same act. Here the decision in *Young v. Hardware Co.* is the first and only decision by the supreme court under the act. In *Douglass v. Pike Co.* the supreme court said:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, the same, in its effect on contracts, as an amendment of the law by means of a legislative enactment."

But here the case arises under an amendment of the law, and not under a change of decision. Moreover, the amendment is a departure from all previous legislation by the state of Ohio upon the subject. Counsel admit that there was no adjudication in Ohio of the exact point decided in *Young v. Hardware Co.* prior to that case, but they insist that the principles involved had been settled in many cases which were in effect, if not in words, overruled by that decision. Without stopping to cite and comment upon the cases referred to in support of this contention, it is sufficient to say that their view, if adopted, would extend the rule laid down in *Douglass v. Pike Co.* beyond all precedent. The demurrer will be sustained, and the bill and the cross bill of the respondents *Sesman and Landis*, to which also a demurrer for insufficiency was filed upon the same ground as those urged in support of the demurrer to the bill, will be dismissed.

RHINO v. EMERY et al.

(Circuit Court, S. D. Ohio, W. D. March 29, 1897.)

No. 4,595.

1. **EQUITY—NEGATIVE PLEAS.**

Negative pleas are permitted.

2. **SAME.**

The averment of heirship in a bill presents a single issue, and a plea framed to meet it is not double, although it negatives two different facts upon which the averment of heirship is based.

3. **SAME.**

The averment in a plea that it is not true that the complainant and one of the defendants are the "sole" heirs at law of a certain person contains a negative pregnant, and is not good, there being no denial that they are heirs.

4. **SAME.**

The averment in a plea that it is not true that complainant and another are the heirs of a certain person is not good, unless supported by an answer denying the allegations of pedigree in the bill showing that they are heirs of the person in question, on his maternal side.

5. **SAME—NECESSITY FOR ANSWER IN SUPPORT OF PLEA.**

Where the case of the complainant stands solely on the bare averment of a particular fact, without the averment of evidence in the bill to support it, it is not necessary for the defendant to file an answer in support of the plea.

This was a suit in equity brought by *Gustavus F. Rhino* against *Thomas J. Emery* and others, seeking to hold the defendants, as trustees, to an accounting for certain real and personal property.

This case comes on to be heard upon a plea to the amended bill. The complainant, Gustavus F. Rhino, averring that he is the heir and next of kin of one James Berry, seeks to hold the defendants, as trustees, to an accounting for certain real and personal property which he alleges in his bill was obtained from James Berry by the fraud of William G. Roberts, one of the defendants, and which came into the hands of the other defendants with notice of the fraud. The first part of the bill, in which the heirship of the complainant is set forth, is as follows: "Gustavus F. Rhino, of Hannibal, Missouri, and a citizen of the state of Missouri, brings this, his bill, against Thomas J. Emery and John J. Emery, of Cincinnati, Ohio, and citizens of the state of Ohio; William G. Roberts, of Cincinnati, Ohio, and a citizen of the state of Ohio; and said William G. Roberts, trustee under the last will and testament of Eliza A. Berry; Sarah A. Weller, of Cincinnati, Ohio, and a citizen of the state of Ohio; and M. E. Sperry, of Minneapolis, Minnesota, and a citizen of the state of Minnesota. And thereupon your orator complains, and says that one James Berry intermarried with one Rachel Rolston; and that there was born of said marriage three children, to wit, James Berry, an only son, and two daughters, Nancy Berry and Betsy Berry; and that the said Nancy Berry and Betsy Berry both died without issue; and that the said James Berry, the son of the said James Berry and Rachel Berry (whose maiden name was Rolston), intermarried with one Eliza A. Rhino, a daughter of Abram Rhino and Catherine Rhino (whose maiden name was Catherine Boyd); and the said James Berry, who intermarried with Eliza A. Rhino, as aforesaid, departed this life, testate, in Hamilton county, Ohio, on the — day of —, A. D. 1864, leaving, him surviving, his relict, Eliza A. Berry, and two children born of the marriage last aforesaid, to wit, a son, James Berry, and a daughter, Kate E. Berry, as his next of kin and sole heirs at law; and the said Kate E. Berry intermarried with one Robert Brady, whom she survived, and died testate, without issue, July, A. D. 1882; and the said Eliza A. Berry, relict of the said James Berry, died testate, on the — day of —, A. D. 1886; and the said James Berry died intestate, without issue, and unmarried, May 13th, A. D. 1891; and at the time of the death of the said James Berry, last aforesaid, to wit, on the 13th day of May, A. D. 1891, the blood of the Berrys and Rolstons, his ancestors on the paternal line, became extinct. And your orator further says that, at the time of the death of the said James Berry, the son of James Berry and Eliza A. Berry, aforesaid, to wit, on the 13th day of May, A. D. 1891, your orator, Gustavus F. Rhino, and the defendant M. E. Sperry, were the nearest of kin and sole heirs at law of the said James Berry, last aforesaid, of the name or family of Rhino; that is to say, your orator was the only son, and the said M. E. Sperry was the only daughter, of John Rhino, a son of Abram Rhino and Catherine Rhino, whose maiden name was Catherine Boyd, as aforesaid, which said John Rhino, then deceased in his lifetime, was the brother of the said Eliza A. Berry, a daughter of the said Abram Rhino and Catherine Rhino, whose maiden name was Boyd, as aforesaid, and which said Eliza A. Berry was the mother of the said James Berry aforesaid, who died May 13th, A. D. 1891; so that your orator, Gustavus F. Rhino, and the said defendant, M. R. Sperry, stood in the relationship of first cousins to the said James Berry, deceased, as aforesaid, and so your orator, as heir at law and next of kin, became entitled upon the death of the said James Berry, on the 13th day of May, A. D. 1891, as aforesaid, to one moiety of the estate, real, personal, and mixed, of which the said James Berry was seised of or entitled to at his death, by virtue of the statute in such case made and provided; the other children of the said Abram Rhino and Catherine Rhino, whose maiden name was Boyd, as aforesaid, to wit, Jefferson Rhino, who in his lifetime was a brother of the said Eliza A. Berry and Prudence Rhino, who in her lifetime was a sister of the said Eliza A. Berry, having each departed this life without leaving any lawful issue." To the bill, Sarah A. Weller, one of the defendants, filed the following plea: "The said defendant, Sarah A. Weller, by protestation, not confessing or acknowledging all or any part of the matters or things in the said amended bill of complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, does plead thereto, and for plea says that, as she is informed and believes, it is not true that at the time of the death of the James Berry

who died on May 13th, 1891, the blood of the Berrys and Rolstons, his ancestors on the paternal line, became extinct, and that it is not true that, on the death of the said James Berry, the complainant and the said defendant M. E. Sperry were his next of kin and his sole heirs at law, all which matters and things this defendant avers to be true, and pleads the same to the said amended bill of complaint, and humbly craves the judgment of this honorable court whether she ought to be compelled to make any further or other answer to the said amended bill of complaint." This plea was set down for argument.

David S. Hounshell and Harlan Cleveland, for complainant.
Herbert Jenney and William Worthington, for defendants.

TAFT, Circuit Judge (after stating the facts). Three objections are made to the plea: First, that it is double, and presents two defenses to the bill; second, that it contains a negative pregnant, in that it only denies that the complainant, Rhino, and defendant Sperry, are sole heirs at law of the intestate, James Berry, but does not deny that they are heirs; and, third, that the plea is not supported by an answer, as it should be.

This is a negative plea. Such pleas are permitted. *Mitt. Eq. Pl.* (Smith's Ed.) 270; 3 *Brown*, Ch. 489; 1 *Madd.* 194; 16 *Ves.* 264, 265; *Sanders v. King*, 2 *Sim. & S.* 277; *Thring v. Edgar*, 2 *Sim. & S.* 274. I do not think the plea is double. The plea is filed to traverse the averment of heirship. That presents a single issue, and the plea is framed to meet it. It does not introduce two different defenses.

The objection to the second averment of the plea, that it contains a negative pregnant, is well founded. It would be quite consistent with this averment if the complainant were an heir, and entitled to a share of the estate of James Berry. Therefore the second averment in the plea is bad. It is bad for another reason. The bill sets out a pedigree which shows that Rhino and Sperry are the sole heirs of James Berry on his maternal side. It is with reference to this part of the bill that this averment of the plea is made and its meaning is to be construed. The averments of pedigree in the bill as to the kinship of Rhino and James Berry on the maternal side, if undenied, would defeat the plea in so far as the second averment in it is concerned. It follows that, if the second averment is to be relied on as part of the plea, it was the duty of the defendant to support it by an answer denying the allegations of pedigree in the bill by which it appears that Rhino and Sperry were the heirs and next of kin of James Berry on his maternal side.

But it is well settled that a plea may be good in part and bad in part. *Mitt. Eq. Pl.* (Smith's Ed.) 343; *Story*, *Eq. Pl.* 692; *Duncalf v. Blake*, 1 *Atk.* 52; *Huggins v. Buildings Co.*, 2 *Atk.* 44; *Beach*, *Mod. Eq. Prac.* § 294; *Kirkpatrick v. White*, 14 *Fed. Cas.* 685. I may therefore overrule so much of the plea as contains the second averment, and treat it as if the plea contained simply a traverse of the averment in the bill "that at the time of the death of the James Berry who died on May 13, 1891, the blood of the Berrys and Rolstons, his ancestors on the paternal line, became extinct." This is the indispensable averment in the bill, upon which depends the right of the complainant to assert any interest in the property made here the subject of the controversy. There are no facts averred

in the bill which, if admitted, would defeat this negative averment. Hence, under the modern rule, no answer is required to support such a plea. There is no averment of evidence in the bill tending to show that the blood of the Berrys and the Rolstons was extinct. The case of the complainant in the bill stands solely on the bare averment of this as a fact. In such a case, it is not necessary for the defendant to file an answer in support of the plea.

Judge Wallace, in the case of *Hilton v. Guyott*, 42 Fed. 249, states the principle as follows:

"The rule is that a defendant must answer as to facts which would be evidence to dispute the plea, but he is not required to answer to those things which may be well admitted consistently with the bar pleaded. If he does not answer interrogatories upon the argument of the plea, every fact which they would tend to prove is treated as proved in impeachment of the plea. But if a plea sets up a defense which appears to be a good bar, notwithstanding all these facts are admitted to be true, it is not necessary to support it by an answer."

In *Sims v. Lyle*, 4 Wash. C. C. 301, 22 Fed. Cas. 184, Mr. Justice Washington said:

"If the plea be only to a part of the bill, the rest of the bill ought to be answered, or else the court would consider the parts not embraced by the plea, or answered, as true. But there is no instance where the plea contains in itself a full defense to the bill, that an answer is necessary, unless it is rendered so, in order to negative some equitable ground, stated in the bill for avoiding the effect of the anticipated bar." Story, Eq. Pl. § 674; 2 Dantell, Ch. Prac. (Ed. 1840) pp. 115, 119-122.

In *Adams' Equity* (Ed. 1890, p. 61) the statement of the rule is as follows:

"It often happens, where a negative plea is used, that the bill contains allegations in evidence of the disputed statement. In this case the plea of its untruth will not protect from discovery of matters which would prove it true; and therefore these allegations must be excepted from the plea, and must be met by an answer in support."

And again, on page 337:

"In order, therefore, to avoid such discovery, he must resort to a negative plea denying the allegations of partnership or heirship; and, until the validity of his plea is determined, he will be protected from giving discovery consequent on the allegation. It is, however, very seldom that a pure negative plea can be made available; for, although it protects against discovery consequent on the alleged equity, it does not protect against discovery required to prove it. If, therefore, there be any statements in the bill tending to prove the disputed allegations, distinct from such allegations itself, the discovery asked on those points must be excepted from the plea, and must be given by an answer in support,"—citing *Thring v. Edgar*, 2 Sim. & S. 274; *Denys v. Locock*, 3 Mylne & C. 205.

I ought to add that the view expressed above with reference to the answer in support of the negative plea is not that which meets the approval of Prof. Langdell in his *Equity Pleading*. Langd. Eq. Pl. pp. 116, 117. He traces the erroneous view to the decision of Sir John Leach in *Thring v. Edgar*, 2 Sim. & S. 274, but he admits the case has had its effect upon modern authorities, and that they support the conclusion I have stated above. See

Hunt v. Penrice, 17 Beav. 525; Young v. White, Id. 532; Wilson v. Hammonds, L. R. 8 Eq. 323.

The order of the court will be that the plea is overruled so far as the second averment is concerned, and is held good so far as the first averment is concerned, and the defendant is given leave to file a replication.

GAMBLE et al. v. CITY OF SAN DIEGO et al.

(Circuit Court, S. D. California. March 22, 1897.)

1. ABATEMENT—PENDENCY OF ANOTHER SUIT—TAXPAYERS' SUITS.

A pending suit by a nonresident taxpayer, in behalf of herself and all other nonresident taxpayers, to annul a contract made by the city, may be pleaded in abatement of a suit for the same object subsequently brought in the same court by other nonresident taxpayers.

2. SAME—STATE AND FEDERAL COURTS.

A suit in a state court cannot be pleaded in abatement of a suit as to the same matter in a federal court.

3. COURTS—CONCURRENT JURISDICTION.

Where a state court has first taken cognizance of a cause of which that court and the federal court have concurrent jurisdiction, the federal court will dismiss a suit brought in that court as to the same matter, or suspend proceedings therein until the final action of the state court.

4. SAME.

Where separate suits seeking the same relief have been filed in a state court and in a federal court on the same day, upon a motion in the federal court to suspend proceedings in the suit brought therein proof will be heard as to which suit was instituted first.

Works & Works, Works & Lee, and Trippet & Neale, for complainants.

H. E. Doolittle, Gibson & Titus, and W. J. Hunsacker, for defendants.

ROSS, Circuit Judge. This is a suit in equity, the bill in which was filed in this court August 27, 1896, not only on behalf of the complainants, but, according to its averments, on behalf of all other property owners and taxpayers of the city of San Diego who are not citizens of the state of California. The bill alleges, among other things, that the complainant William A. Gamble is a resident and citizen of the state of Ohio, and the complainant Elvira Carver is a resident and citizen of the state of Massachusetts, and that all of the defendants are residents and citizens of the city of San Diego, state of California; that each of the complainants is the owner of real estate in the defendant city; that the amount of taxes that each of the complainants would be compelled to pay by reason of the levying of the taxes necessary to pay the principal and interest of the bonds mentioned in the bill will exceed the sum of \$2,000, and that the property owners and taxpayers of the defendant city who are not citizens of the state of California number about 700, and each of them has a direct interest with the complainants in the relief sought by them; that the population of the defendant city has never at any time mentioned in the bill exceeded 20,000 inhabitants; that the average daily consumption of water

by the city and its inhabitants, for all purposes, during all of the times mentioned in the bill, has never exceeded 150 miner's inches of water per day; that the defendant city is now receiving, and since June 25, 1889, has received, its supply of water for all purposes from the San Diego Water Company, a corporation organized under the laws of the state of California to supply and sell water to the city and its inhabitants for a compensation to be charged therefor as fixed by the legislative branch of the city council from time to time as required by law; that the San Diego Water Company, for the purpose of carrying on its said business, secured from the city a franchise to lay and maintain in and along the streets, lanes, and alleys thereof its water mains and pipes, and to furnish, through such system, water to the consumers of the city, and at all the times mentioned in the bill has furnished water to the city and its inhabitants for all useful and necessary purposes; that, in and by section 14 of article 11 of chapter 2 of the special charter of the city of San Diego, it is provided that all ordinances incurring indebtedness or liability against the treasurer of the city must, before being passed by the common council, be presented to the city auditor, and, until he certifies in writing upon the ordinance that such indebtedness can be incurred without violation of the provisions of the charter, no further action shall be had upon the same by the common council; that on the 7th day of May, 1896, the common council of the defendant city, by ordinance adopted by it, assumed and attempted to authorize the execution by the mayor of the city of a certain contract on the part of the city with the defendant Southern California Mountain Water Company, a corporation organized under the laws of the state of California, which ordinance is set out in the bill; that thereafter, and on the 9th day of May, 1896, the mayor of the city and the Southern California Mountain Water Company, assuming to act in pursuance of that ordinance, entered into the contract which is set out in full in the bill; that on the 5th day of June, 1896, the common council of the city assumed and pretended to pass and adopt an ordinance calling a special election submitting to the voters of the city the proposition of the incurring of a debt for the purpose of paying for the water rights, rights of way, distributing system, and other property mentioned and described in the contract between the city and the Southern California Mountain Water Company, which ordinance the bill sets out at large; that each and all of the ordinances above mentioned were passed and adopted by the common council of the defendant city before and without obtaining the certificate of the auditor of the city upon such ordinance, or otherwise, that the indebtedness or liability created by such ordinance could be incurred without the violation of any of the provisions of the charter of the city; that the debt and liability sought to be created by virtue of the contract between the city and the Southern California Mountain Water Company could not be paid out of the revenue provided for the fiscal year of 1896, or for any of the years following; that at the time of the execution of the contract there had been no assent of two-thirds of the qualified electors of

the city voting at an election held for the purpose of obtaining their assent to the incurring of such indebtedness and liability; that on the 5th day of June, 1896, the common council assumed and pretended to pass an ordinance by which the common council assumed to provide for the publication of the notice of a special election to be held in the city on the 27th day of June, 1896, to vote upon the issuance of the bonds, amounting to \$1,500,000, for the purposes specified therein, which ordinance the bill sets out in full; that the clerk of the defendant city, in pursuance of the ordinance last mentioned, published a notice of such special election, to be held in the city, for the period of two weeks prior to June 27, 1896, in the San Diegan Sun, the official newspaper of the city of San Diego; that on the 11th day of May, 1896, the common council of the defendant city ordered and directed that the contract of May 9, 1896, between the Southern California Mountain Water Company and the defendant city, and the plans and estimates of the engineer, be printed in book form, and copies thereof sent to the registered voters of the city; that the board of public works of the city caused the contract and plans and estimates to be published in book form, and thereafter, on or about June 10, 1896, the clerk of the defendant city, under and by virtue of the order of the common council, mailed and caused to be mailed a copy of the contract, plans, and estimates to the registered voters of the city, as directed by the council; that in pursuance of the ordinance mentioned an election was held in the city on the 27th day of June, 1896, at which election the question of issuing bonds of the city in the sum of \$1,500,000, for the purposes in the ordinances set forth, was voted upon, and was by the electors, as shown by the tally sheets of the election, carried by a vote of more than two-thirds majority of the voters voting at the election; that the proposition, as submitted to the voters of the city, was a joint proposition for the incurring of an indebtedness for the acquisition by purchase of the water, water rights, and other property, as shown by the ordinance, and the construction of a public improvement for the city, to wit, a distributing system, rights of way, and reservoirs,—the vote, as called for and given, being upon a proposition to incur an indebtedness for both such acquisition by purchase of said property and the construction of such improvement in the gross sum of \$1,500,000, and not separately.

The bill further set out the form of the ballots submitted and voted at the election, and alleged that, before the question of incurring the indebtedness was submitted to the vote as aforesaid, the common council of the defendant city had caused to be made what purported to be plans and estimates of the cost of the proposed improvement, but that the purported plans and estimates were not such in fact, for various reasons specified in the bill. The bill further alleged that the contract between the defendant city and the Southern California Mountain Water Company was made and executed before the election was held, and without any notice given by the council inviting sealed proposals for furnishing the labor and materials for the proposed improvements, nor have such bids ever been made; that the notice given by the council of the special election did not set forth

fully or correctly the purposes for which the indebtedness was to be incurred, as required by law; that the purpose for which the indebtedness was to be incurred was for the carrying out of the contract between the defendant city and the Southern California Mountain Water Company, and the payment of the sums of money therein provided for, at the times and in the manner therein specified, and not otherwise, and that, unless enjoined from so doing by this court, the common council and officers of the defendant city will use the money derived from the sale of the bonds in making the payments provided for by the contract, and, in order to procure the voting of the bonds, it was represented by the defendants and others who supported the measure at the polls that the contract was the one under which the money derived from the bonds would be expended, and copies of that contract were, by order of the council of the defendant city, mailed in printed form to the voters of the city, and represented it to be the basis for the proposed bonds, and the voters were thereby induced to, and did, vote therefor, with the understanding and belief that the moneys to be realized therefrom would be used to carry out the contract, and would not otherwise have voted therefor; that the contract and the execution thereof were unauthorized and in violation of law, and beyond the power of either the defendant city or the Southern California Mountain Water Company to make, for various reasons stated in the bill; that since the election was held, to wit, on the 23d day of July, 1896, an ordinance was passed by the council of the defendant city authorizing and ordering the issuance of the bonds, which ordinance is set out at large in the bill; that the council of the defendant city and its mayor, treasurer, and auditor are about to, and will, unless enjoined by this court, issue the bonds of the city attempted to be provided for by the proceedings referred to, and will, unless enjoined by this court, use the proceeds of the sale of the bonds to carry out the contract of the defendant city with the Southern California Mountain Water Company. The prayer of the bill is that the contract be adjudged illegal and void, and that it be ordered surrendered for cancellation; that the defendant city and its officers, and the defendant Southern California Mountain Water Company and its officers, be, each and all, forever enjoined from setting up any rights, privileges, or benefits under the contract; that the proceedings of the common council and mayor and other officers of the defendant city in the passage and approval of the ordinances, and the election held thereunder to vote upon the proposition of the issuance of the bonds of the city, be declared illegal and void, and that the bonds in question, and all the proceedings leading up to the voting thereof, and the issuance of such bonds, be decreed null and void; and that each of the defendants be restrained from taking any further action towards the issuance or sale of such bonds, or the carrying out of the contract in question; and for such other and further relief as in equity may seem just.

All of the defendants except the Southern California Mountain Water Company joined in filing exceptions to the bill, and that company filed thereto separate exceptions, but of a similar nature. While these exceptions were under reference to a special master, all

of the defendants except the Southern California Mountain Water Company moved the court for leave to file two pleas to the bill, and on the same day the Southern California Mountain Water Company made a separate but similar motion. In these pleas the defendants allege: That on the 29th day of June, 1896, one Albert Meyer, a property owner and taxpayer within the city of San Diego, Cal., filed his complaint in equity against all of the defendants to the present bill in the superior court of the county of San Diego, state of California. That thereafter, to wit, July 14, 1896, H. I. Capron and O. M. Turner, residents and taxpayers of the city of San Diego, by leave of the superior court of that county filed a complaint in intervention in the suit there brought, and on the 3d day of November, 1896, R. Niccolls, Joseph Story, R. H. Dalton, H. Omerd, J. H. Smith, A. Overbaugh, Thomas J. Higgins, G. W. Magwood, Heber Ingle, George Nickson, J. A. P. Vawclain, J. H. Barbour, J. B. Hooker, B. Kampling, Putnam Field, W. B. Norris, C. Williams, John D. Parker, and R. H. Young, residents and taxpayers of the city of San Diego, by leave of the superior court of San Diego county filed their complaint in intervention in that suit. That on the 30th day of June, 1896, the San Diego Water Company, a corporation created and existing under the laws of the state of California, a resident and taxpayer of the city of San Diego, exhibited its complaint in equity against all of the defendants to the present bill in the superior court of the said county of San Diego. That, in and by the several complaints and complaints in intervention mentioned, the plaintiffs therein set forth the same cause of action as is stated and set forth in the complainants' bill in the present suit, and by the various prayers of those several complaints and complaints in intervention the parties plaintiff therein prayed the judgment and decree of the superior court of the county of San Diego, adjudging and determining that the contract executed by and between the city of San Diego and the Southern California Mountain Water Company, referred to and set forth in the complainants' bill of complaint in the present suit, be declared null and void; that the defendant city, its officers, and the Southern California Mountain Water Company, and its officers, be, each and all of them, forever restrained and enjoined from setting up any rights, privileges, or benefits under that contract, and from complying with the terms thereof; that neither the defendant city nor the Southern California Mountain Water Company had power or authority to enter into the contract; that the proceedings had by the common council of the defendant city and its officers in the passage and approval of the ordinances mentioned and referred to in the complainants' bill in the present suit, and the election held thereunder, on the 27th day of June, 1896, to vote upon the proposition of the issuance of the bonds by the city of San Diego, mentioned and referred to in the ordinances and in the bill of complaint in the present suit, be declared illegal and void; that the bonds voted on the 27th day of June, 1896, and all proceedings leading up to the voting of those bonds and their issuance, be declared null and void; and that the superior court of San Diego county perpetually enjoin and restrain the defendants in those suits, and each of them, from taking any further

action towards the issuing or sale of the bonds or carrying out of the terms of the contract; and for general relief. That the defendants in the suit brought in the superior court of San Diego county, including the defendants to the present bill, appeared and filed their several answers to each of the complaints and complaints in intervention, which put in issue the allegations thereof. That thereafter, to wit, on the 21st day of September, 1896, all of the suits so pending in the superior court of the county of San Diego came on regularly for trial before that court, and by consent of all of the parties thereto an order was made by the said superior court consolidating all of the aforesaid actions, and thereupon they were tried by the said superior court as one action, and witnesses for plaintiffs and interveners therein and defendants therein were duly sworn and examined, and documentary evidence introduced by the respective parties upon the issues so made as aforesaid, and thereupon the consolidated action was submitted to the court for its decision, and on the 17th day of November, 1896, the superior court of San Diego county made and filed its decision in writing in favor of the defendants to the present bill, and against the plaintiffs and interveners therein, and thereafter, to wit, on the 17th day of November, 1896, the said superior court rendered and entered its judgment in the consolidated action, in accordance with its written decision, in favor of the defendants and against the plaintiffs and interveners therein. That no appeal has been taken from that judgment. That the time for appeal therefrom has not expired, but that the plaintiffs and interveners in the consolidated action have already taken the preliminary steps to have the judgment and the proceedings in that action reviewed on appeal by the supreme court of the state of California. That the rights and interests claimed and the relief sought by the complainants in the present bill are the same rights and interests involved and the same relief sought in the said several suits in the superior court of the county of San Diego, state of California. All of which matters and things the defendants to the present bill plead in abatement, and ask leave to file as a defense to the bill of the complainants herein.

A separate plea filed by all of the defendants jointly, except the Southern California Mountain Water Company, and also by that company as a separate and distinct plea, alleges: That on the 29th day of June, 1896, one F. S. Nicholson, a citizen of the state of New York, and a property owner and taxpayer within the city of San Diego, state of California, exhibited her bill of complaint in this court against the defendants to the present bill, on behalf of herself and all other property owners and taxpayers of the city of San Diego who are not citizens of the state of California, to obtain a decree of this court determining and adjudging that the contract executed by and between the city of San Diego and the Southern California Mountain Water Company, referred to in the complainants' bill of complaint in the present suit, be canceled and declared null and void, and that the defendant city of San Diego and its officers, and the Southern California Mountain Water Company and its officers, and each of them, be forever restrained and enjoined from setting up any

rights, privileges, or benefits under the contract, or in carrying out the terms thereof; that neither the city of San Diego nor the Southern California Mountain Water Company had power or authority to enter into the contract, and that the proceedings mentioned in the bill of complaint in the present suit by the common council of the defendant city and its officers in regard to the passage and approval of the various ordinances mentioned in the bill herein, and the election held under those ordinances on the 27th day of June, 1896, to vote upon the proposition of the issuance of the bonds mentioned in the bill of complaint herein, be declared illegal and void; that the bonds voted on June 27, 1896, and all proceedings leading up to the voting of the bonds and the issuing thereof, be declared null and void; that a writ of injunction be granted against the defendant city and its officers, restraining and enjoining them, and each of them, from taking any further action towards the issuing and sale of the bonds; and for such other and further relief as the nature of the case should require. That on the 23d day of July, 1896, the said F. S. Nicholson exhibited to this court her amended complaint, wherein she set forth substantially the same facts as were stated in her original bill, and prayed the same relief asked in and by her original bill. That the cause of action and the relief sought by said Nicholson in and by her original and amended bills of complaint are the same as the cause of action and the relief sought by the complainants in the present suit. That all of the defendants to the present suit, except the Southern California Mountain Water Company, appeared and filed their demurrers to the amended bill of F. S. Nicholson, and also exceptions thereto, and the defendant Southern California Mountain Water Company filed separate but similar demurrers and exceptions thereto, all of which are still pending and undetermined. All of which matters and things the defendants to the present bill plead in abatement, and ask leave to file in defense thereof.

Upon the coming on of the hearing of the motions for leave to file these pleas, all of the defendants thereto moved this court for an order dismissing the present suit and discontinuing further proceedings therein, basing the motion upon the records and pleadings and files in the cause, and upon a certified copy of the transcript on appeal to the supreme court of California in the case of *Albert Meyer v. The City of San Diego et al.*, defendants, *H. I. Capron, O. M. Turner, R. Niccolls et al.*, intervenors, and upon certain admissions of counsel to the effect that the defendants and intervenors in the suit brought by *Albert Meyer* in the superior court of San Diego county had appeared in that suit prior to the institution of the present suit in this court. At the same time the complainants in the present bill asked leave to file an affidavit of *John G. Capron*, to which objections were interposed by the defendants to the present suit. That affidavit states, among other things: That on the 11th day of December, 1895, the Consolidated Water Company, a corporation organized and doing business under and by virtue of the laws of the state of West Virginia, brought its suit in this court against the city of San Diego and certain of its officers, *E. S. Babcock*, and the

Southern California Mountain Water Company, by bill in equity, charging, in substance and effect, that the city of San Diego was about to enter into a contract with the Southern California Mountain Water Company to purchase from that company a water right to 1,000 inches of water, and for the construction of a distributing system by the company for the city, and that, unless enjoined by this court, such contract would be made, and that the city was about to, and would unless enjoined by this court, issue and sell its bonds for the purpose of carrying out such contract and purchasing the said water right, and for the construction of said distributing system. That, at the time the bill of the Consolidated Water Company was filed, propositions had been made by the city of San Diego to the Southern California Mountain Water Company for the purchase of said water right and the construction of said distributing system, but no contract therefor had actually been made. That various grounds were alleged in the bill brought by the Consolidated Water Company why such contract and the issuance of such bonds would be illegal and void and injurious to that complainant,—among others, that the making of such contract and the issuance of such bonds were beyond the power and authority of either the city of San Diego or the Southern California Mountain Water Company. And that this court was, in and by that bill of complaint, asked to decree: (1) That the making of the proposition to the Southern California Mountain Water Company, the acceptance thereof, and all proceedings and acts of the common council of the city of San Diego relating thereto, were the result of, and brought about by, bribery and fraud, as in the bill in that case alleged, and that any contract made in pursuance thereof would be fraudulent and void; (2) that neither the city of San Diego nor the Southern California Mountain Water Company had power or authority to enter into the contract proposed to be made in pursuance of the proposition and its acceptance, and that any such contract, if made, would be void; (3) that the defendants to that bill, and each and all of them, be enjoined from entering into the alleged proposed contract, or any contract of similar import, and from the submission of the question of issuing the bonds of the city to carry out any such contract, and from issuing or disposing of any such bonds or their proceeds, if voted,—and for such other and further relief as should to the court seem just and proper in the premises. That thereafter, and on the 27th day of July, 1896, the Consolidated Water Company made application to this court for leave to file a supplemental bill, and on the 14th of August, 1896, by leave of the court first had and obtained, filed its amended bill in its suit, making parties complainant thereto, together with the original complainant, Constantine W. Benson and Henry Livesley Cole, and, after the filing of that amended bill, again made application to this court for leave to file a supplemental bill in connection therewith. That on the 19th day of August, 1896, the defendants in that action, being the same defendants now before the court in the present suit, with the exception of E. S. Babcock, made a motion to strike from the files the said amended bill, filed their demurrer to the petition therefor, and objected to the filing of the said last-mentioned supplemental

bill. That on the 2d day of September, 1896, the demurrer to the said amended bill, and motion to strike the same from the files, demurrer to the said petition for leave to file the supplemental bill, and objections to the filing thereof, were submitted to this court (Judge Wellborn presiding), and are still pending, under advisement. That in and by the said last-named supplemental bill, offered and proposed to be filed by the said complainants, it was alleged that, since the commencement of the original action by the Consolidated Water Company, the city of San Diego and the Southern California Mountain Water Company had, as was alleged in the original bill that they would do unless enjoined by the court, made and entered into a written contract for the purchase by the city from the Southern California Mountain Water Company of a water right to 1,000 inches of water, and the construction of a distributing system for the city, and that the city had passed and adopted an ordinance calling an election to submit to the voters of the city a proposition to issue bonds in the sum of \$1,500,000 to carry out the terms and provisions of said contract. And that it was alleged in said supplemental bill that the said proposed contract was illegal and void, for certain reasons in said bill set forth, and that the proceedings for the issuance of such bonds were illegal and void, for reasons therein set out. And that it was alleged both in the original and amended bills in the suit of the Consolidated Water Company, and the supplemental bill proposed to be filed therein, that the bonds proposed to be issued would be illegal, and would, if sold to innocent purchasers, burden the property owned in the city of San Diego, including the property held as security for the bonds of the San Diego Water Company owned by the Consolidated Water Company, with heavy and illegal taxes for 40 years to come, depreciate the same in value, and work the complainants irreparable injury. And that the prayer for relief in said proposed supplemental bill was as follows:

"Wherefore, your orators pray that they be granted the relief prayed for in their amended original bill herein, and that the said city and its officers, made defendants herein, be perpetually enjoined from issuing or selling the bonds as the result of said election, and from paying any money for the delivery of any bonds to the said Southern California Mountain Water Company or any one else on account of said contract, or in pursuance of or as performance or part performance thereof; that said contract and proceedings for the issuance of said bonds be declared illegal and void, and that the said Southern California Mountain Water Company be required to deliver up said contract for cancellation; and that the same be by this court canceled and annulled."

The proffered affidavit of Capron further states that the cause of action set forth in the original bill filed by the Consolidated Water Company, and in its amended bill, and the supplemental bill sought to be filed by it, and the grounds upon which it was in those pleadings claimed that the proceedings of the common council of the city of San Diego were illegal and void, and the relief sought therein, were the same as in the present suit. The proffered affidavit of Capron further states: That on the 29th day of June, 1896, one F. S. Nicholson filed her bill of complaint in this court against all of the defendants named in the bill of the Consolidated Water Company, except E. S. Babcock; the object thereof being to have set aside and de-

clared void the contract entered into between the city of San Diego and the Southern California Mountain Water Company, and to enjoin the common council of the city from issuing the bonds of the city for the purpose of carrying out that contract; the grounds for the relief asked being, in substance, the same as some of the grounds set forth in the bill of complaint of the Consolidated Water Company. That in and by the Nicholson bill the complainant prayed the court for a writ of injunction against the city of San Diego and its officers, restraining them from taking further action towards the issuance or sale of the bonds, and the use of any money derived from the sale thereof in the construction of waterworks or the acquisition of water rights, reservoirs, reservoir sites, meter-house sites, and rights of way, of and from the Southern California Mountain Water Company, and further prayed as follows:

"(a) That the proceedings heretofore had by said common council, the mayor, and other officers of said city in the passage and approval of said ordinances and the election held under said ordinances to vote upon the proposition of the issuance of the bonds of said city, as set out in said ordinances, for the sum of \$1,500,000, be declared illegal and void. (b) That the said pretended contract between said city and the Southern California Mountain Water Company, as set out in Exhibit G, upon the final hearing be declared and decreed to be null and void, and that said city and said water company be perpetually enjoined from carrying out the terms of said contract."

That thereafter, and on the 9th day of July, 1896, the above-named Constantine W. Benson and Henry Livesley Cole filed their petition in said suit for leave to intervene, and presented therewith their complaint in intervention, in which the same grounds for the setting aside of the contract and enjoining the issuance of the bonds were set forth as were contained in the amended bill in the suit of the Consolidated Water Company, and the same relief was asked for therein. That thereafter, and on the 23d day of July, 1896, the complainant in the suit, by leave of the court, filed her amended bill, setting forth more fully and in detail the same cause of action, and asking for the same relief, as in her original bill. That the defendants to the suit demurred to the petition of the said Benson and Cole to intervene, and also filed exceptions to the amended bill of complaint of the complainant, and also a demurrer to the bill of complaint, and that on September 7, 1896, the several exceptions to the bill were referred to a master, and that all of the matters above mentioned are still pending in this court and undisposed of. That in each and all of the cases above mentioned the defendants thereto have contended and maintained that this court has no jurisdiction thereof, on the ground, in the case of the Consolidated Water Company, that necessary and indispensable parties resident within the state were not made parties to the suit, and, in the case of Nicholson, that the amount in controversy was not sufficient to give the court jurisdiction, and that the question raised as to the jurisdiction of the court in both of those suits is still under advisement and undetermined. That the suit of Albert Meyer, mentioned in the pleas in abatement in this suit offered to be filed, was commenced in the state court on the 29th day of June, 1896, being the same day on which the bill of complaint of the said Nicholson was filed in this court. That other taxpayers

mentioned in the proposed pleas in abatement made application for leave to intervene in that suit, which was allowed, and their complaints in intervention duly filed. That the San Diego Water Company brought its action in the state court on the 30th day of June, 1896, as set forth in the proposed pleas in abatement, and that thereafter those cases were consolidated and tried together in the state court. That on the 10th day of August, 1896, the plaintiff Meyer moved the state court for a change of the place of trial thereof, in support of which he filed a certain affidavit, setting out grounds upon which it was claimed that the presiding judge of that court was disqualified, and that he was joined in that motion by the interveners in the suit, upon the same grounds, who also filed an affidavit in support thereof, and that the motions for a change of the place of trial were by the court denied. The proposed affidavit of Capron, for the purpose of showing the disqualification of the presiding judge of the state court in which the consolidated cases were tried, also sets out various grounds upon which it is claimed by counsel for the complainants that judge was disqualified from trying the cause.

In support of the contention of counsel for the defendants to the present suit that the cause of action here involved is not the same as, but is entirely separate and distinct from, that involved in the suit heretofore brought and now pending in this court by the Consolidated Water Company, the defendants filed an affidavit of the city clerk of the defendant city, in which he states: That he is now, and ever since the 1st day of May, 1893, has been, such clerk. That in the month of December, 1895, pursuant to instructions from the common council of the city of San Diego, Edwin M. Capps, city engineer of that city, prepared plans and estimates of the cost of a water right to 1,000 inches of water, to be acquired by the city from the Southern California Mountain Water Company at a point near the Upper Otay Reservoir Site, located in the county of San Diego, and also estimates of the cost of the acquisition by the city of that reservoir and dam site, containing 423.13 acres, and also of the acquisition by the city of a right of way 20 feet wide from that dam site to the eastern boundary limits of the city, and a right of way 20 feet wide, within the limits of the city, for a pipe line by which to distribute such water to the city and its inhabitants. That on the 16th day of December, 1895, an action entitled "The Consolidated Water Company, Complainant, v. E. S. Babcock et al., Defendants," was commenced in this court for the purpose of having declared illegal and void the proposition set forth on page 26 of the bill in that action, or any contract which might be based thereon. That on the 27th day of August, 1896, the present suit was commenced, by the terms of the bill in which action the complainants therein sought to have the contract mentioned and described therein, between the city of San Diego and the Southern California Mountain Water Company, annulled and set aside, and declared illegal and void. That the proposition mentioned on page 26 of the bill in the case of The Consolidated Water Company v. E. S. Babcock et al., upon which that action is based, is an entirely different, separate, and distinct proposition and cause of action from that upon which the present suit is based. That the proposition, as it

appears upon page 26 of the bill in the Consolidated Water Company's case, was a preliminary report by the joint water company committee of the common council of the city of San Diego, and that afterwards, pursuant to instructions by the common council, the said city engineer prepared plans and estimates for the purpose of determining the cost to the city of constructing and acquiring the property embodied therein. That thereafter such plans and estimates, after being prepared by the engineer, were adopted by the common council, and thereafter a contract for the purpose of acquiring the property embraced in that proposition was prepared and furnished to the council of the city, and thereafter the proposed contract came on regularly for hearing before the council, as a committee of the whole, on the 7th day of February, 1896, and upon such hearing the proposition, in its entirety, was defeated, and not adopted, and that the same never has since been taken up or considered by the council. That thereafter, pursuant to instructions from the council, the said engineer prepared plans and estimates of the cost of the acquisition by the city of the real property and water right described in the contract mentioned in the present suit, and the construction of the pipe line and distributing system therein mentioned. That the proposition which was defeated, and has never been adopted by the common council of the city, was the proposition upon which the Consolidated Water Company's case was based, and is entirely separate and distinct from that upon which the present suit is based, and especially so in these particulars: That the proposition upon which the Consolidated Water Company's case was based included the acquisition by the city of the following described real property:

"All that land contained in the county of San Diego, state of California, constituting the Upper Otay Reservoir Site and the Upper Otay Dam Site, located in sections 24, 25, and 36 of township 17 south, range 1 west, and sections 19 and 30 in township 17 south, range 1 east, San Bernardino meridian, consisting of 423.13 acres. Also, a right of way from the said dam site to the eastern boundary limits to the city of San Diego, 20 feet in width, for a pipe line. Also, a piece of land along the line of said right of way, west to the west line of Sweetwater valley, 150 feet square, commencing at a point on the north line of lot 13 of Encanto, 325 feet west from the northeast corner of said lot 13, thence running south 150 feet, thence west 150 feet, thence north 150 feet, and thence east 150 feet; also a piece of land located in said county of San Diego, commencing at a point south 24° and 30' west 1,458 feet from the southwest corner of section 30, township 17 south, range 1 east, San Bernardino meridian, thence south 150 feet, thence west 150 feet, thence north 150 feet, thence east 150 feet to the point of beginning; and also a right of way therefrom 50 feet wide, south 33° west to the 120-foot contour line of the said Upper Otay Reservoir Site; and also a right of way 25 feet in width from the said last-mentioned piece of land 150 feet square to the northern boundary line of the Janal Rancho, thence west along said boundary line to the 120-foot contour line of the said Upper Otay Reservoir Site."

—That the estimates of the said city engineer for the said described property were about \$15,000, and that none of the said property is embraced or included in the proposition upon which the present suit is based. That the proposition upon which the Consolidated Water Company's case is based included also the building of a dam on the said Upper Otay Dam Site 120 feet high, and sufficient in capacity to form a reservoir to impound 632,448,000 cubic feet of

water. That the building of such dam involved an expense of from \$275,000 to \$300,000, and is not included or mentioned in the proposition upon which the present suit is based. That the proposition upon which the Consolidated Water Company's case is based also included the building of a dam by the Southern California Mountain Water Company at either the Barrett Dam Site or the Morena Dam Site, in said county of San Diego, of a sufficient capacity to impound at the Barrett Dam Site, above the 80-foot contour line, 632,448,000 cubic feet of water, and at the Morena Dam Site, above the 30-foot contour line, a dam of sufficient capacity to impound 632,448,000 cubic feet of water, while the proposition upon which the present suit is based does not provide for any dam to be built at Barrett's Dam Site at all. That the proposition upon which the Consolidated Water Company's case is based was to acquire a water right from the Southern California Mountain Water Company, at a point east of the Upper Otay Reservoir Site, of 1,000 inches of water, from an artificial aqueduct, for the sum of \$485,000, while the proposition upon which the present suit is based is to acquire from the Southern California Mountain Water Company a right to 1,000 inches of water several miles nearer the city of San Diego, and at a much higher elevation, for the sum of \$727,579. That the proposition upon which the Consolidated Water Company's case is based provided that the dam to be constructed at the Upper Otay Dam Site, and the pipe line to be built by the city, should cost \$1,075,000, while the proposition upon which the present suit is based provides that the pipe line to be constructed by the city shall cost only \$767,421.

In respect to the suit commenced in this court by the Consolidated Water Company on the 11th day of December, 1895, it is enough for the proper disposition of the motions in the present suit to say that that suit, having been commenced long prior to the making of the contract or the doing of any of the acts for the annulment of which the present suit was brought, in the nature of things, did not and could not embrace, as part of its subject-matter, the contract and proceedings involved in the present suit; for no such contract was then in existence, and, as a consequence, no act had been done in pursuance thereof. The suit brought by F. S. Nicholson in this court on the 29th day of June, 1896, was a suit by a non-resident taxpayer of the city of San Diego against the identical defendants who are defendants to the present suit. The acts constituting the alleged cause of action in that suit are the same acts of which complaint is made in this suit, and the same relief is prayed for in both suits. Manifestly, therefore, the Nicholson suit may be properly pleaded in abatement of the present one, if the complainants in this suit are so far parties to that one as to be bound by any judgment that may be rendered therein. It is important, therefore, to inquire whether they will be so bound. As has been seen, that suit was brought by the complainant on her own behalf, and on behalf of all other property owners and taxpayers of the city of San Diego who are not citizens of California; and, like the present suit, its main purpose was to obtain a decree of this court adjudg-

ing null and void the contract entered into between the city of San Diego and the Southern California Mountain Water Company, and all proceedings thereunder. The grievances complained of by her, on her own behalf and on behalf of all other property owners and taxpayers of the city who are not citizens of California, are identical with the grievances complained of by the complainants in the present suit, and are common to all other property owners and taxpayers of the city similarly situated. The complainant in the Nicholson suit may therefore be justly and properly regarded as representing a class, all of whom will be concluded by whatever judgment may be rendered therein. "The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others, and a bill may also be maintained against a portion of a numerous body of defendants representing a common interest." Story, Eq. Pl. §§ 97, 98; Smith v. Swarmstedt, 16 How. 288, 302; Brown v. Trousedale, 138 U. S. 389, 11 Sup. Ct. 308; 1 Freem. Judgm. § 178; 2 Black, Judgm. § 584; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161; Sabin v. Sherman, 28 Kan. 289; State v. Chester & L. R. Co., 13 S. C. 290. But while the defendants are entitled to plead in abatement of the present suit the one heretofore brought and now pending in this court for the same cause against the same defendants, it is well settled that they cannot plead in abatement of the suit here the suits brought in the superior court of San Diego county by Albert Meyer against the same defendants, and for the same cause. Stanton v. Embrey, 93 U. S. 554; Gordon v. Gilfoil, 99 U. S. 169, 178; Sharon v. Hill, 22 Fed. 28; Pierce v. Feagans, 39 Fed. 587; Rawitzer v. Wyatt, 40 Fed. 609; 1 Beach, Mod. Eq. Prac. § 303.

In addition to the motions already considered, all of the defendants to the present suit move the court to dismiss it, and to discontinue further proceedings therein, upon the ground that the superior court of San Diego county first acquired jurisdiction of the parties and subject-matter of the controversy. If the record showed such to be the fact, this court would not hesitate to grant the motion, or at least to suspend further proceedings in the suit here until the final action of the state court; for I conceive it not only to be settled, but rightly settled, that, where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain and exercise such jurisdiction, to the final determination of the action and the enforcement of its judgment and decree. Sharon v. Terry, 36 Fed. 337, 354; Sharon v. Sharon, 84 Cal. 424, 430, 23 Pac. 1100; Taylor v. Taintor, 16 Wall. 366; Works, Courts, p. 68; Foley v. Hartley, 72 Fed. 570, 573; Hughes v. Green, 75 Fed. 691; Hatch v. Bancroft-Thompson Co., 67 Fed. 802; Bank v. Herrenden (N. Y. App.) 4 N. E. 332; Freem. Judgm. (4th Ed.) 118a. It needs no argument to show that the rule stated is vital to the harmonious movement of courts of concurrent jurisdiction, exercising their powers within the same spheres and over the same subjects and persons. It is nowhere made to appear, however, that the suit brought by Meyer

against the defendants to the present suit in the superior court of San Diego county was instituted prior to the commencement of the Nicholson suit in this court. It does appear that both of those suits were commenced on the same day, to wit, June 29, 1896, but which one was first commenced nowhere appears. For this reason the court will withhold a ruling upon the motion to dismiss the present suit and to suspend further proceedings therein, with leave to the respective parties to introduce proof in respect to that question of fact.

The affidavit of John G. Capron, sought to be filed by the complainants on the hearing of the present motions, containing, as it does, attacks upon the qualification of the judge of the superior court of San Diego county who tried the consolidated case in that court, will not be allowed to be filed herein. With the qualification or disqualification of the judge of the state court this court has nothing whatever to do. A disqualification of the judge in no respect affects the jurisdiction of the court.

Orders will be entered (1) denying the application of the complainants to file the affidavit of John G. Capron; (2) allowing the defendants hereto to file their pleas setting up the suit heretofore brought by Nicholson against the same defendants for the same cause in abatement of the present suit; (3) denying the application of the defendants hereto for leave to plead in abatement of the present suit the suit brought by Albert Meyer against the same defendants for the same cause in the superior court of San Diego county; and (4) continuing under advisement the motion of the defendants for the dismissal of the present suit and the discontinuance of proceedings herein, with leave to introduce further proof upon the point indicated.

ATLANTIC TRUST CO. v. WOODBRIDGE CANAL & IRRIGATION CO.
(THOMPSON, Intervener).

(Circuit Court, N. D. California. March 15, 1897.)

WATER COMPANIES—PRIORITY OF SCRIP OVER MORTGAGE LIEN.

Scrip issued by a water company in payment of claims for labor furnished for construction or repair, which stipulates that it is accepted for the purpose only of being used in payment for the purchase of a permanent water right, "and not as a claim against the company for any other purpose whatever," is a floating right, not yet attached to any specific property, and, in the absence of a showing by the holder that he has land alongside the canal or ditch, and that the ditch has arrived opposite his land, accompanied by an offer of the scrip in payment for the permanent water right, it cannot be recognized to the prejudice of a prior mortgage lien by decreeing a conveyance of a water right, or by providing in the decree that the holder shall be paid that amount of the scrip out of the proceeds of the sale of the ditch property in advance of the mortgage, or by decreeing that it shall be recognized as a subsisting right by the purchaser of the property.

Scrivner & Schell and John B. Hall, for complainant.

Budd & Thompson and W. M. Cannon, for J. C. Thompson, intervenor.

MORROW, District Judge (orally). This is an intervention of J. C. Thompson for the specific performance of certain contracts for water rights. The petitioner alleges, among other things:

"That the defendant, the Woodbridge Canal & Irrigation Company, on and for a long time prior to the first day of October, 1894, was the owner of, and in the possession of, and operating, the system of canals and ditches described in the amended bill of complaint on file herein, reference to which for more particular description is hereby made. That the defendant, the Woodbridge Canal & Irrigation Company, continued to be the owners of, and in the possession of, and to operate and carry on, construct, and maintain, the system of canals and ditches described in the complaint, until this honorable court, on the 3d day of October, 1894, took possession of all the property of the said defendant, the Woodbridge Canal & Irrigation Company, by the appointment of a receiver, who then took, and ever since has had and now has the charge, control, and possession of, all the property of said corporation. That prior to the time that said receiver took possession of the property of said corporation, the said corporation, the Woodbridge Canal & Irrigation Company, at various times, which are hereinafter fully set forth, for value received, made, executed, and delivered to the parties hereinafter named, and of whom your petitioner is the assignee, certain scrip, true copies of which are hereinafter fully set forth in this petition, which said scrip was issued in payment for work, labor, and materials done and furnished by the various persons, assignors of your petitioner named herein, and which said scrip was issued and was to be received by the company for the purchase of permanent water rights from said Woodbridge Canal & Irrigation Company, and was accepted by your petitioner's assignors for such purpose, and to be applied in the purchase of water rights from the said Woodbridge Canal & Irrigation Company. That heretofore, to wit, on the 30th day of July, 1892, the Woodbridge Canal & Irrigation Company issued and delivered to Byron D. Beckwith, for value received, that certain scrip No. 3, in words and figures following, to wit: 'No. 3. Office of the Woolbridge Canal & Irrigation Co. \$400.00. San Francisco, Cal., July 30th, 1892. This is to certify that this scrip will be taken by the Woodbridge Canal & Irrigation Company for the amount of four hundred dollars (\$400.00) from Byron D. Beckwith or his assigns, in payment for any debt or debts due or to become due by him to this company, for the purchase of permanent water rights (but not for rentals or interest), at the time he shall present the same properly indorsed to the San Francisco office of this company. And the said Byron D. Beckwith accepts the same for such purpose, and such purpose only, and not as a claim against this company for any other purpose whatever.'"

It appears, further, by the allegations of the bill, that this scrip was assigned and set over to John C. Thompson, the petitioner. The intervention refers, in the same language, to a number of other instruments of the same character. The dates, numbers, and sum total of these certificates are as follows:

July 30, 1892, 14 contracts.....	\$ 5,200 00
May 31, 1893, 2 "	100 00
Oct. 30, 1893, 1 "	662 50
Feb. 9, 1894, 10 "	2,313 69
Feb. 27, 1894, 2 "	200 00
July 9, 1894, 2 "	100 00
Aug. 4, 1894, 6 "	2,259 20
Aug. 7, 1894, 1 "	23 42
Sept. 11, 1894, 1 "	132 45
39 contracts.....	\$10,991 26

—without interest.

The petition concludes as follows:

"That the action above entitled was brought by the Atlantic Trust Company, a corporation, against the said corporation the Woodbridge Canal & Irrigation Company, to foreclose a certain deed of trust upon all of the said canal and other property of said defendant corporation, and that said deed of trust was given and executed to secure the payment of certain bonds issued by the defendant corporation. That said deed of trust is set out in full in the amended bill of complaint in said action, and is hereby specially referred to and made a part of this petition. That the defendant in said action, the Woodbridge Canal & Irrigation Company, failed to appear in said action or to plead therein within the time allowed by law and the rules of this court, and the plaintiff has, by reason of defendant's said default, entered a judgment pro confesso against said defendant. That a final judgment and decree will soon be entered in said action foreclosing all defendant's rights in and to said property, and the whole thereof, and ordering and directing a sale of all of said property pursuant to said decree. That in and by said decree and foreclosure sale defendant will be foreclosed of all right and interest in said property, and will be unable to honor the said scrip above set out, and that said scrip will thereby become valueless, unless the same is enforced against the property of said company by this honorable court. That before the filing of this petition, and after the assignments aforesaid, the petitioner, being desirous of purchasing from said defendant permanent water rights in said canal system, and the water thereof, tendered to the said receiver all of the said water scrip, and demanded that said receiver issue, grant, and transfer to the petitioner water rights in and to the water of said canal and branches on lands within the flow of the water of said canal, but said receiver refused, ever since has refused, and still refuses, to comply with said demand, or to recognize said scrip in any manner whatsoever, although said receiver had and has it in his power to comply with said demand, as petitioner is informed and verily believes. That petitioner and his assigns have duly done and performed all the obligations of said scrip contracts on their part to be done and performed, and are now ready and willing to deliver up said scrip to said receiver, or to deposit the same in court, in payment for permanent water rights, as aforesaid, and to do and perform any and all other acts and things necessary or proper to be done or performed by them in the premises. That certain of the said scrip bears interest upon its face value at the rate specified therein, to be payable in permanent water rights in the same manner as provided in said scrip for the redemption thereof."

The petition then prays:

"That a decree be entered directing the said receiver to sell and convey to petitioner permanent water rights in the said canal system and property equal in value to the face value of the said scrip with accrued interest, and that he, the said receiver, make, execute, acknowledge, and deliver to said petitioner good and sufficient grants and deeds of conveyance of said permanent water rights, and that said receiver receive the said scrip in full payment for said water rights, and that he be further ordered to place petitioner in possession thereof. Petitioner further prays that his rights and equities under said water scrip be fully investigated and adjudicated by this honorable court, and that petitioner be adjudged to have a decree of specific performance against said receiver, and against all the parties to said action, and that this honorable court, in its final judgment and decree in said action, recognize the petitioner's rights under said scrip, and order and decree that said scrip shall constitute a permanent charge on the said property for permanent water rights, and that all purchasers of said property and canal system, under foreclosure sale or otherwise, shall take the said property and system subject to the said charge, and the rights and equities of petitioner under said scrip; and that it be further adjudged in said decree that said scrip, or the water rights issued thereon, shall be as valid and binding as against any purchasers of said property under the process of this court as it is against the said defendant, the Woodbridge Canal & Irrigation Company."

This petition was amended in the following particulars; that is, particulars that are essential to be considered upon this question:

"Petitioner avers that the said scrip, and each piece thereof, was issued and executed by said corporation to the above-named parties for work, labor, and services theretofore done and performed by them for said corporation, and upon the canal system and property of said corporation; that said work, labor, and services were and are of the reasonable value of the amounts mentioned and set out in each of said scrip contracts, respectively; that the indebtedness created by said corporation for said work, labor, and services was for the necessary current expenses incurred by said defendant corporation in the operation of said canal system and property, and for the necessary current expenses incurred by said corporation in preserving said canals and canal system, and contributed largely to the advantage of the bondholders of said defendant, and said work, labor, and services were essential to the conservation and preservation of the property of said defendant above and in the amended bill of complaint herein described, and to the security of defendant's bondholders, and were necessary to keep said canal property and system a going concern. Petitioner further avers that all the income from said canals and ditches during the time of its operation, and during the time of the employment of petitioner's assignors, was diverted from the payment of the wages of your petitioner's assignors to the permanent improvement and equipment of said canals and canal system, and to the payment of the interest due to the bondholders of said corporation aforesaid. Petitioner, in addition to the prayer of his petition herein, further prays this honorable court that if said court cannot equitably enforce the said scrip against said property as permanent water rights, then, and in that event, this court will adjudge that said scrip and claims be preferred over the claims of the mortgage bondholders, and paid out of said property, and the proceeds of any sale thereof, in advance of and in preference to the claims of said mortgage bondholders."

The petitioner refers to the amended complaint, and makes the amended complaint a part of the petition. The original bill of complaint was filed October 3, 1894, and the amended bill December 16, 1895. By reference to the amended complaint, it is found that the bill is for the foreclosure of a mortgage to satisfy the payment of certain bonds which have not been paid in accordance with their terms. Attached to the bill of complaint is the mortgage. The material part of this mortgage is as follows:

"Now, therefore, this indenture witnesseth, that for the purpose of securing the said bonds for \$100,000, to be issued as herein provided for, and the interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the premises, and of \$10 to it in hand paid by the said trustee, at or before the execution and delivery of these presents, receipt whereof is hereby acknowledged, the said Woodbridge Canal & Irrigation Company has bargained, sold, granted, conveyed, assigned, and set over, and by these presents does bargain, sell, grant, convey, assign, and set over, unto the said Atlantic Trust Company, as trustee, its successors and assigns, the entire corporate property of said Woodbridge Canal & Irrigation Company, and all its lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, easements, and fixtures, now owned or hereafter to be acquired, and all its canals, flumes, head works, gates, dams, bridges, etc., now constructed or to be hereafter constructed, extending from the present point of diversion, in the Mokelumne river, in the town of Woodbridge, in San Joaquin county, aforesaid, in a westerly direction, to Taison and New Hope, in said county, and in an easterly and southerly direction to the Calaveras river, with all other or branch canals that may be hereafter constructed within said territory, south and west of the Mokelumne river, and all the estate, right, title, and interest, claims and demands, rights of way, and other easements, whether at law or in equity, of the said company, of, in, and to the same, and each and every part and parcel thereof; and also all buildings, fixtures, and personal property thereon or belonging to said company, and all receipts, incomes, and profits which said company shall derive

on account of any contract or agreement for the transfer of water rights, as appurtenant to specified lands, excepting and not including the annual rentals for the use of said water and interest on such contracts or agreements."

The bonds are dated July 17, 1891, and the mortgage to secure the payment of 66 of these bonds is dated on the same day, and is prior to the date of any of the scrip mentioned in the intervention of Thompson.

The constitutional provision of this state in relation to water rights is as follows:

"Art. 14. Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by law: provided, that the rates or compensation to be collected by any person, company or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. * * *

"Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The law upon the subject is as follows (section 552 of the Civil Code of California):

"Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

It will be observed that this law, under the constitution, refers to water to irrigate lands which a corporation has sold, and which, it provides, shall remain a perpetual easement attached to the land sold. In this case the petitioner set forth as his claim of intervention the ownership of certain scrip which do not appear to be attached to any land, but, as the term "scrip" indicates, they are intermediate instruments of title, not connected with any land, but documents that give to the person to whom they are issued a right at some time thereafter to receive water from the company. The scrip contract is as follows:

"* * * for the amount of four hundred dollars (\$400) from Byron D. Beckwith or his assigns, in payment for any debt or debts due or to become due by him to this company, for the purchase of permanent water rights (but not for rentals or interest), at the time he shall present the same, properly indorsed, to the San Francisco office of this company. And the said Byron D. Beckwith accepts the same for such purpose, and such purpose only, and not as a claim against this company for any other purpose whatever."

This is simply an agreement on the part of the company that this scrip may be used for the payment of a permanent water right, whenever any person holding it shall have land to which it may be

attached. It is like the scrip sometimes issued by the government for unlocated land. It is a floating right, not yet attached or assigned to any specific property.

The petitioner, holding this scrip, asks that one of three things be done: (1) That there be a conveyance by the receiver of these water rights to him; or (2) that it be decreed that he shall be paid the amount of the scrip out of the proceeds of the sale of this ditch property in advance of the payment of the mortgage; (3) or, in default of either of the other remedies, that the rights of the petitioner be recognized in the decree,—that is to say, that the scrip contracts be recognized as a subsisting right which will be acknowledged hereafter by the company or by whoever may purchase the property.

Some features of the law of this case have already been established by Judge McKenna in the Matter of the Intervention of William Alloway, claiming preference as a laborer, etc. (79 Fed. 39). Upon that intervention the question was as to whether or not the petitioner was entitled to be paid out of the proceeds of the sale of this ditch in advance of other claims. The court held that, so far as the services or materials were for the purposes of construction, they were not entitled to preference over the mortgage lien (citing *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546); that, so far as they were for repairs and improvements, they could not be given preference, as there was no allegation in the petition of diversion of income, or, in fact, of the receipt of any income; that, so far as they were for operating expenses,—keeping the works a going concern,—they were entitled to preference over the mortgage lien. It was held, further, that the principles peculiar, in this respect, to railroad corporations, were applicable to water companies; citing *Ditch Co. v. Zellerbach*, 37 Cal. 577; *Price v. Irrigating Co.*, 56 Cal. 431; *San Diego Land & Town Co. v. City of National City*, 74 Fed. 79; *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56.

The law having been determined as above set forth, it is incumbent on the court to apply that law to the case as the questions arise. Under this law, can the scrip in question be now recognized in any of the three ways that have been suggested by the petitioner? I determine, in the first place, that with respect to a conveyance of a permanent water right by the receiver, this court has no authority whatever to direct the receiver to make a conveyance to the petitioner holding these claims for water rights. Whatever may have been the origin of these claims, the measure of obligation of the company is now to be found in the terms of this scrip. The scrip expressly stipulates that it is accepted for the purpose only of a payment for the purchase of a permanent water right, "and not as a claim against this company for any other purpose whatever." If the claims were originally for labor furnished for construction or repair, such claims have now been merged in the terms of this scrip, and the terms of the scrip measure the rights of the holders. The scrip contract is that they shall be entitled to offer this in payment of any water rights. It does not appear

from the petition that any of the water rights sought to be recognized as against the mortgage lien by these scrip contracts are appurtenant or attached to any specific parcel of land. If the petitioner had land alongside of this canal or ditch, and should come into this court and represent that the ditch had arrived opposite his land; that he had this scrip, and wanted to offer it in payment of the permanent water right,—it would present a very different question. But there is no such question presented here now; therefore it is impossible for the court, under the law as the court understands it, to make any order conveying a permanent water right or any water right to the petitioner.

With respect to the second proposition made by the petitioner, that it should be decreed that out of the proceeds of the sale of this property the petitioner shall be paid the amount of his claim, I do not understand the law, as it has been established, gives to the persons holding these claims any priority over the claims of the mortgagees. As I said a moment ago, whatever may be the rights of these original holders of the claims; whatever may have been the rights of the persons who furnished the material and the supplies which resulted in the issuance of these certificates,—their rights are now merged in these scrip contracts. These scrip contracts, in my judgment, must take the same position that mortgages and other documents have taken in railroad companies where they have been issued for the purpose of construction and of making the railroad a going concern. The case which I think decides this question is that of *Thompson v. Railroad Co.*, 132 U. S. 68, 10 Sup. Ct. 29. The case is a long one, but I will refer to it somewhat in detail:

"This suit was brought by holders of obligations of the Indiana, Cincinnati & Lafayette Railroad Company, and on behalf of other holders similarly situated, to enforce an alleged lien claimed by them upon earnings of a section of the road of the White Water Valley Railroad Company against the claim to priority of bondholders secured by an earlier mortgage. The White Water Valley Railroad Company was organized as a corporation in 1865, under the laws of Indiana, with authority to locate, construct, and operate a line of railway from Hagerstown, in Wayne county, of that state, to the town of Harrison, Dearborn county, on the boundary line between Indiana and Ohio. To raise the necessary means to construct the railway, the company issued its coupon bonds to the amount of \$1,000,000, in sums of \$1,000 each. They were dated August 1, 1865, and were to mature August 1, 1890, and draw interest at the rate of 8 per cent, per annum, payable semiannually. To secure the payment of the principal and interest of these bonds, the company executed to trustees, by way of mortgage, a deed bearing date on that day, of its railroad and all the right of way and land occupied thereby, with the superstructure, and all property, materials, rights, and privileges, then or thereafter appertaining to the road, and the benefit of all contracts with other railroad companies, then existing or thereafter to be made, and all property, rights, and interests under the same. The deed contained the usual covenants to execute suitable conveyances for the further assurance of property subsequently acquired and intended to be included in the instrument. The company soon afterwards commenced the construction of the road, and by the 4th of November, 1867, completed that part of it which lies between the towns of Harrison and Cambridge City, leaving the distance from the latter place to Hagerstown—between seven and eight miles—unconstructed. It was then without the requisite means to equip the part of the road completed, or to undertake the construction of the remaining portion of the road. In this con-

dition it entered into a contract of perpetual lease with the Indianapolis, Cincinnati & Lafayette Railroad Company, a corporation then in existence, in consideration of which the latter company agreed to furnish all the necessary equipments, material, and laborers to operate the line of the road then completed, and to construct and put in good and safe running order for the accommodation of the public that part of the line then uncompleted,—that is, the section between Cambridge City and Hagerstown,—and to pay to the lessor annually the sum of \$140,000 in four quarterly payments, of \$35,000 each. The contract referred to the mortgage of \$1,000,000 before mentioned, and provided for the payment of the interest thereon out of the rents received, and for the resumption of possession by the lessor if the lessee failed to keep its covenants."

The lessee in this case proceeded and constructed the remaining portion of the road between Cambridge City and Hagerstown, and also furnished the necessary equipment to put the whole road in operation; in other words, the lessee made the road a going concern, and, having furnished the material and means for that work, issued its bonds to the two persons who did this work, namely, Smith and Lord. In my opinion, the bonds that were issued to Smith and Lord for the purpose of securing the construction of the remaining portion of this road from Cambridge City to Hagerstown, and for the purpose of equipping and placing the other portion in a going condition and as an operating road, are substantially the same class of obligations that have been issued in this case to the persons who have received these scrip contracts. The court, in this case of *Thompson v. Railroad Co.*, said:

"The claims of the complainants, whatever validity and force may be given to them as liens upon the earnings of the section of road from Cambridge City to Hagerstown, between the parties agreeing to such liens, are entirely subordinate to the rights of the bondholders under the mortgage of the White Water Valley Railroad Company, executed for their benefit to trustees on the 1st of August, 1865. That mortgage was made before the claims of the complainants had any existence."

In the case referred to, the parties who had completed this road and furnished the equipment brought suit on their obligations, and the original bondholders came in as interveners. These original bondholders had secured a foreclosure of their mortgage, and they intervened in this last suit to secure their rights, and, although they came in as interveners where the parties holding the second class of obligations were proceeding to secure the acknowledgment of their rights in court, it was held that these second obligations for the construction of the road and its equipment, under the terms of the agreement, were subordinate to that of the original bondholders.

If the law relating to the construction and equipment of railroads is applicable to this ditch company, as has been held by Judge McKenna, and I am right in understanding the law established in *Thompson v. Railroad Co.*, that case substantially decides the question involved in this case. The bonds in the case cited were, if there was any difference, of a higher order of obligation than the scrip in this case, because, as I have already called attention to the fact, this scrip is an exceedingly undeterminate agreement or contract. If the scrip in the case at bar can be enforced against

the permanent water rights of the corporation as against the prior claim of the mortgagee, it follows that all of the water rights belonging to the company might be conveyed away in this manner, to the prejudice and loss of the mortgagee. It seems to me clear that the mortgagee's prior lien cannot be displaced or divested by any such method. As was well said in *Fosdick v. Schall*, 99 U. S. 253:

"The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none."

And in *Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. 953, Mr. Justice Brewer used the following language:

"No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced."

See, also, 5 *Thomp. Corp.* p. 5647, § 7122.

The general rule as to the effect of the creation of liens after the execution of the mortgage is thus laid down in 19 *Am. & Eng. Enc. Law*, 761:

"Contracts made by a railroad company after the execution of a mortgage, and without the consent of the mortgagees, and without a positive statute which enters into the mortgage contract, constitute no lien upon the property or franchise of the corporation superior to that of the mortgage."

Take the case of *Dunham v. Railroad Co.*, in 1 *Wall.* 254. A short reference to that case will indicate the same principle of law. The court said, referring to the obligations in that case:

"The respondents, in the second place, rely upon the terms of the subsequent agreement made by the company with the contractor for the completion of the route. Counsel of respondents concede that the mortgage to the complainant was executed in due form of law, and the case also shows that it was duly recorded on the 9th day of March, 1855, more than eight months before the contract set up by the respondents was made. All of the bonds, except those subsequently delivered to the contractor, had long before that time been issued, and were in the hands of innocent holders. Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship on the contractor, as he must have known when he accepted the agreement that he took the road subject to the rights of the bondholders. Acting, as he did, with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad mortgages, made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied. Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration; but suffice it to say that, in the

view of this court, the argument is not sound, and we think that the weight of judicial determination is greatly the other way."

It is claimed, further, on the part of the petitioner, that this mortgage virtually recognizes the permanent water right, and the income from it, and therefore that a conveyance of the kind mentioned in this scrip has been agreed to or acknowledged by the company. I do not so understand the provisions of this mortgage. It conveys all the "lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, easements, and fixtures, now owned or hereafter to be acquired, and all its canals, flumes, head works, gates, dams, bridges," etc., "now constructed or to be hereafter constructed, * * * and all the estate, right, title, and interest, claims and demands, rights of way and other easements, whether in law or in equity, of the said company, of, in, and to the same, and each and every part and parcel thereof; and also all buildings, fixtures, and personal property thereon or belonging to said company, and all receipts, incomes, and profits which said company shall derive on account of any contract or agreement for the transfer of water rights, as appurtenant to specified lands, excepting and not including the annual rentals for the use of said water, and interest on such contracts or agreements." This is very broad language, and it appears to me that whatever right there was, whatever right in the permanent water right there might be, in connection with this ditch or irrigation company, that right was mortgaged to the trust company, and, in that view, these claims must be held subordinate to the mortgage in this case. This disposes of the petitioner's third proposition, that the scrip should be recognized in the decree.

It was urged upon the argument that the permanent water rights referred to in the scrip were outside the provisions of the constitution of this state, and therefore the action of the officers of the company in issuing the scrip was *ultra vires*. In the view I take of the subordinate character of the scrip contracts, it will not be necessary to pass upon that question at present; but if, upon the sale of the property, the proceeds should prove to be in excess of the amount due on the bonds secured by the mortgage, the petition may be presented as against such surplus proceeds, and whatever question then remains will be determined. The demurrer to the petition must therefore be sustained.

NASH v. INGALLS.

(Circuit Court, S. D. Ohio, W. D. March 29, 1897.)

EQUITY JURISDICTION—SIMPLE CONTRACT DEBT.

An independent suit against a railroad receiver to recover a simple contract debt owing by the receiver is not sustainable in equity.

David Stuart Hounshell, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendant.

TAFT, Circuit Judge. This case was begun in the superior court of Cincinnati. The petition avers that on October 1, 1868, Joseph Butler leased to the Cincinnati & Indiana Railroad Company, for 99 years, renewable forever, a piece of real estate on the southwest corner of Carr and Sixth streets, in the city of Cincinnati; that by the lease the railroad company agreed to pay Butler an annual rental of \$3,504, in monthly installments, together with the taxes and assessments; that the Cincinnati & Indiana Railroad Company took possession of the premises, and subleased the same to the plaintiff, John Nash, at an increased annual rental, for the term of 25 years, with the privilege of renewal; that the plaintiff erected buildings and improvements upon the lot, at a cost of \$25,000, and paid his rent as the same fell due; that the railroad company defaulted in rent under its lease to Joseph C. Butler on April 1, 1876; that on August 1st of the same year, in a mortgage foreclosure suit brought against the railroad company, Melville E. Ingalls was appointed receiver of the property of the Cincinnati & Indiana Railroad Company, and entered upon his duties as such receiver; that on January 26, 1878, the executors of Joseph C. Butler, deceased, filed a petition in the receivership suit, reciting the facts, and praying an order against Ingalls, as receiver, directing him to pay the rents due the petitioners under the lease from the railroad company; that Ingalls answered this petition, and in the answer stated that there was due from him to Nash \$4,350 for merchandise furnished to him as receiver. The petition avers that this amount was due as admitted; that said Ingalls, as receiver, paid to the plaintiff the sum of \$2,200 down to the 4th day of January, 1888, when the receivership suit was ordered off the docket of this court. Plaintiff further avers that in the foreclosure suit the leasehold of the railroad company, with the buildings, structures, and improvements thereon, was sold, and realized \$10,000, which was applied to the arrearage in rent due to Butler's executors. The plaintiff further states that the last payment made to him by Ingalls was made in October, 1887, during the pendency of the foreclosure suit, and that Ingalls claimed to hold back the remainder of said \$4,350 on account of the claim made by the said executors of the said Joseph C. Butler. Plaintiff further states that the said defendant, Melville E. Ingalls, at all times promised to pay him the residue of said \$4,350, until November 27, 1895, when he refused to pay the residue of said sum, or any part thereof, and wholly denied his trust. Wherefore the plaintiff prays judgment against the receiver for the sum of \$3,450, with interest thereon from the 5th day of June, 1878, until paid, subject to a credit of \$2,200, and for all general relief.

A demurrer is filed to the petition—First, on the ground that the petition does not state grounds sufficient to constitute a cause of action; and, second, that neither this court nor the superior court of Cincinnati, from which this action was removed, had any jurisdiction of the subject-matter thereof. The petition is docketed on the equity side of the court, and the demurrer on the ground that the petition does not state a cause of action may properly be treated as a demurrer for want of equity. The cause of action, as stated

upon the petition, is merely a suit for merchandise furnished to Ingalls as receiver. The facts stated in the petition do not give the case any equitable features. They do not create the defendant, Ingalls, a trustee holding a fund for the use of the plaintiff. It was a simple contract debt owing by the receiver to the plaintiff, which the receiver failed to pay; and if the debt is not barred by the statute of limitations, and if the receiver has not been discharged from his office, the plaintiff would be entitled to recover a judgment at law against the receiver, as such. The demurrer, therefore, must be sustained, on the ground that there is no equity stated in the petition. It may be remarked that it was the duty of counsel, after removal, to reframe the pleadings according to the rules in equity, if he intended, as it may be inferred he did, both from his brief, and from the fact that this petition appears on the equity docket, and from his praying for general relief, that he wished this action treated as one in equity. As the demurrer for want of equity is sustained, the plaintiff may take leave either to amend his bill so as to make it state a cause in equity, or may have leave to refile the cause on the law side of the court, striking out from his petition the prayer for general relief.

PROVIDENCE STEAM-ENGINE CO. v. HATHAWAY MANUF'G CO.

(Circuit Court, D. Massachusetts. March 9, 1897.)

No. 780.

1. REFORMATION OF CONTRACT—MISTAKE—ESTOPPEL.

Where a written contract for the sale of an engine contained a clause guarantying that the engine should develop a certain horse power at a boiler pressure of 100 pounds, the fact that the seller has brought an action at law to recover the balance of the purchase price, stating the warranty as it appears in the written contract, does not preclude him from maintaining a suit in equity to reform the contract upon the ground that the pressure at which the required horse power was to be developed was by mistake stated at 100 pounds instead of 130 pounds, as the effect of such a change will not be to increase the complainant's own right, but merely to deprive defendant of the right to maintain a cross action brought by him upon the warranty as stated by plaintiff in his action at law.

2. SAME—PLEADING.

In a suit in equity to reform a written contract on the ground of mistake, the allegations of the bill that the terms of the contract were agreed upon, that they were to be put in writing by plaintiff, and that both plaintiff and defendant executed the writing under the mistaken impression that it did conform to the prior verbal agreement, fully meet the objection that the bill states merely a case of unilateral mistake in making a proposition.

3. SAME.

The lapse of nearly three years from the making of an error in a contract to the filing of a bill to reform the contract, in the absence of a substantial change of condition, is not sufficient, under the circumstances alleged in the bill, to bar the plaintiff's right of reformation.

Williams & Copeland, for complainant.
Charles W. Clifford, for defendant.

BROWN, District Judge. This is a suit in equity, in which the plaintiff seeks to reform, upon the ground of accident and mistake, a clause contained in a written contract for the furnishing by the plaintiff to the defendant of certain engines and equipments. The clause is as follows:

"We guaranty the compound engine to develop a horse power when driving its full load of 1,100 indicated horse power with sixteen (16) pounds of water evaporated into dry steam at the boiler pressure of 100 pounds to the square inch, and we also guaranty that the same engine will develop 1,100 indicated horse power with good economy with a boiler pressure of 125 pounds to the square inch."

The bill avers: That the terms of the contract were "verbally" agreed upon by agents of the plaintiff and defendant, and that it was understood and agreed that there should be incorporated into the contract a guaranty in the form above set forth, excepting that the figures 130 instead of 100 should be inserted therein. That the plaintiff was requested by the defendant to put into writing the terms thereof. That, in accordance with said request, the plaintiff wrote and sent to the defendant on August 17, 1892, a "proposition" (as it is termed in the bill) correctly embodying the terms agreed upon. That on August 22, 1892, the defendant wrote the plaintiff as follows: "Have never yet received your specifications for Hathaway engine as agreed with you some time ago. Neither have I received plan of engine foundation. It is important that we have these at once." That thereupon the plaintiff ordered its typewriter to make a new copy of said "proposition," but that by accident and mistake in making said copy the typewriter substituted the figures 100 for the figures 130. The plaintiff, supposing the copy made by the typewriter to be correct, and to conform to the "verbal" agreement, by accident and mistake caused the same to be signed, and forwarded to the defendant. "The defendant corporation, by its treasurer J. F. Knowles, also supposing, as the plaintiff believes, and so alleges," that said "proposition" conformed to the verbal agreement, and read 130 instead of 100, by accident and mistake signed and accepted said proposition so sent in the form so written. That thereafter the plaintiff proceeded to build, and the defendant to prepare for the location and operation of, said engines, upon the basis and understanding that said engines were to be of such character as to "develop a horse power, when driving its full load of 1,100 indicated horse power with sixteen pounds of water evaporated into dry steam at the boiler pressure of 130 pounds to the square inch," etc. That after the completion of said contract in accordance with the agreed terms, and in accordance with the terms of what the parties supposed to be the written contract, differences arose between the plaintiff and defendant other than those relating to the said guaranty, and on June 24, 1894, plaintiff brought an action at law in this court for the balance of money due under the contract; and as part of its pleadings set forth in its declaration a copy of the contract, signed by the defendant, still supposing that the guaranty read 130, instead of 100, pounds. That the error was not discovered by plaintiff until after the bringing of its action

at law, nor was any claim for breach of said guaranty made by the defendant until long after the bringing of plaintiff's suit. On or about September 1, 1894, defendant brought a cross action against plaintiff in a state court of Massachusetts, which action was afterwards transferred to this court, where both actions are now pending. The subject-matter of this cross action is not definitely set forth in the bill, though defendant's brief assumes that it involves the clause in question in this suit. On August 12, 1895, plaintiff communicated the fact of its discovery of the error, and requested defendant to rectify it, and after this time plaintiff and defendant were engaged in negotiations for a settlement, upon the failure of which, on or about November 14, 1895, the plaintiff filed in the supreme judicial court for the county of Bristol, in the state of Massachusetts, a bill in equity for the reformation of the contract. A demurrer for want of jurisdiction while said suits at law were pending in this court was sustained in the state court on April 13, 1896, whereupon, on July 30, 1896, plaintiff filed his present bill. The defendant corporation demurs to the bill, assigning as special causes: (1) Laches. (2) The pendency in this court of a prior action at law, wherein the complainant seeks to enforce its rights at law upon the contract in its original form; wherefore the complainant, seeking to have a reformation of the contract upon which his suit is now pending, should not be heard in this court sitting as a court of equity.

The second ground of demurrer will be first considered, since it bears upon the defense of laches. The defendant's position is thus stated upon its brief: "If it appears by the plaintiff's bill that it is asserting its legal rights upon the contract against the defendant, it will not be heard in a court of equity asking relief from the legal rights of the defendant upon the same contract." Both as a general proposition and as a proposition applicable to this case, this is erroneous. The same contract may give to the parties separate and distinct rights, and separate and distinct actions may be brought upon different parts of the same contract. The argument of the defendant upon this point treats the contract as entire and indivisible, and fails to distinguish the right affirmatively asserted by the plaintiff at law from the right involved in the present bill. The clause in question is a warranty. Whether it is reformed or not, the plaintiff's claim upon the rest of the contract is the same; its claim for damages is the same. In its present form, the clause guarantees that the required horse power shall be developed at 100 pounds pressure. This warranty is larger than that which complainant avers was agreed upon; i. e. the development of the required horse power at 130 pounds pressure. But the plaintiff's right does not rest upon this clause, whatever its proper form. The clause is solely for the defendant's benefit. By stating in the action at law the larger warranty, plaintiff gains nothing, and does not seek to increase its affirmative rights. The present bill seeks not to increase plaintiff's right, but merely to deprive the defendant of an independent counterclaim, assertable either by cross action or by recoupment (a substitute for a cross action permissible to

avoid circuitry of action). *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696; *Railroad Co. v. Smith*, 21 Wall. 261. Even were it a condition precedent to recovery in the action at law that plaintiff should prove its machine equal to the requirements of the larger warranty, and capable of doing the required work at 100 pounds pressure, there would still be no inconsistency between the claim made in the action at law that plaintiff is entitled to the balance of the contract price under the contract in its present form, and the claim that it is also entitled under the contract in the form to which by reformation plaintiff seeks to bring it, since the former claim, instead of being inconsistent with the latter, includes it. But in view of the allegations that no claim was made for breach of the warranty in this respect until after June 24, 1894, and that the work was completed according to the terms orally agreed upon, the defendant's right, so far as now appears, is merely a claim upon the warranty as a collateral undertaking of plaintiff to respond in damages for a deficiency in the machine to perform the required work. The fact that defendant has brought a cross action indicates that it has correctly interpreted its right as distinct from that upon which the plaintiff proceeds in the action at law. There is neither inconsistency nor inequity in the conduct of plaintiff in asserting affirmative rights under parts of the contract, and denying that under distinct parts of the same contract the defendant is entitled to a cross action or a defense by way of recoupment. Nor does there appear to be force in the suggestion that plaintiff should be willing to surrender its rights at law as a condition for asking relief from defendant's counterclaim. The principle that equity will not act partially, but will take full and final jurisdiction of the controversy, is inapplicable as an objection to the bill. So far as now appears, the only controversy involving equitable considerations is upon the clause of warranty, a clause which defendant, and not plaintiff, may enforce. If the defendant has equitable defenses to those parts of the contract upon which plaintiff bases its rights at law, they may possibly be matter for answer; but, as they do not appear in the bill, the existence of such defenses cannot be urged upon demurrer. The same reasons which render it proper for a defendant to found a cross action or recoupment on a clause of warranty justify the plaintiff in bringing a bill merely for reformation of such a clause, without divesting itself of independent legal rights arising from separable parts of the contract. Should plaintiff proceed in its action at law, it would deprive the defendant of no rights, but rather confer upon it gratuitously an advantage in defense. If such advantage is unconscionable, defendant must advance some other objection to being deprived of it than the fact that the plaintiff has inadvertently, or even negligently, misstated defendant's rights, and that the defendant has prepared its defense in reliance upon the misstatement. The defendant's claim of a right to treat the bringing of a suit on the contract as written as a direct affirmance of its terms, and so to rely upon it in his cross action, and to prepare himself for litigation on that basis, is, upon the case stated in the bill, a claim of sub-

stantial right arising out of mere mistake,—a claim supported neither by equitable nor legal principles. It is to prevent the assertion of claims of this character that the equity of reformation exists. If the plaintiff is to be responsible to the defendant for a failure of the engine to perform more work than was contemplated by the parties, such responsibility must rest upon some more substantial foundation than the fact that in the action at law it mistakenly asserted the rights of the defendant, and that the defendant has gone to the trouble and expense of so framing its cross action or defense as to take advantage of the mistake.

In endeavoring to establish the defense of laches the defendant ignores material allegations of the bill. Even were the document wherein the alleged mistake occurs a mere "proposition," as defendant contends, the allegation that the defendant by accident and mistake signed and accepted said proposition, supposing the warranty to be in the form which the bill seeks to establish, sufficiently sets forth a case of mutual mistake. But the bill does not justify the claim of the defendant that the document sent to defendant was a mere proposition. It states that the terms of the contract were verbally agreed upon * * * as set forth in Exhibit A, and that it was understood and agreed that there should be incorporated into the contract a guaranty in the form contained in Exhibit A, and that the plaintiff was requested to put into writing the terms thereof. The plaintiff's somewhat inaccurate use of the word "proposition" cannot fairly be taken to contradict the prior statement that the terms were agreed upon, and were to be put in writing. A proper construction, in view of all the allegations of the bill, is that the plaintiff made no new proposition, but merely adopted, in writing out the terms of the prior agreement, the convenient and common form of a letter of proposal containing all the terms of the agreement, thus substantially complying with the alleged request of the defendant that plaintiff should write out its terms, since a mere acceptance by the defendant, such as is affixed to Exhibit C, would complete the written evidence of the prior agreement. The defendant construes the allegation of the bill that "the terms of the contract were verbally agreed upon * * * as set forth in * * * the copy marked 'A'" as meaning merely that the specifications were agreed upon, and refers in support of this construction to the language of defendant's letter, Exhibit B. This is a premature argument on the facts of the case, rather than an argument upon the question of the proper meaning of the language of the bill. The allegations that the terms of the contract were agreed upon, that they were to be put in writing by plaintiff, that both plaintiff and defendant executed the writing under the mistaken impression that it did conform to the prior verbal agreement, fully meet the objection that the bill states merely a case of unilateral mistake in making a proposition. The arguments based upon the character of the mistake, the supposed injurious effect upon the defendant's rights, the change of conditions resulting from the litigation at law, do not sufficiently meet the case made by the bill. The change in the relations of the par-

ties which will render it inequitable to reform a contract, and serve as a basis for the defense of laches, must be substantial, so that hardship will result from disturbing the new relations which have grown up through acquiescence or delay. *Gallihier v. Cadwell*, 145 U. S. 373, 12 Sup. Ct. 873. Assuming, for the purposes of demurrer, the truth of the allegations of the bill, the sole hardship apparent in the present case is that of depriving the defendant of the technical advantage which he now has, or hereafter may have, in setting up in a court of law an inequitable claim. The lapse of time from the making of the error, on August 23, 1893, to the filing of the present bill, on July 30, 1896, in the absence of a substantial change of conditions, could hardly be considered sufficient to bar the plaintiff's right of reformation, even were there no explanation of the delay. But the bill alleges that the mistake was not discovered by plaintiff until after the bringing of its suit at law, on June 24, 1894; that no claim was made by defendant for any breach of warranty involving the matter in question until after the bringing of that suit; that on August 12, 1895, the discovery of the error was communicated to the defendant, with a request to rectify it; and that on November 14, 1895, plaintiff brought in a state court of Massachusetts a bill in equity for reformation, which, on July 30, 1896, was dismissed upon demurrer for want of jurisdiction. These allegations show a reasonable degree of diligence upon the part of the plaintiff, especially in view of the fact it does not seek to enlarge its right by the reformation, but merely to defend against a counterclaim first asserted by defendant but little more than two years before the filing of this bill. As, upon the case stated, the pendency of the suit at law tends in no wise to the prejudice of the defendant, and the defendant has suffered no substantial detriment from plaintiff's delay in seeking reformation, the demurrer is overruled.

UNITED MINES CO. v. HATCHER.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 847.

1. CORPORATIONS—LEASE—LIABILITY OF LESSOR FOR DEBTS OF LESSEE.

Where a mining corporation executed a lease of its property for five years, by which the lessee covenanted to organize a "leasing company," to which the lease was to be assigned, stipulating that the stock of the new corporation was first to be offered to the stockholders of the lessor, the new corporation thus organized was not identical with the old, although the greater part of the stock was subscribed for by the stockholders of the old corporation, and the statutory liens of persons who have furnished supplies to the new corporation while operating the mines under the lease do not attach to the title of the lessor as owner of the mine. 75 Fed. 363, reversed.

2. SAME—RETROSPECTIVE STATUTES.

The lien law of Colorado having provided for a lien in favor of all persons who should perform labor or furnish material in the working of a mine, with the proviso that the statute shall not apply to the owners of any

mine "when the same shall be worked by lessee or lessees," an amendment to the statute materially modifying that proviso must be held to apply only to leases made after its enactment, as to give it a retrospective operation would be contrary to the express inhibition of section 11 of article 2 of the constitution of Colorado.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a suit in equity, brought by Ernest J. Hatcher against the United Mines Company and the United Leasing Company to enforce a mechanic's lien. Judgment was rendered against defendants, and the United Mines Company has appealed. The opinion of the circuit court is reported in 75 Fed. 368.

This is a suit in equity to establish and enforce alleged statutory liens upon four mining lodes or claims owned by the appellant, and situate in Mineral county, Colo., on account of cordwood, timber, and other mining supplies sold and furnished between October 1, 1895, and January 13, 1896, by the appellee and other persons, for the working of the mine, to the United Leasing Company, who, during that time, and prior thereto, had possession of said mining claims, which adjoined each other, and was working the same as a single mine. No question is made but that proper proceedings had been taken under the Colorado statute to perfect the liens, and that the other lien claimants had, before the suit was begun, for value, sold and assigned to the appellee their accounts and claims for liens. The United Leasing Company was made defendant, but did not answer, and the judgment against that company was by default. The only question in the case is whether the liens attached to the title of the appellant as owner of the mine. The agreed statement of facts shows that the appellant was an Iowa corporation, organized in December, 1893, when it acquired the title to this mine, and began to develop it, and that, after expending what moneys it could raise, and incurring an indebtedness to the amount of \$15,000 or thereabouts, the directors, by authority of the stockholders, on April 1, 1895, executed an indenture of lease of said mine, including said four mining claims, to Robert H. Reid, for the term of five years from that date, in and by which the said Reid covenanted that he would at once pay all indebtedness of the appellant at that date, not exceeding \$15,000, to be repaid the lessee out of royalties reserved; also that he would organize a leasing company, giving to the stockholders of appellant the option to subscribe to the stock thereof before the same should be opened to the general public for subscription, and would assign such lease to the leasing company. The lease contained covenants respecting the development and working of the mine, and reserved royalties to the lessor upon the ore obtained, and also had provisions respecting forfeiture and the determination of the lease. Such agreed statement further shows that on the same 1st day of April, 1895, the possession of said mining property passed under said lease to said Reid, who, on the same day, with other persons named, organized the United Leasing Company under the laws of the state of West Virginia, with a stock limited to \$250,000, and that the agreement for such organization was received by the secretary of state of West Virginia on April 5, 1895, and the charter of incorporation thereunder was issued on the same day; that stock of said leasing company was then issued to the amount of \$25,000, and was nearly all subscribed and paid for by stockholders of the appellant, as were likewise two later issues of such stock of \$25,000 each; that said lease was assigned and transferred as of its date, but at a later time, by said Reid to said United Leasing Company, who entered upon the development and working of the mine, and expended about \$75,000, and incurred the indebtedness for supplies for which the said liens are claimed, and ceased the operation of the mine on January 13, 1896. The agreed statement also shows that the United Leasing Company had its offices separate from those of appellant, and, while its stockholders originally were also, with two exceptions, stockholders in the appellant company, yet by transfers the stockholders became, in many instances, diverse.

W. H. Bryant (C. S. Thomas and H. H. Lee with him on the brief), for appellant.

John R. Smith (Albert L. Moses with him on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The lease executed by the appellant to Robert H. Reid on April 1, 1895, was valid and effectual as a lease and demise of the mining property. The covenants constituted a valuable and sufficient consideration, and under the lease he on that day became entitled to the immediate possession and use of the leased property, and it is admitted that the possession of the property passed on that day from the appellant to said Reid.

2. The terms of the lease did not constitute Reid the agent of the appellant in organizing the United Leasing Company. It was competent for the lessor to stipulate in its lease that the lessee should organize such a company to assume the lease and carry on the business, and Reid, in organizing such company, was fulfilling his covenants in that behalf. So also the provision that the stock of such new company should first be offered to stockholders of the appellant to subscribe for, or not, at their option, would not make the new corporation identical with the appellant, even if all the stock had been so subscribed for as to have included all the stockholders of the appellant. The corporation would not only differ in organization, but in objects and functions. *Richmond & I. Const. Co. v. Richmond, N. I. & B. Ry. Co.*, 15 C. C. A. 289, 68 Fed. 105; *Exchange Bank of Macon v. Macon Const. Co. (Ga.)* 25 S. E. 326. It follows from the foregoing that the possession and working of the mine passed from the appellant on April 1, 1895, to its lessee, Reid, and soon afterwards to the United Leasing Company, upon Reid's transfer of the lease, and that at the time of the furnishing of material by the appellee and other lien claimants the mine was being worked, not by the owner, the appellant, but by its substituted lessee, the United Leasing Company, under the lease which took effect, and under which the lessee entered into the possession of the mine, on the 1st day of April, 1895.

3. The lien law of Colorado at the time this lease went into effect provided for a lien in favor of all persons who should perform work or furnish material in the working of a mine, but with this exception: "Provided further, that this section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, when the same shall be worked by lessee, or lessees." Sess. Laws Colo. 1893, p. 321, § 8. On April 13, 1895, by another act of the legislature of Colorado, the proviso was changed so as to read as follows: "Provided further, that this section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, who shall lease the same in small blocks

of ground to one or more sets of lessees." Under the proviso in the act of 1893, first above quoted, and which was in force when the lease went into effect, the title of the appellant to the mine could not be subjected to any lien for material furnished to the lessee in working the mine. Any subsequent change in the statute law which, without the consent of the lessor, would subject its property to the payment of debts of the lessee, would seriously and injuriously affect the right and title of the lessor in the leased property. The amendment of 1895 must be held to have a prospective operation only, and to be applicable only to leases made after its enactment. To hold that it applies to past leases is to give it a retrospective operation, contrary to the express inhibition of section 11 of article 2 of the constitution of Colorado. *Railway Co. v. Woodward*, 4 Colo. 162; *Lundin v. Railway Co.*, 4 Colo. 433. Wherefore it is ordered that so much of the decree appealed from as awarded a judgment against the United Leasing Company for the sum of \$5,199.85, together with costs of suit, be, and the same is hereby, affirmed, and that the residue of said decree be reversed and annulled, and that the bill of complaint be dismissed, as against the United Mines Company, at the cost of Ernest J. Hatcher, complainant.

GREGORY v. PIKE.

(Circuit Court of Appeals, First Circuit. March 13, 1897.)

No. 206.

1. ANCILLARY PROCEEDINGS—SERVICE OF PROCESS.

Proceedings seeking to enjoin the defendant from prosecuting any suits touching certain matters except a certain equity cause are ancillary in their nature; but the bill, being technically an original one, requires process and service as other original bills of an ancillary nature.

2. SAME—SERVICE UPON ATTORNEY.

While in nearly all, if not in all, of the classes of proceedings of an ancillary character, service of process may be made under some circumstances on the attorney of record or on some other agent of the defendant in such proceedings, yet such special service is void in the absence of any allegation appearing of record, or any order of court, supporting the substitution.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit brought by Mary H. Pike against Charles A. Gregory, praying an injunction restraining said Gregory, his agents and attorneys, from further prosecution of certain suits touching the right of the complainant in certain notes, or the proceeds thereof, or any suits touching those matters, except a certain equity cause, to which it is alleged this bill is brought as a branch or ancillary suit, and in which the complainant prays this may be considered a cross bill. The facts out of which the controversy arose are stated in 15 C. C. A. 33, 67 Fed. 837, and 23 C. C. A. 138, 77 Fed. 241. Process was served on the attorney for said Gregory, and the court, upon motion, took the bill of complaint pro confesso for want of appearance and answer,

and subsequently entered a decree for injunction, from which defendant appealed.

Francis A. Brooks, for appellant.

John Lowell and Thomas H. Talbot, for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges

PUTNAM, Circuit Judge. It is impossible to regard this bill as a summary petition. In *Gregory v. Pike*, 15 C. C. A. 33, 67 Fed. 837, we held that we might regard a cross bill filed in those proceedings by one Kemp Van Ee as an intervening petition; but in that case we had full jurisdiction of the parties and of the merits, and our determination therein was, in effect, only a rejection of what was not necessary to a full disposition of the questions before us. But here the only question is one of jurisdiction, and we could not avoid it if we would. Whether or not the circuit court can hereafter allow a reframing of the pleadings so as to convert the present bill into a summary petition, or need do so, we cannot now determine. The proceedings are undoubtedly ancillary in their nature, but the bill is technically an original one, requiring process and service as other original bills of an ancillary nature. *Story, Eq. Pl. § 388; Car Co. v. Washburn*, 66 Fed. 790, affirmed on appeal in *Washburn v. Car Co.*, 21 C. C. A. 598, 76 Fed. 1005. This case contains a detailed explanation of the classes of proceedings ancillary in their nature, but commenced by original writs or bills.

Rule 13 of the rules of practice in equity is as follows:

"The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family."

Notwithstanding this rule, and rules 14, 15, and 16, the law is well settled that in nearly all, if not in all, of the classes of proceedings of an ancillary character, service may be made, under some circumstances, on the attorney of record, or on some other agent, of the defendant in such proceedings, with the same effect as though made in strict compliance with the rule. *Dunn v. Clarke*, 8 Pet. 1, 3; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633; *Hobhouse v. Courtney*, 12 Sim. 140; *Murray v. Vipart*, 1 Phil. Ch. 521; *Adams, Eq. *324*. So far there can be no doubt. But in this case service was made on a member of the bar of the circuit court, in lieu of service on the appellant, without any allegation appearing of record, or any order of the court, supporting the substitution. This was not allowable; and the service was, therefore, void, and all the proceedings following it were erroneous. Rules 11 to 16 relate principally to matters which may be done as of course with reference to the issue and service of process, and they may, therefore, be understood to have no universal application to proceedings under the special orders of the chancellor. Indeed, *Minnesota Co. v. St. Paul Co.*, supra, was decided after the adoption of the rules referred to. Yet, so far as the point we are considering is concerned, the rules named operate as an express and

full limitation on parties complainant. The practice on this point, and the reasons therefor, will appear in the following cases, though some of them may lay down too narrow rules as to the classes of suits in which special service may be ordered: *Smith v. Woolfolk*, 115 U. S. 143, 148, 5 Sup. Ct. 1177; *Eckert v. Bauert*, 4 Wash. C. C. 370, Fed. Cas. No. 4,266; *Ward v. Seabry*, 4 Wash. C. C. 426, Fed. Cas. No. 17,161; *Ward v. Seabring*, 4 Wash. C. C. 472, Fed. Cas. No. 17,160; *Hobhouse v. Courtney*, *supra*; *Murray v. Vipart*, *supra*. The expressions of the lord chancellor in the last case show that a departure from the usual method of service of process, such as appears in this case, involves the exercise of judicial discretion, and something on record to support the judicial determination authorizing it; neither of which, as we have seen, exists here. A form for an order of service, suitable under some circumstances, will be found in *Curt. Eq. Prec.* The decree of the circuit court is reversed, with the costs of this court for the appellant, and the case is remanded to the circuit court, with directions to take proceedings not inconsistent with our opinion filed this day.

RITCHIE et al. v. McMULLEN et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1897.)

No. 344.

1. EQUITY PLEADING—AMENDMENTS—DISCRETION OF COURT.

An application for leave to file an amended answer and cross bill, made long after the cause is at issue on the original pleadings, and only a few days before the time fixed for closing the evidence, is addressed to the legal discretion of the court, and is not grantable as of course. The court may properly examine the legal sufficiency of the facts averred, and also look into the evidence already taken to see whether there is such a probability that defendant can support by proof his new averments as will justify delaying the case for that purpose.

2. BILL TO CANCEL JUDGMENT—FRAUD.

A default judgment, recovered by means of false statements in respect to a fact essential to the right of recovery, which deceived both the defendant and the court, cannot be set aside by a suit in equity, as this is not a collateral or extrinsic fraud.

3. EQUITY—SUIT TO SUBJECT PLEDGED SECURITIES—OFFSET—UNLIQUIDATED DAMAGES.

In a suit in equity to subject to a judgment the judgment debtor's interest in stocks and bonds pledged with third parties as collateral, the pledgor is entitled to set up, by way of set-off or counterclaim to the debts for which the securities are pledged, unliquidated damages claimed by him because of the pledgees' failure to lend him financial credit and support in carrying out certain enterprises, which they were bound to do under the terms of the contract of pledge.

4. CORPORATIONS—RIGHTS OF STOCKHOLDERS—MISCONDUCT OF DIRECTORS—PLEDGE OF STOCK.

If a stockholder pledge his stock as collateral, with directors of the corporation, and the latter enter into a conspiracy to depreciate the price of the stock by using their power as directors, for the purpose of buying it in for less than its value, this is a wrong, not against the corporation only, but against the pledgor, for which there is a direct liability to him.

5. EQUITY—ENFORCING RIGHTS—PURPOSES OF PARTIES.

The purpose of parties in bringing on the litigation cannot, if their rights are clear, affect the duty of the court to grant the relief asked.

6. CORPORATIONS—COMPENSATION TO PROMOTER.

A promoter of a corporation, who renders arduous and valuable services to it during a long period, is not entitled to direct compensation, where there is no contract to that effect, and where the circumstances show it to have been the understanding that he would give his services, while his associates advanced the money, and that he expected his reward from the enhanced value of the large amount of stock and bonds owned by him. 64 Fed. 253, affirmed.

7. PLEDGE—CONTRACTS FOR TRANSFER OF TITLE.

A court of equity scrutinizes with great care a contract between pledgor and pledgee for transfer of title, and will set it aside if there is any ground for believing that it is a harsh contract, brought about by the position of vantage occupied by the pledgee.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an appeal from a decree of sale entered upon two creditors' bills consolidated. Samuel J. Ritchie was the owner of a large amount of the stock of the Canadian Copper Company, an Ohio corporation, engaged in the mining of nickel and copper at Sudbury, Ontario, in Canada. He was also the owner of a large amount of the stock of the Anglo-American Iron Company, another Ohio corporation, organized to do a mining business in Ontario, Canada, and possessing extensive tracts of iron, copper, and nickel mining lands in that region. Ritchie also owned many of the bonds and shares of preferred and common stock of the Central Ontario Railway Company, a company owning and operating a railway in Ontario, Canada. He became indebted in a large sum to Henry B. Payne, and secured the debt by depositing, as collateral, large blocks of stocks of the two mining companies, and of the bonds and stocks of the railway company. He also became indebted to Stevenson Burke, and secured the loan by similar collateral. He also became indebted to Thomas W. Cornell, and secured him in the same way. Included in the collateral pledged to Thomas W. Cornell were 901 shares of Canadian Copper stock, and 1,939 shares of the Anglo-American Iron stock, which belonged to Sophronia J. Ritchie, but which she had authorized her husband to pledge for this Cornell debt. James B. McMullen and George W. McMullen, citizens of Illinois and residents of Ontario, obtained a judgment against Ritchie, in Canada, for a large sum in a court of Ontario in 1888, and obtained a judgment in the circuit court below, on the law side of the court, based on the Canadian judgment, in February, 1890, for the sum of \$265,307. Execution was issued, and returned nulla bona. The McMullens then filed two creditors' bills, the object of which was to subject to the payment of their judgment the interest of Ritchie in the collateral pledged by him to Payne, Burke, and Cornell, after satisfying the debts for which it was pledged. The first bill was filed October 1, 1891, by the McMullens against Payne, Burke, and Cornell, then in life, the Canadian Copper Company, the Anglo-American Iron Company, and the Citizens' Savings & Loan Association, all citizens of Ohio. After making the necessary averments concerning the recovery of the judgment against Ritchie and the nulla bona return, the bill set forth debts owing by Ritchie to Burke, Payne, and Cornell, respectively, together with the bonds and stocks pledged to secure each. The bill averred that, in the case of each loan, the value of the collateral was largely in excess of the amount of the debt. The bill prayed that an account might be taken between Ritchie and his various creditors; that the stocks and bonds might be sold at a judicial sale; that the receiver might be appointed to collect the interest and dividends; and that the Anglo-American Iron Company and the Canadian Copper Company, which were made parties defendant, might be enjoined from transferring the stocks on their books until such sale. On the 30th of October, all the defendants and Ritchie entered their appearances, and Ritchie entered his appearance upon the 2d of November. On the 5th of December, 1891, Cornell, Payne, and Burke filed separate answers to the bill. Cornell answered, averring that Ritchie's indebtedness to him was about \$151,776, with interest; that it was secured by \$558,900 par value of Anglo-American Iron stock, by \$90,100 par value Canadian Copper

stock, and by \$12,000 of the Central Ontario bonds; that \$1,000 of the total amount due to Cornell was secured by \$160,000 par value of the coupons cut from the bonds of the Central Ontario Company; and that the marshal of the court had seized the box, and taken it away, without the consent of the defendant, under the process issued by the complainants in this cause. Payne's answer, after setting up an indebtedness from Ritchie to him aggregating \$477.-397.63, with interest, averred that it was secured by \$300,000 in Canadian Copper stock, by \$753,000 of Central Ontario bonds, by \$80,000 of the preferred stock of the Central Ontario Railway Company, and by \$12,000 in the common stock of that railway. Burke answered, averring that the indebtedness of Ritchie to himself was \$214,964.31, and that it was secured by \$105,000 par value in the Canadian Copper stock, \$400,000 in the Anglo-American Iron Company stock, and \$225,000 in the bonds of the Central Ontario Railway Company. These three defendants consented in their answers to the sale, under the decree of the court, of the various securities respectively held by them, and to the application of the proceeds of the sales to their debts. Upon the 15th of September, Sophronia J. Ritchie, wife of Samuel J. Ritchie, applied to the court to be made a party defendant, representing that she was the owner in her own right of a large amount of the stocks and securities set forth in the separate answer of Cornell. On the 11th of January, 1892, Mrs. Ritchie was made a party, and in her answer she averred that she was the owner of 901 shares of the Canadian Copper stock, and 1,939 shares of the Anglo-American Iron Company stock, mentioned in Cornell's answer as held by him; that the copper stock was pledged for the indebtedness of her husband to Cornell for not exceeding \$40,000; and that the Iron Company stock was pledged for a debt of \$14,508; and that Cornell knew of the facts with reference to her ownership of the stock, and the limitation upon her husband's authority in pledging the same. She alleged that Cornell had a large amount of other securities from her husband, which should, in equity, first be subjected to the payment of his debt, and that her stock should not be taken until Ritchie's securities were first exhausted. She prayed an accounting between her and her co-defendant T. W. Cornell, and between Cornell and her husband.

By supplemental bill, the complainants had set up the fact that the Canadian Copper Company and the Anglo-American Iron Company were largely indebted to Ritchie for services rendered by him to them, and sought to subject to the payment of their debt the amounts thus alleged to be due. Ritchie, in his separate answer, filed December 19, 1891, to the bill and supplemental bill, denied that he was insolvent; denied that he was indebted to any of his co-defendants in the amounts alleged in the bill of complainants; admitted that his co-defendants Payne, Burke, and Cornell held the stocks and securities mentioned in the bill; and denied that the beneficial interest in all of them, after paying the debts for which they were pledged, belonged to him, but averred that a large part thereof belonged to Sophronia J. Ritchie, who had pledged her part of the same as collateral security for a portion only of said indebtedness, and as surety only. He further admitted that the copper company and the Iron company were indebted to him for services rendered and for money expended, but averred that he was unable to state the amount which was in dispute between them, for the reason that they had never come to an accounting in relation thereto. He joined in the prayer that an account be taken of the amount due to the complainants, and of the amounts due from each of the two companies to him. He also prayed that the respective interests of the said owners of said stocks and securities should be worked out in accordance with their respective rights and interests, and that such order be made in the premises as to justice might pertain. On the same day he filed what he called a separate answer to the answers of Cornell, Payne, and Burke. He denied that he was indebted to them in the amounts claimed by them. He averred that he was entitled to a credit of \$60,000 from Payne on his indebtedness. He averred that Cornell and Burke had promised to carry him financially, and to aid him in maintaining the market value of the stocks of the mining companies, and in consolidating the mining companies and the railway company, in consideration for which he had delivered to each large blocks of the stock in each company, and that they had broken their promises; that he was therefore entitled to compel them to account for the stocks thus given them, because the considera-

tion had failed. He also charged that, in the purchase of the stock of the Vermillion Mining Company for the Copper Company, Cornell had received, as trustee for Ritchie, \$8,750 in copper stock, which he had converted to his own use, and should account for the same. He prayed an accounting with all the defendants.

On February 16, 1893, complainants, on leave of court, dismissed their bill as against the executors of Thomas W. Cornell, deceased since the filing of the bill, and the defendant Sophronia J. Ritchie. On May 11, 1893, the executors of Cornell were allowed again to become parties, and to file an answer in which, at the request of Ritchie, and, upon his statement of the facts, they averred that in January, 1890, Ritchie assigned to Cornell, as collateral security for the indebtedness existing between Ritchie and Cornell, the securities which were then held by the Citizens' Savings & Loan Association of Cleveland, Ohio, and which since had been transferred to Payne; that they had not found among the books and papers of the said Thomas W. Cornell, which came into their hands or under their control as said executors, any reference to or memorandum concerning said assignment which said defendant Ritchie so claimed to have been made, as aforesaid; and, for want of such information, they were unable either to affirm that such an assignment was made, or to deny the fact of its having been made; but they averred that if it was true, as claimed by said Ritchie, that he did so assign the said securities to the said Thomas W. Cornell, these defendants as his executors were entitled in this proceeding to have the lien created by the said assignment enforced as against said securities in any decree which may be rendered in this cause, and they prayed accordingly.

So much for the first creditors' bill. On November 3, 1891, the same complainants below filed a second creditors' bill, in which they set up their judgment against Ritchie, already referred to, the issue of execution, and the return of nulla bona, Ritchie's insolvency, the services of Ritchie to the mining companies, and prayed that the amount due Ritchie for his services be subjected to the payment of the judgment. This suit was brought against the Canadian Copper Company, the Anglo-American Iron Company, and Ritchie, as well as the Central Ontario Railway Company. The two mining companies filed their answers, denying that Ritchie had rendered any service to them for which they were liable to pay to him compensation. Ritchie answered at great length, setting out the services rendered, and claiming that he was entitled to have the same allowed in this proceeding, as prayed for by the complainants. Finally, on February 16, 1893, an amended bill of complaint was filed, in which, in addition to the other defendants, the executors of Cornell and Sophronia J. Ritchie were made defendants, and the averments of the bill in the original suit, from which these defendants had been dismissed, relating to Ritchie's indebtedness to Cornell, and the collaterals held by Cornell to secure the same, were repeated. The amended bill was answered by the various defendants, and then the two causes were consolidated August 7, 1893, and came on to be heard together.

On the 31st of July, 1893, without obtaining the leave of court, the counsel for Ritchie filed an amended answer and cross bill in cause No. 4,927, the first suit brought. In this answer and cross bill, Ritchie set out, at great length, the history of the organization of the three corporations, the Central Ontario Railway Company, the Anglo-American Iron Company, and the Canadian Copper Company. He repeated the averments already made in his answer of his gifts of stock in the copper company and the iron company to Burke and to Cornell, in consideration of their promises to help him financially, and to maintain the value of the stocks, and to consolidate the three companies. He now made a similar averment as to Payne, stating that he had given him, in consideration for a similar promise, 4,000 shares of the Canadian Copper stock, of the value of \$400,000. After referring to the indebtedness owing by him to the three defendants Cornell, Payne, and Burke, he made this averment: "(23) And this defendant avers that, in the prosecution of said enterprise, he has invested therein almost his entire available estate that could be utilized for such purpose; that he was dependent upon development of the said properties for the release of the said securities which had been placed in the hands of the said Burke, Payne, and Cornell, as hereinbefore averred, all of which the

said defendants, Burke, Payne, Cornell, and McIntosh well knew, and the facts last above stated were the subject-matter of repeated conversations between this defendant and the said Burke, Payne, Cornell, and McIntosh; and the said defendants, Burke, Payne, Cornell, and McIntosh, well knowing this defendant's financial situation as above stated, and that this defendant could not relieve said securities except through the development of said properties, thereupon conceived the purpose of procuring the said securities of this defendant in their own right, and depriving the defendant of all benefit thereof. The moneys he had received had all been invested in the properties as hereinbefore averred, and, by the acquirement of these securities, they would get, not only the benefit of said moneys, but of all other moneys that had been invested by this defendant, as hereinbefore set forth, in efforts to develop said properties, and the benefit of said properties as well." He then sets out in detail the various acts of the defendants by which they sought to carry out this purpose. They include many acts of alleged intentional corporate mismanagement, with a view to depreciate the value of Ritchie's stock, and having that effect. The answer then continues: "(31) And the said defendants, Burke, Payne, Cornell, and McIntosh, further to accomplish the objects of the said conspiracy as hereinbefore averred, afterwards entered into a combination, confederation, and conspiracy with the said complainants, the said McMullens, by which the bonds, stocks, and coupons so held by the said defendants, as hereinbefore set forth, were to be sold, and the title thereto transferred to the said defendants, the said associates of this defendant, the particulars of which will be hereinafter specifically set forth. On the 13th day of January, 1886, a contract was entered into between said complainants, James B. and George W. McMullen, and this defendant, by which, in substance, it was agreed that the said McMullen sold to this defendant two hundred and ten of the first mortgage bonds of the said Central Ontario Railway, with coupons thereon, maturing April 1, 1885, October, 1885, and April 1, 1886, also coupons of the said company amounting to \$71,250, a copy of which said contract is hereunto annexed, and made a part hereof, and marked 'Exhibit A.' This defendant avers that, at the time of entering into the said contract, they asserted that they, the said McMullens, were the owners of coupons to the said amount of \$71,250, but in point of fact they did not have the said coupons, but, on the contrary thereof, the coupons they had in their possession were coupons that had been taken from the bonds of said company prior to the issue of such bonds, and were actually valueless, and were intended to be canceled, having been detached to be canceled by the secretary of the said company; but the secretary of said company having failed to cancel the same, and the same having been left in the custody of the Toronto General Trust Company, in the box belonging to the said railway, to which box the said McMullens had access, they (the said McMullens) procured the possession of said worthless coupons, and, so having possession of them, stipulated, as appears in said agreement, to transfer the same to the defendant. Afterwards the said McMullens brought suit against this defendant on said contract in the high court of justice, queen's bench division, in the dominion of Canada, and without the production of the bonds and the coupons mentioned in said contract, and without having the possession or the control of such bonds or coupons, and without having ever tendered the same to the defendant, and without having the power to tender or deliver the same as required by said contract, procured a judgment in said action against this defendant for the sum of \$238,000, with interest from February 26, 1888. (32) And this defendant avers that a part of the basis of said suit, and upon which the said judgment was rendered, was the said \$71,250 of coupons which the said complainants, McMullen and McMullen, never owned, which they had surreptitiously obtained, and which were utterly without value and void, because of the fact that they had been detached from the bonds prior to the issuance thereof, they being coupons that on their face had matured prior to the issuance of such bonds, and had been detached therefrom for the purposes of cancellation. This defendant further avers that afterwards the said McMullens brought suit upon the said judgment rendered in the dominion of Canada, in the circuit court of the United States, in the Northern district of Ohio, and there obtained a judgment against the defendant for the amount of the said Canadian judgment." The thirty-seventh paragraph of the amended answer and cross bill

is as follows: "(37) And this defendant, by reason of the premises, denies that either of the said parties are entitled to have from him any of the moneys claimed in their said several answers, and denies that they have any equitable right to hold the said securities for any purpose whatever, and avers that, by their fraudulent conduct hereinbefore specifically set forth, it is inequitable and unconscionable for them to retain the said securities, or any part thereof, and that they should, in equity and good conscience, be required to deliver up the same and be remitted for any claims they may have on account of said money to the properties of the said several companies in which the said moneys were invested at the instance and request of the said defendants, Burke, Payne, Cornell, and McIntosh, and with the understanding and agreement hereinbefore set forth."

The prayer of the amended answer and cross bill is as follows: "This defendant further avers that by reason of the misconduct of the said defendants, and of the mismanagement of said corporations as hereinbefore set forth, and the depreciation of the said properties in consequence of the conduct of the said defendants as hereinbefore averred, his interests in said properties have been greatly injured and damaged. And he avers that, for the services rendered and the moneys expended by him in the service and management of said properties as in this bill hereinbefore set forth, said defendants are indebted to him in a large sum of money, not less than the sum of \$700,000; and, forasmuch as this defendant is otherwise without adequate remedy, he prays: First. That the said several parties herein named, including the said corporation, be required to answer this his cross bill. Second. That the said McMullen, complainants in the original creditors' bill, be forever enjoined and restrained from in any wise proceeding to the collection of the said judgment, and that judgment be decreed to be null and void. Third. That the said Burke and Payne, the executors of the said Cornell, and the said McIntosh, be ordered and decreed to deliver up to this defendant the said stocks, bonds, and coupons so held by them, derived from defendant on account of said moneys, as in this answer and cross bill alleged, and that they be decreed to transfer to defendant the other stocks received by them in consideration of services to be rendered by them. Fourth. That the said executors of the said Cornell be decreed to surrender the said certificates of stock issued to the said Cornell on account of the said Vermillion and the Crean and McConnell properties referred to and described in the said bill. Fifth. That the said defendants, Burke, Payne, McIntosh, and the executors of the said Cornell, be restrained and enjoined from making transfers of any of the stocks, bonds, and coupons held by them respectively, and that the said several companies be restrained and enjoined from permitting any transfers of said stocks, or any of them, on the books of said several companies. Sixth. That said Payne, Burke, McIntosh, and the executors of the said Cornell be enjoined from in any wise voting or using the said stock in the control and management of the said several corporations. Seventh. That an account be taken of the damages sustained by this defendant (cross complainant) by reason of the wrongful conduct of the said defendants, and that they be decreed to pay to him the amount thus ascertained to be due. Eighth. That an account be taken as to the value of the services of this defendant in and above the various services rendered and expenses incurred and paid in the matters in this bill set forth, and that the said defendants be decreed to pay to him the sums thus ascertained. Ninth. That the said companies be decreed to cancel the said stock issued to others to which this defendant was justly entitled, and to reissue the same to this defendant. And he further prays the court to grant him all other and proper relief that may be just and equitable in the premises."

No leave was ever given to file this amended answer and cross bill. No process was ever issued on it against Ritchie's co-defendants. Subsequently there was tendered for filing in January, 1894, what was called a supplemental answer and cross bill, which merely amplified the averments of the amended answer and cross bill, and added other circumstances claimed to show the conspiracy of Payne, Burke, and Cornell to depreciate the value of the stock, and to obtain legal title thereto by sale of the same when depreciated. The evidence taken on the issues was very voluminous. It began in January, 1892, and was continued from time to time until November 29, 1893. The pleadings

and evidence make a record of 2,000 printed pages. A motion was made by the counsel for Ritchie for an order requiring the Anglo-American Iron Company and the Canadian Copper Company to bring into court the books of the corporations for use of counsel for Ritchie in taking his evidence. This motion and a motion to consolidate the two cases came before Judge Lurton, in Nashville, and he denied the former and granted the latter. On the 30th of September, 1893, Ritchie moved for leave to file the amended answer and cross bill, and, in support of the motion, referred to the testimony in the two consolidated cases and the several affidavits of the defendants Ritchie and his wife in support of the motion. Subsequent to this there was further evidence taken, and the cause was set for hearing, and heard in the spring of 1894. It was decided January, 1895. Leave to file the amended answer and cross bill was denied, as was also the motion for leave to file a supplemental answer and cross bill. The decree found that there was due from Ritchie to complainants the sum of \$339,541, for which they were given a lien on all the bonds, coupons, and stocks held by the co-defendants of Ritchie, except those belonging to Mrs. Ritchie; that there was due Stevenson Burke, after crediting a dividend from the copper stock of \$7,350, the sum of \$269,023, for which he held 1,050 shares of Canadian Copper stock, 4,000 shares of the Anglo-American Iron Company, and 225 bonds of the Central Ontario Railway Company; that there was due Henry B. Payne, after crediting Ritchie with \$21,000 received from the copper stock held as collateral, \$605,382.26, for which Payne held in pledge 800 shares of the preferred stock of the Central Ontario Railway Company, 1,200 shares of the common stock of the Central Ontario Railway Company, 753 first mortgage bonds of the Central Ontario Railway Company, and 3,000 shares of the capital stock of the Canadian Copper Company; that the note for \$60,000, claimed by Ritchie to have been a payment of that amount on the indebtedness to Payne, was not intended to be such a payment, but was only tendered and received as collateral security for the debt; that there was due the executors for Cornell, deceased, the sum of \$205,686.84, to secure which they held of Mrs. Ritchie's stock 901 shares of the Canadian Copper Company and 1,939 shares of the Anglo-American Iron Company; that said executors also held property of Samuel J. Ritchie to secure the same amount,—336 shares of the Anglo-American Iron Company, 12 bonds of the Central Ontario Railway Company, and the 332 coupons, amounting in par value to \$9,960, cut from the bonds of the Central Ontario Railway Company, and also a lien on certain other coupons, the property of Samuel J. Ritchie, in the hands of the marshal, amounting in par value to something over \$150,000; that Ritchie was not entitled to any compensation for services rendered to the Canadian Copper Company and the Anglo-American Iron Company, or either of them, or for expenses incurred by him in their services, and that the stocks, bonds, and coupons pledged to the Citizens' Savings & Loan Association, and held in pledge by Payne, had not been assigned by Ritchie to Cornell, as alleged in Ritchie's answer. The complainants were required to deliver to a special commissioner the mortgage bonds and coupons, upon the delivery of which their judgment against Ritchie had been based, and these were first ordered sold to pay the judgment. The other defendants, Payne, Burke, and Cornell's executors, were ordered to deliver to the commissioner all the bonds, stocks, and coupons held by them respectively, and to sell the same at public auction in separate lots. Out of the proceeds of each lot, the commissioner was ordered to pay the debt which that lot was pledged to secure. Ritchie was given an opportunity to pay the complainants and his co-defendants, in which case the commissioner was directed to deliver the bonds and stocks to him, except those which belonged to Mrs. Ritchie, which were to be delivered to her. Ritchie and Mrs. Ritchie took exception to everything found in the decree, and ordered to be done thereby. The reasons for the action of the circuit court are set forth in an opinion of Judge Lurton, reported in 64 Fed. 253.

Benj. Butterworth, Wm. H. Upson, and C. R. Grant (Shellabarger & Wilson and Geo. W. Sieber, of counsel), for appellants.

Samuel E. Williamson, Squire, Sanders & Dempsey, and Stevenson Burke, for appellees.

Before TAFT, Circuit Judge, SEVERENS, District Judge, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts). The main error assigned is the action of the circuit court in refusing leave to Ritchie to file a pleading termed an amended answer and cross bill. It was a single pleading, in which no distinction was made between the answer and the cross bill. Such practice in the federal courts of equity is irregular, to say the least of it. *Hubbard v. Turner*, 2 McLean, 519, Fed. Cas. No. 6,819; *Morgan v. Tipton*, 3 McLean, 339, Fed. Cas. No. 9,809; *Fost. Fed. Prac.* (1st Ed.) § 172. The application for leave was not made until a year and a half after the case was at issue on the original pleadings, and only a few days before the time fixed for closing the evidence. Made at so late a day, the application was addressed to the legal discretion of the court, and was not to be granted as of course. The circuit court, in considering the propriety of granting the leave, properly examined into the legal sufficiency of the facts averred as equitable defenses to the case made in the bill and the answers of Ritchie's co-defendants, and as grounds for the affirmative relief asked. Certainly, if the tendered pleading presented no defense on the merits, it would have been improper in the court to allow it to be filed after the long delay. The circuit court also examined into the evidence already taken in the cause, to see whether the probability that Ritchie could support by proof his new averments was sufficiently great to justify a delay of the case for this purpose. In taking the testimony on the original pleadings, Ritchie had adduced all the evidence he could bring to sustain the averments of his proposed amended answer and cross bill. It was clearly within the power and duty of the circuit court if, in its opinion, this evidence, taken with the other circumstances and testimony, failed to maintain the allegations made in the answer and cross bill, to refuse leave to file the same. A material amendment of the answer changing the issues ought not to be permitted, after the evidence is closed, unless, either in the evidence already offered or in a showing upon affidavits, it is at least made to appear to the court that the defendant can probably sustain by his proof the amendments offered. The sixtieth equity rule provides that the answer "shall not be amended in any material matters, as by adding new matters, facts, or defenses, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported if required, by affidavit."

Mr. Justice Story, speaking of applications to amend answers, in *Smith v. Babcock*, 3 Sumn. 583, Fed. Cas. No. 13,008, said:

"When the object is to let in new facts and defenses wholly dependent upon parol evidence, the reluctance of the court is greatly increased, since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room for the introduction of testimony manufactured for the occasion. * * * The whole matter rests in the sound discretion of the court. * * * It seems to me that before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected

or the facts to be added are made highly probable, if not certain; that they are material to the merits of the case in controversy."

It has been held that, where the complainant proves by affidavit that the new matter sought to be introduced is false, leave to amend the answer will be denied. *Hicks v. Otto*, 17 Fed. 539.

It is manifest that the appellant Ritchie cannot complain of the action of the circuit court in looking into and weighing his evidence upon the issues he sought to raise by the amended answer before granting him leave to file it.

This brings us to the questions of law and fact which the circuit court decided in refusing the leave. The issues tendered by the answer and cross bill shortly stated were—First, that the judgment upon which the bill was founded had been obtained by fraud, and should be set aside; second, that, of Ritchie's co-defendants Payne, Burke, and Cornell, each one had made a contract with him by which, in consideration of the delivery to each of a large amount of stock in two mining companies, each had agreed to aid him in developing the mining enterprises, to lend to him large financial credit, to keep up the market value of the stock in the mining companies, and to assist in the consolidation of the railway with the mining enterprises; that each had not only failed to keep his agreement, but had taken affirmative steps to destroy Ritchie's credit, and the value of the stock, thereby entitling Ritchie to set off the damages for this breach of contract against the indebtedness claimed by each against him; third, that the same three co-defendants, Payne, Burke, and Cornell, had entered into a conspiracy to become absolute owners of Ritchie's stocks pledged to each at much less than their real value, by assuming the management of the companies, and by preventing the development of their properties, by causing the companies to repudiate valuable contracts, by preventing the companies from earning and paying dividends, by refusing for the companies the acceptance of valuable subsidies, and by publicly depreciating the value of the stock of the companies, for which wrongs he was entitled to damages against each of his pledgors to be set off herein against his indebtedness.

The circuit court held that the amended answer did not state facts sufficient, even if proven, to justify the court in declaring the judgment of complainants void for fraud. In this conclusion we fully concur. The answer alleges that the McMullens and Ritchie entered into a contract by which the McMullens agreed to sell, and Ritchie to buy, 210 bonds of the Central Ontario Railway Company and coupons cut from the bonds of the same company, amounting in their face value to \$71,250; that, at the time of making the contract, the McMullens asserted that they owned the coupons, when in fact the coupons referred to were never obligations of the railway company, but were coupons accruing due on their face before the issue of the bonds, and were thus void and valueless; that afterwards the McMullens brought suit in the queen's bench division of the high court of justice of Ontario, Canada, and without the production of the bonds and coupons, and without having tendered the same to Ritchie, procured a judgment in the action against Ritchie; that he (Ritchie)

did not know that the coupons to be delivered were of the fraudulent character stated, either when the Canadian judgment was obtained, or when the judgment on that judgment was obtained in the court below. "And he avers that the said McMullens procured the said coupons by fraud, and were without right or title thereto; that they pretended to be the owners thereof, and fraudulently and corruptly engaged to sell the same to this defendant, and fraudulently procured from the court judgment thereon, as hereinbefore set forth." There is no ground for setting aside the Canadian judgment to be found in these averments. It must be inferred therefrom that Ritchie was duly brought before the court by personal service, and that he failed to take issue with the plaintiffs as to their asserted ownership of the coupons, and their ability to deliver them, because he did not then know the falsity of this claim. He now seeks to avoid the judgment, on the ground that the plaintiffs obtained it by a false and perjured statement of his case, which deceived not only the court, but also himself, the defendant, so that he interposed no denial thereof.

In *U. S. v. Throckmorton*, 98 U. S. 61, the supreme court held that the fraud for which a bill to set aside a judgment or decree could be sustained was that which was extrinsic or collateral to the matter tried, and not a fraud which was in issue in the prior suit; that relief would be granted only in cases in which, by fraud or a deception practiced on the unsuccessful party, he was prevented from fully exhibiting his case, so that there never had been a real contest of the subject-matter of the suit. The case made by the defendant Ritchie in the amended answer is not within the foregoing requirement. The only fraud alleged is the false statement by the McMullens that they owned valid coupons, and were able and ready to deliver them. This was not an extrinsic or collateral fraud. It was a false statement in respect to a fact essential to the plaintiff's right to recovery, and the fact that it deceived the defendant as well as the court does not change its character, as being a fraud in respect to an issue of the former suit. It was the duty of Ritchie, by inquiry, to learn the facts in respect to the plaintiffs' cause of action; and if he contented himself with accepting the truth of plaintiffs' averments in their pleading, and let the case go by default, he cannot afterwards have the judgment set aside in equity, on the ground that the averments of plaintiffs in their petition were false. The answer states no excuse for Ritchie's failure to learn the facts before permitting the default in the Canadian suit, and before the judgment in the court below, and charges no act on plaintiffs' part to prevent his discovering the truth, and pleading it, except the mere false statement concerning the ownership and validity of the coupons embodied in the original pleading. Clearly, the part of the amended answer attacking the McMullen judgment would neither be ground to set it aside by bill for the purpose, nor constitute a valid defense in equity to its enforcement.

The next defense raised by the answer was that Payne, Burke, and Cornell had each agreed with Ritchie to aid him in developing the mining and railroad enterprises, by lending him financial credit, and by helping him to keep up the market value of the mining and rail-

way stocks, and by aiding him to bring about a consolidation of the three companies, in consideration of Ritchie's delivery to each of them of large amounts of said stocks; that each had wholly failed to perform his agreement, whereby Ritchie was entitled to damages therefor, by way of set-off to the debt due from him to each of them. If Ritchie were able to prove this defense, we are of opinion that it would constitute a valid defense pro tanto to the claims of Payne, Burke, and Cornell, and might be used by Ritchie, by way of set-off against those claims. The debts were contracted in a partial performance by Payne, Burke, and Cornell of the very contracts for the breach of which Ritchie asks damages. Such damages, if allowable thereon, could be properly treated as equitable set-offs to the debts thus contracted, because growing out of the same transaction. *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148. The McMullens cannot complain of the delay incident to an adjustment of the mutual indebtedness between Ritchie and his pledgees, even though it require the ascertainment of unliquidated damages, because they can subject nothing to their judgment but the equitable interest which Ritchie has in the stocks, or their proceeds, after payment of the ascertained balance due from Ritchie to his pledgees. Indeed, they pray an accounting between Ritchie and his pledgees; and, if the damages referred to are a proper credit to Ritchie in that accounting, their remedy against the stocks must remain in abeyance until such damages are exactly ascertained.

The further question remains whether the showing, by way of evidence, which Ritchie made of the existence of these contracts and their breach, was sufficiently convincing to justify the court in allowing a new and formal issue to be made thereon, so late in the hearing of the cause. We shall postpone consideration of this question of fact until after we have examined the legal sufficiency of the next defense of Ritchie, which is that Payne, Burke, and Cornell, each holding in pledge a large amount of the stocks of the two mining companies and of the railway company belonging to Ritchie, conspired together to depreciate the market value of these stocks, so that they might acquire absolute title to them at much less than their true value, by forced sales under the pledges, and, in furtherance of this conspiracy, did many things in and about the management of the companies to depreciate the value of the stocks, which they were able to do because they owned stock in said companies, were directors and officers thereof, and controlled the stock of Ritchie pledged to them. Without going into too much detail, it will suffice to say that these acts charged consisted—First, in refusing to develop the mining property in such a way as to earn dividends; second, in refusing to accept subsidies voted to the railway and mining enterprises; third, in repudiating and breaking up profitable contracts made for and on behalf of the mining companies; fourth, in refusing to entertain a proposition for the treating of iron ore, which, if successful, would make the railway company and iron mines very profitable; fifth, in declining to unite the mining companies and railway company in one corporation; sixth, in declining to grant an option to sell the mines for \$15,-

000,000. For the depreciation of the pledged stocks thus brought about, Ritchie asks damages to be set off against the indebtedness due from him to each of the pledgees.

The learned circuit judge was of opinion that Ritchie could have no credit in the accounting between him and his pledgees for the loss suffered by him from this conspiracy and the wrongful acts in pursuance thereof; that the wrongs committed were injuries to the corporations only, and that Ritchie, as a stockholder, could have no redress directly against the wrongdoers, and must find a remedy, if at all, in the enhancement in value in his stock caused by a recovery of damages by the corporations. As the very object of the conspiracy and wrongs done was to cause Ritchie to cease to be a stockholder, it might be difficult to point out how such an indirect remedy could benefit him after the wrong had been completed and he had parted with his ownership of the stock. It is undoubtedly true, as the circuit court held, that a stockholder, merely as such, cannot have an action in his own behalf against one who has injured the corporation, however much the wrongful acts have depreciated the value of his shares. *Smith v. Hurd*, 12 Metc. (Mass.) 371; *Allen v. Curtis*, 26 Conn. 456; *Wallace v. Bank*, 89 Tenn. 630, 15 S. W. 448; ; *Hersey v. Veazie*, 24 Me. 1; *Conway v. Halsey*, 44 N. J. Law, 462; *Porter v. Sabin*, 149 U. S. 478, 13 Sup. Ct. 1008. But we are of opinion that this principle has no application where the wrongful acts are not only wrongs against the corporation, but are also violations by the wrongdoer of a duty arising from contract or otherwise, and owing directly by him to the stockholders.

In *Smith v. Hurd*, 12 Metc. (Mass.) 371 (a leading case), Chief Justice Shaw delivered the opinion, sustaining the principle relied on by the circuit court. His first and main reason for holding that a stockholder could not recover for injury suffered by the malfeasance of a director was that there was a want of privity between them. He said (page 384):

"There is no legal privity, relation, or immediate connection between the holders of shares in a bank and the directors of the bank on the other. The directors are not the bailees, the factors, agents, or trustees, of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers, and servants are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it."

In the case under review there was a privity between Payne, Burke, and Cornell, on the one hand, and Ritchie, on the other, created by the pledges of the stocks. The bailee owes a direct duty to the pledgor to be reasonably careful that no harm shall come through his custody to the subject-matter of the pledge. *Jones, Pledges*, §§ 403-405. A fortiori it is the bailor's duty not to do any act with the intention of depreciating the value of the pledge. Hence, if Payne, Burke, and Cornell combined together, and wrongfully reduced the value of the stocks pledged, with the intention of buying them in at less than their value, they have done Ritchie an injury, for which he is entitled to compensation.

But it is said that they did this only as directors and stockholders of the corporation, and that for their wrongful acts as directors the corporation only can recover, and that for wrongful acts as stockholders they cannot be held accountable at all, because in voting as stockholders they are dealing with their own. It is true that the obligations of the pledgee of stock to the pledgor would not be violated by the pledgee if the stock held in pledge suffered a loss in value through negligence of the pledgee in acting as director of the company or through ill-advised or negligent voting of other stock owned by him. The fact that the pledgee of stock owns other stock in the same company, or is a director or officer therein, does not impose any greater duty upon him, in respect to the stock pledged, than if he had no relation to the company at all. But, if such pledgee use his position as director and his vote as stockholder intentionally to depreciate the stock of his pledgor held in pledge with the dishonest purpose of acquiring ownership of the stock at forced sale, this is a direct injury done by him to his pledgor, and he cannot avoid direct liability to his pledgor for it, by pleading that the means by which he accomplished this wrong, and violated his duty as pledgee, involved an injury to the corporation, for which it may also recover damages. Ordinarily, one's vote as stockholder or director in a corporation cannot subject him as an individual to a suit for damages by another injured by the corporate action voted for, unless the vote is shown to be malicious; i. e. with intent to injure the person complaining. But it is well settled that, "if any number of persons combine with intent to injure and defraud another, they cannot defend themselves against an action by showing that they did the act in the character of corporators under any charter whatever." *Vose v. Grant*, 15 Mass. 519; *Spear v. Grant*, 16 Mass. 9, 15, 16; *Bartholomew v. Bentley*, 15 Ohio, 659, 667; *Harman v. Tappenden*, 1 East, 555.

In *Walsham v. Stainton*, 1 De Gex, J. & S. 678, the facts charged in the bill were these: Joseph Stainton was the manager, and Henry Stainton was the London agent, of the Carron Company, a corporation. They appointed their nephews, Joseph Dawson and Henry Dawson, to confidential positions in the company. The Staintons and Dawsons entered into a conspiracy to secure to themselves the whole benefit of the company, "and, with that view, conspired together to procure the discontinuance of the committees of management, where proxies were not allowed, and to keep the accounts of the company fraudulently, so as to conceal from the shareholders the real value of the shares, in order that they themselves might buy up at an undervalue such shares as were offered for sale, and at the same time make themselves a majority of the votes at the meetings of the company." To carry out this plan, the Staintons retained in their hands large funds belonging to the company, which never appeared in the earnings, and so reduced the dividends. By these means the market value of the shares of stock was kept much below their real value. As a result, Henry Stainton purchased 40 shares, and Joseph 15, at a price much below a fair value. When the facts were discovered, the company compelled the

Staintons, or their representatives, to account for the large amount of money retained by them; and the representatives of the sellers of the stock filed this bill to compel a return of the stock still held by Henry Stainton's representatives, and to compel the estates of Joseph and Henry Stainton to make good the difference between the price at which the 15 shares now in the hands of an innocent purchaser had been sold to Joseph Stainton and its real value, and to compel an accounting for all dividends received on the stock since the sale. Vice Chancellor Wood sustained a demurrer to the bill, but the lords justices, on appeal, reversed this ruling, and held that the bill stated a good ground for relief, and that each wrongdoer might be compelled in equity to make good to the defrauded owner of shares the loss without regard to his having profited by the fraud. This case illustrates, in quite a satisfactory way, how managers of a corporation may so conduct the affairs of the corporation as to incur a direct liability to the stockholders in respect to their particular stock. In the case cited, the liability arose because of the relation between the corporate managers and the stockholder of vendees and vendor of the stock. In the case at bar it arises because of the relation between the corporate managers and the stockholder of pledgees and pledgor of stock.

We are therefore of opinion that if the averments of the amended answer and cross bill concerning the conspiracy of Payne, Burke, and Cornell to depreciate Ritchie's stock, in order to force a sale at less than its real value, are true, Ritchie is entitled to relief. What relief, it is perhaps not necessary exactly to say. Were Payne, Burke, and Cornell asking a sale of the stock, proof of such a conspiracy would justify a dismissal of their bill and a denial of all relief. But here the McMullens, as judgment creditors, are entitled to subject Ritchie's interest in the stock to the payment of their judgment; and a court of equity cannot inquire into their motives if their judgment is a valid one, as it is. The only mode of giving relief to Ritchie, therefore, would be to allow him to set off, against the debts of Payne, Burke, and Cornell, damages for this wrongful depreciation of his pledged stock, the measure of which would be the difference between the market value now and what it would have been had not this conspiracy been set on foot, and had the wrongful acts in pursuance of it not been done.

We come now to determine how far the averments of the answer and cross bill are supported by the evidence. First, what, if any, evidence is there that Payne, Burke, and Cornell made and broke the promises, as the answer charges? Upon this subject, Ritchie testified:

"The real consideration, the positive, unqualified agreement between those parties and myself, was that, if those companies were organized and put in, they should be used to protect the road, and they would use their credit and other influence and their position as a whole, and sell them as a whole. They never would have been in it, or had anything to do with it under any other consideration."

Payne and Burke emphatically deny that they ever made any such agreement, and further deny that Ritchie gave them any stock

therefor. Cornell died before this issue was distinctly raised, and Ritchie's statement as to a contract with him is not competent evidence, under section 858 of the federal statutes. *Morris v. Norton*, 21 C. C. A. 553, 75 Fed. 912, 922.

In order properly to weigh the conflicting evidence on this and other issues, it is necessary to make a short statement of the history of these Canadian enterprises, and the connection which Ritchie, Payne, Burke, and Cornell had with them.

In 1881, Ritchie, then a manufacturer of Akron, Ohio, purchased, with J. B. and G. W. McMullen, a large interest in a railway 40 miles long, running from Picton, on Lake Ontario, northwest to Trenton. The road lay wholly in Prince Edwards county, and took its name therefrom. Ritchie and the McMullens, after procuring the necessary legislation, projected an extension of the railroad to Coe Hill, in Hastings county, a distance of about 70 miles, and called the whole line the Central Ontario Railway. \$2,200,000 in bonds were issued, and \$750,000 in stock, of which \$300,000 was preferred, and the remainder was common. They acquired from one Coe an undivided three-quarters interest in 15,000 acres of mining land, in consideration of a payment of \$100,000 and the extension of the road. H. B. Payne was a rich man, a citizen of Cleveland, and a senator in congress from Ohio. Stevenson Burke was also a rich man, and a citizen of Cleveland. He was largely interested in railroads. Thomas W. Cornell was a rich man of Akron, Ohio. They were all well acquainted with Ritchie, and he with them. Payne bought \$100,000 of the railway bonds, and \$100,000 of the preferred stock, both at par, and received \$150,000 of the common stock as a bonus. He also bought a third interest in the mining lands for \$50,000. Burke advanced \$150,000 to pay for \$150,000 par value of the bonds, reserving the right to sell them back at par to Ritchie. Cornell advanced a considerable sum, but much less than Burke, to Ritchie, upon the railway bonds as collateral. The railroad was completed in 1885. Meantime Ritchie had bought out the McMullens, and the railroad was practically owned by Ritchie, Payne, and one McLaren. They had purchased a tract of mining land extending northwardly from the northern terminus of their road, and embracing 65,000 acres. After a good many thousand tons of the iron ore mined at Coe Hill had been carried to the rolling mills of Cleveland, it was discovered that the ore was so full of sulphur that it was practically useless. As the success of the railroad was largely dependent on the freight to be earned from the transportation of iron ore, the failure of the ore was the failure of the road. Ritchie, who had been the promoter of the railroad, at least so far as Payne, Burke, and Cornell were concerned, and who had in some manner, not disclosed by the record, acquired an intimate acquaintance with the leading men of Canada, and also with her mineral resources, learned that copper ore had been found in the construction of the Canadian Pacific Railway near Sudbury Junction, a point about 200 miles to the northwest of the northern terminus of the Central Ontario Railway, and separated therefrom by a rough, unbroken, and uninhabited country. Ritchie went to

Sudbury, and in October, 1885, contracted for the purchase of 900 acres of copper-mining land, for \$14,000. He returned to Cleveland, and persuaded H. B. Payne and his son O. H. Payne to take one-fourth interest in his purchase, which they did. There were now organized two mining companies, one the Canadian Copper Company, with a capital stock of \$2,500,000, and the other the Anglo-American Iron Company, with a capital stock of \$5,000,000, both corporations of Ohio. To the former, Ritchie conveyed the copper-mining land, which he and the Paynes had bought for \$14,000, in consideration of an issue to them of \$1,000,000 par value of the capital stock of the company. Of this issue, Ritchie received \$750,000, and the Paynes \$250,000. Ritchie had become obligated to Burke to open for him a mine on the Central Ontario road, from which Burke should be able to take as his one-fourth interest 100,000 tons of first-class Bessemer iron ore. The collapse of the iron mining enterprise prevented compliance with this, and, in consideration of Burke's releasing Ritchie from one-third of Ritchie's obligation in respect of the ore, Ritchie conveyed to him \$100,000 of the capital stock of the copper company. This, at all events, is the transaction as evidenced by the written contracts of the parties. Subsequently, other copper lands were acquired, and the stock issued for all the land aggregated \$1,733,000. Ritchie, Burke, and Payne received of the remaining \$733,000 their proportion of the same, measured by the amount paid by them for the purchase money of the lands. Subsequently, in order to develop the property, upward of \$600,000 in cash was expended in opening mines and erecting a plant. Of this sum, Ritchie contributed \$62,300, while Payne, Burke, and Cornell each paid in about twice as much as Ritchie, all taking additional stock at par. Late in 1886 it was discovered that the copper ore was also rich in nickel. As nickel was more valuable than copper, this made the success of the company more certain, and increased the value of its stock. The discovery, in 1888 or 1889, that nickel, when mixed with steel, made the best armor plate for warships, indicated such a future demand for nickel as still further to increase the prospective value of the property of the copper company. In 1888 the Canadian Copper Company gave an option to one Thompson, of London, by which it agreed to sell all its property for \$6,000,000. A renewal was asked, and \$6,000 offered for the privilege, but Ritchie, Cornell, and others defeated it. Burke, Payne, and McIntosh were in favor of granting it.

Ritchie, Payne, and McLaren deeded to the Anglo-American Iron Company, in 1886, an undivided three-quarter interest in 15,000 acres of iron land near Coe Hill, and the 65,000 acres of land to the north of that. They each received \$500,000 par value in stock for this conveyance. Subsequently, in 1888, a valuable copper and nickel tract near Sudbury was bought, and conveyed to the iron company, but very little money has since been expended in developing the property.

In 1887, Ritchie attempted to interest New York and Canadian capitalists in the extension of the Central Ontario Railway, from Coe Hill to North Bay, a point on the Canadian Pacific Railway, about 40 miles east of Sudbury Junction. This would have required

the building, through a very rough and uninhabited country, of about 150 miles of railroad. It would have been of advantage to the Anglo-American Iron Company, because it would have run through its 65,000-acre tract of timber and iron mining land. To induce the investment, Payne, Burke, and Ritchie agreed to sell to those who should undertake the extension their holdings in the Anglo-American Iron Company for the same price which they had paid for the stock. An effort was made to procure a subsidy from the Canadian government for the extension, but it did not succeed. The plan fell through. After this, in 1888, the Anglo-American Company acquired the valuable copper and nickel property already spoken of.

Ritchie was the president of the copper company from its organization, in January, 1886, until 1887, when he resigned, and at his request Cornell was elected in his place. He was a director and vice president in the Anglo-American Company from 1886 until 1891. He was president and director in the Central Ontario Railway from 1882 until March, 1892. He was exceedingly active in and about the concerns of the three companies until 1891. He gave much of his attention in 1888 and 1889 to an investigation of methods for eliminating the sulphur from the Coe Hill iron ore, so as to make it marketable. In 1889 he was also engaged in enlarging the market for nickel, by pressing the value of its use for armor on the navy department of the United States; and he went to Europe in 1889, to learn as much as he could concerning its treatment and use in Europe. While in Europe, Ritchie conceived a plan, and discussed it with English merchants, of uniting the two mining properties, and selling them to an English company. He expresses the opinion that, had he been given a power of attorney to do so, he could have sold the two mining properties for \$15,000,000, with an additional sum for the railroad. The copper company's board of directors declined to give Ritchie such a power of attorney. In the fall of 1889 Ritchie returned from Europe, and entered into negotiations with Thomas A. Edison for the treatment of the iron ore at Coe Hill, and received from Edison a proposition for the treatment that we shall have to consider more in detail later in this opinion. At this time congress was just assembling, and the formation of the new tariff bill, subsequently known as the "McKinley Tariff Bill," had begun. It was of great importance to the copper company and the iron company, interested, as they both were, in finding a market for nickel, that the heavy duty then imposed on the metal in both its crude and refined condition should be removed or reduced in the new bill. Ritchie threw himself into the struggle with tremendous energy, and, with the assistance of the navy department, succeeded in having the duty on the nickel matte reduced to nothing. He was engaged in this till September, 1890.

During the seven years preceding the 1st of May, 1890, Ritchie had called on Payne, Burke, and Cornell to help him in a financial way to such an extent that he then owed, either directly or as surety, to Burke \$280,000, to Payne \$350,000, and to Cornell about \$120,000.

All of this indebtedness was secured by stocks of the two mining companies, and bonds and stocks of the railway. Cornell had lent him \$150,000 in addition, which Ritchie had paid off, and Burke's debt was soon reduced by a sale to him of \$75,000 of copper stock at par. Ritchie had grown very lax about paying interest, and had made the payments on the principal above referred to only by selling part of the collateral pledged to secure the debt. In 1887 he had contracted a debt of about \$200,000 to the McMullens, which they had put in judgment in Canada in 1888. They sued on the judgment in the court below in the same year. They did not obtain judgment in that court until February, 1890. The fear of Ritchie and his associates was that the McMullens would garnishee the stocks of Ritchie held as collateral. Execution on the McMullen judgment was not issued until November, 1890, and the bill below was not filed till December, 1891.

As soon as Ritchie could leave Washington, in the fall of 1891, after the passage of the McKinley bill and the negotiations with the navy department for the sale of nickel, he took up the plan of uniting Sudbury Junction, where the copper and nickel mines were, with the Coe Hill Mines, the then terminus of the Central Ontario Railway, by an extension of the railway about 160 or 170 miles; and he attempted to induce the Canadian and Ontario governments to give subsidies for the extension, by promising the erection of nickel-steel plants and the investment of large amounts of capital in developing the country. From this time dates the dissension between Ritchie, on the one hand, and Payne, Burke, and Cornell, on the other. Ritchie's plan was that, as soon as the extension was completed, the copper company, the iron company, and the railway company should be consolidated. Ritchie's interest in the copper company, by reason of his sales of its stock, which was the only stock owned by him having a real selling value, had been materially reduced, while his heavy holdings in the collapsed railway and in the iron company remained. Consolidation was therefore much more likely to benefit Ritchie than Burke and Cornell, whose holdings in the railway were comparatively little. In September, 1890, Ritchie, in the glow of his success with the tariff bill, had been elected an additional director of the copper company, at a special meeting. At the meeting in January, 1891, after he had manifested a desire to involve the copper company in his plan of extension and new construction, he was left out of the directory. A very sharp, and, on Ritchie's part, an acrimonious, correspondence, followed a polite warning of him by Burke not to use the copper company's name in his various plans of extension, and of the construction of nickel-steel plants. Ritchie thereupon went so far as to break up, by threats of litigation, a contract which the copper company was negotiating for the sale of its nickel matte, and this led to a circular letter from the company advising the public that Ritchie was not connected with the company, and had no authority to represent it. This was smoothed over to some extent by an agreement to arbitrate, and Burke and Payne and Cornell wrote a letter to some of the members of the Canadian government to assure them that both mining companies would regard the extension

of the railway to Sudbury Junction as beneficial, but nothing was said therein as to a consolidation of the companies. Ritchie spent the summer of 1891 in seeking to secure the consent of Burke, Payne, and Cornell to a consolidation, but without success. In the fall of 1891 he invited a vote of a subsidy from the town of Trenton of \$75,000 towards the erection of a plant for the treatment of the iron ore from Coe Hill, and he also aroused public interest at Hamilton, Ontario, in the erection of a plant there, so far as to evoke a proposition to give land and money for the establishment of the same. Burke and other directors of the railway company, happening to be at Trenton to attend a meeting of the stockholders of the railway company, were called upon by a committee, who inquired in regard to the subsidy. Burke discouraged it, by stating that Ritchie had no authority as president of the railway to invite the subsidy, or to assume for it the responsibility and obligations which the acceptance of such a subsidy would impose. This created the final breach. Thereafter Burke, Payne, and Cornell did nothing to postpone or avoid the efforts of the McMullens to reach Ritchie's stocks pledged as collateral to them. How far they co-operated with the complainants is a subject of dispute. At all events, in December, 1891, the bill was filed. In March, 1892, Ritchie was ousted from the presidency of the railway company.

It nowhere appears in the evidence that Ritchie ever applied to Burke, Payne, or Cornell for financial aid and credit that they did not extend it to him. He does not testify that they failed him in this regard, and, if he did, the very large sums of money which he procured from each of them during seven years would certainly refute such a claim. The burden of his complaint is that, at the outset, they agreed to consent to the consolidation of the companies and the treatment of all the investments as on exactly the same footing, so that success in the copper company would be used to lift the railway investment out of the slough. Burke and Payne do not deny that they were opposed to consolidation, and do not hesitate to accept the responsibility for defeating it. The only issue is therefore whether they bound themselves by contract to consent to it, and to bring it about, as alleged and testified by Ritchie. We have read this voluminous record of 2,000 pages with great care, and are convinced that no such contract as that to which Ritchie testifies was ever entered into by Burke, Payne, or Cornell, and that it has found a lodgment in Ritchie's vivid imagination, because of the injustice he feels in the result by which the copper company is a great success, and the railway company is a great failure. It is quite clear to us that no contract whatever of a definite character was made by Ritchie with these three capitalists in respect to their joining him in the copper company enterprise, except such as appears in writing in the case. The railway investment had proved a failure, and Ritchie was hunting for something to offset the loss. He found some copper land. It could not be developed except by the investment of a large amount of money, and he had none. What course did he pursue? The one always pursued in such cases. He gave to these men, who had money, a share in the enterprise, with the hope that it would lead

them to put money into it, and it did. He called on Payne to pay one-fourth of the purchase money of the land, and exactly the number of shares of the stock were issued to Payne to which his payment entitled him. He let Burke have 1,000 shares in consideration of his release of an obligation to furnish him 33,000 tons of Bessemer ore. Now, it is quite likely that this release was not the real motive for the transfer of the stock to Burke. The real purpose was probably to induce Burke to lend his credit to the company, and to invest his money in it. What Ritchie transferred to Burke, though sounding great as \$100,000 par value of the stock, had cost Ritchie just \$1,400. What he transferred to Cornell cost him \$280. And it is to be borne in mind that the purchase of the land by Ritchie and Payne, and the issue of the stock, were practically contemporaneous. There was therefore no increase in value between the purchase of the land and the issue of the stock for it. We may stop here to allude to a feature of Ritchie's evidence which explains many of the absurdities that crop out in it. He ascribes exactly the same value to the stock in the copper company when it was organized that it now has, after nearly a million dollars has been spent in developing its property. Considering the circumstances surrounding the parties, we cannot hesitate to credit the statements of Payne and Burke that they made no contract with Ritchie either in regard to lending credit or in consolidating the copper company with the railroad. No scheme could be more foolish at the time than the union of the two properties. The railroad was in a state of collapse. It was practically bankrupt. In order to make the copper company a success, it was necessary to raise half a million dollars. Was it likely that those who advanced this money for stock in the copper company would agree to load it down with the debts of a railroad which had no prospect of success at all? It would be contrary to all human experience. It is doubtless true that Ritchie got up the copper company with the idea of recouping Payne and himself for the losses sustained by them in the railroad, but this was to be effected, not by a union of a dead enterprise with a live one, but by the profits realized from the latter. Neither Burke nor Cornell had any stock in the railway company. Why should they agree to invest large sums of money in one company, with a view to its ultimate union with a bankrupt enterprise? It is true that some of Ritchie's indebtedness to them was secured by railroad bonds, but it was a much more direct way of helping themselves to aid Ritchie in his new and possibly successful enterprise. It would be of little assistance to Ritchie to imperil the only prospect of success in the copper company by a disastrous union with the railway company. The stockholders of the copper company and the railway company were not the same at any time during the lives of the companies. The property of the copper company lay on the Canadian Pacific Railway, nearly 200 miles from nearest point of the Central Ontario Railway. The copper company thus had ample railroad facilities. Why consolidate it with a railway with which it had no legitimate connection?

There is nothing in the evidence of Ritchie's acts and letters for seven years disclosed in the record to show that he believed that

Payne, Burke, and Cornell were under any obligation to him to consent to a consolidation. It is true that in 1887, when they were all trying to induce New York and Canadian capitalists to undertake the extension of the railroad to North Bay, and to sell their bonds at par, they offered to sell, to any one undertaking the extension, their interest in the Anglo-American Iron Company, at what it cost them. This merely indicates a desire to get out of the entire investment in the railroad and the iron ore lands, to reach which the road was built, the money they put in. The ore land extended many miles along the proposed extension, and was owned by the same persons who owned the railway, and in about the same proportions. A union between the iron company and the railway company at that time would not have been strange, because the success of each was largely dependent on that of the other, and the prospect of neither was bright. Subsequently, the iron company acquired valuable copper and nickel land, and it is this probably that gives its stock any value to-day. The effort of Burke and Payne to bring about an extension of the road in 1887 to North Bay, a point 40 miles east of Sudbury, on the Canadian Pacific Railway, and their willingness at that time to part with their investments in the iron company at cost, do not have the slightest tendency to show that a plan was agreed upon in 1885 by which the copper company was to be consolidated with the other enterprises. In 1891, when Ritchie was working for consolidation, and writing letters beseeching Payne and Burke to consent to it, there is not the slightest intimation that they were under any obligation to do so. He writes to Lord Mount Stephen, a Canadian capitalist, whose aid he was seeking in his new plan of consolidation and sale, and says that he will propose the consolidation to his associates, not as a plan to which they were bound by contract, but as a new proposal; and, when he encounters opposition to it, he frankly admits that he expected it, and nowhere intimates that it involved a breach of faith on the part of Burke and Payne, as he now contends. There is nothing, therefore, in the case, to support the claim that there was a contract, but Ritchie's uncorroborated words. He is contradicted flatly by Burke and Payne. The contract he swears to is utterly improbable, and is at variance with every circumstance in the case, and especially with his own previous words and conduct.

It remains to consider the evidence in support of the charge that Burke, Payne, and Cornell conspired to manipulate the affairs of the three companies so as to depreciate Ritchie's stocks held by them in pledge for the purpose of acquiring title to them at the depreciated value. None of the acts which are said to have been done in pursuance of this conspiracy happened before 1889. Down to that time it seems to be conceded that the associates were working in good faith for the good of all. The first conduct which Ritchie charges to be treacherous was the so-called refusal to sell the two mining properties at \$15,000,000. We may properly begin with this charge, because its slight foundation in fact fairly illustrates the weight to be given to all the charges made. Ritchie and Cornell were in Europe in 1889. Ritchie saw a good many persons interested in nickel property in England, and conceived the idea that he might float on the

London market a scheme to sell the properties of the two mining companies to an English corporation for \$15,000,000, and he asked for a power of attorney to sell the property of both. The copper company, through Burke, Payne, and other directors, declined. Ritchie treats this action as a refusal to sell the properties at \$15,000,000, and much of the brief of counsel is taken up with picturing the prosperous condition of Ritchie and every one else associated with him if only this power of attorney had been given. The evidence of Ritchie on this subject is as follows:

"Q. Now, tell me what parties you were negotiating with, and I want to know whether they were persons of credibility and responsibility, and what their standing was? A. They were believed to be the most credible and responsible manufacturers of England. Q. Now, what was the result of your conference there to make a sale of these properties? A. Oh, it resulted in an agreement between a large number of parties, quite a number of parties agreeing to underwrite and put it at a rate that would give us fifteen million dollars for the two properties. We could not sell the one separate, because it would leave the other as a competitor. Q. Could you have closed that arrangement? A. There is no doubt in the world about it. Q. What would have resulted, after the closing of that arrangement to your company? A. The company would have had about \$15,000,000. Of course, there is always some expense coming out of these things, but we would have had substantially that for the property, and that is about the price put on it before, as shown by the two papers already put in evidence." He further says that Cornell's agreement to go home and get the power of attorney was made in the presence of Sir Charles Tupper, and with his knowledge. Q. "Did you get the power of attorney? A. No, sir; none ever came at all. Q. Do you know why? A. They sent a telegram to me that they unanimously declined the proposition, and I wrote them another letter, which I have a copy of here, which they professed not to be able to find, giving them the complete outline of this arrangement and the agreement with Mr. Cornell. It was a very short affair, simply on the back of an envelope; and I inclosed that envelope to Mr. McIntosh, saying he would return home, and would call the company together, and send me a power of attorney to place this property on the market, and, in case the company did not see fit to go in and sell all their property, that I was at liberty to sell his interest with my own, and signed that, and that was done just as we were leaving the hotel at Liverpool. Q. Why, if you know, did the company refuse to accept this \$15,000,000 for that property? A. Well, they said to me they declined the proposition. I want to say, in addition to that, of course the road was to go with it in addition to the price and for that reason this report of Sir Charles Tupper recommended strongly that works should be built upon this property, and the road was to go to it, and the government should treat it very liberally."

Ritchie then produced this letter from Sir Charles Tupper to substantiate his statement:

"September 23, 1893.

"Dear Mr. Ritchie: In reply to your inquiries, I beg to say that I remember that after you and I had visited France and Germany in company with Mr. T. W. Cornell, making inquiries in connection with nickel, on our return to London, in the latter part of September, 1889, Mr. Cornell said that he would return to America, and obtain and send you a power of attorney from the Canadian Copper Company, of which he was then president, authorizing you to put the property of that company on the London market. We were all of the opinion that it was a favorable time for such an operation. With best wishes, I remain,

"Yours faithfully,

Charles Tupper."

Weighing Ritchie's glowing statement of the prospect of a sale in the light of his character as a promoter, hereafter to be commented

on more at length, and in connection with the letter of Sir Charles Tupper, it is manifest to us that there was no agreement of any kind that would be legally binding on any one to pay \$15,000,000 for the mining properties, but that Ritchie's hopes were merely founded on conversations held with promoters like himself as to the possibility of organizing a company to take the properties. He introduces no written evidence of even negotiations on this head. He gives the names of no persons with whom he was negotiating, and least of all does he produce any sort of a written proposition which, by acceptance, could be made binding on any one. It was proposed to put the scheme "on the London market," as Sir Charles Tupper says, and the price of \$15,000,000 was a mere guess or estimate of Ritchie, born of that wonderful and bounding hopefulness on his part that is so apparent in the record. Burke, Payne, and McIntosh, the secretary of the company, say that they never heard of a proposition to buy at \$15,000,000. Their action merely was to deny to Ritchie the authority to involve them in promoting a scheme of sale on the London market of an indefinite character. Judging from the willingness of Burke and Payne and McIntosh to sell out the copper company's property for \$6,000,000 the year before, and to renew an option therefor, we may be very certain that they would have eagerly accepted a proposition to sell the property of both companies for \$15,000,000 in 1889. Certainly, the reluctance of the directors to put in the sole hand of Ritchie the right to dispose of their property on the London market, without retaining any power of control over the details of the sale and the security for payment, furnishes no ground for the charge that they declined to do so because they wished to prevent Ritchie from realizing on his stock, and were conspiring to deprive him thereof.

The next circumstance upon which Ritchie relies is the failure of the iron company and the railway company to accept the proposition of Thomas A. Edison to erect a plant at the iron mines for the treatment of the refractory iron ores of Coe Hill. In Edison's letter of November 26, 1889, to Ritchie, he expresses the opinion that he can separate the sulphur from the ore sufficiently to make the ore marketable, and he proposes to erect a plant at the mines with a capacity of treating not less than 1,000 tons daily at 70 cents a ton. It is said that the refusal of the iron company to accept this proposition is evidence of bad faith. It appears from Ritchie's statement that there was a further negotiation between Edison and the directors, the details of which are not given in evidence. Burke says (and we do not think his construction of Edison's proposition unreasonable) that its acceptance would have obligated the company to furnish Edison 1,000 tons of ore a day, and to pay him \$700 a day for treating it, without any certain market for the ore after it was treated, and that, even assuming that Edison had solved the difficult problem of ridding the ore of sulphur, Burke and his associates were not willing to enter into a certain liability of \$200,000 a year, with grave doubt as to the probability of disposing of the ore at a profit. Certainly, we cannot say that such a conclusion as to the proper policy of the company could not have been reached by the directors without tending to show bad faith towards Ritchie as a stockholder and their pledgor. Nor are we by any

means convinced that Edison's letter established beyond peradventure the success of his treatment of the ore. Some two years later, when Ritchie was pressing the acceptance of a subsidy to erect a plant at Trenton for this same purpose, he seems to have selected a process different from that of Edison, indicating, what is quite clear from other circumstances in the record, that the successful treatment of the ores was still in the experimental stage. It is not to be wondered at that capitalists who had seen so much money sunk in the railroad enterprise and this iron mining property should be conservative and doubtful in respect to the successful outcome of any proposed plan which should involve them in further liability. And this shows the view we take of another action of Burke in respect to the treatment of the iron ore which forms the ground for a charge of fraud. In October, 1891, Ritchie had proposed to the citizens of Trenton that, if they would vote a subsidy of \$75,000, the interested companies, including the railway company, would erect a plant for treating this ore in their town. Burke and others visiting Trenton about this time to attend a stockholders' meeting repudiated Ritchie's authority to make an agreement to bind the railway company in this matter, expressed a want of faith in the efficacy of the treatment of the ore proposed, and emphatically discouraged the proposal to vote a subsidy for the purpose. At the same time, Burke and other directors of the railway company, learning that Ritchie, as president, had gone so far as to order, in the name of the company, the machinery needed in the proposed plant from a firm in Chicago, advised the firm that the order was given without authority. Now, clearly, had the company accepted the subsidy, it would have been under an obligation, both moral and legal, to use the money in erecting a suitable plant, with the possibility that it would cost much more than the subsidy. Should the experiment of treating the ore prove unsuccessful, then the whole investment would be a loss, and the citizens of Trenton might very well complain that they had been misled into voting \$75,000 to the winds. Payne, Burke, McIntosh, and Chisholm, a practical man, were all doubtful of the success of any process, and, as we have said, we think it was reasonable that they should be. It is fully conceded that the discovery and adoption of some process for treating the ore were absolutely necessary to give the railroad and the iron mines any value at all, but what we wish to be understood as finding from this evidence is that reluctance to spend money and incur large liability on the faith of the success of any process was entirely consistent with good faith on the part of those who directed the course of the railway and iron companies. Nor do we see how, entertaining these views, Burke and McIntosh could have done other than they did in notifying the Chicago firm that Ritchie had no authority to give them the order he had given them for the railway company. There are disclosed in the record certain reports of experiments with the ore communicated to Burke, Payne, and McIntosh, tending to show that the ore could be treated successfully. These experiments were conducted under direction and at the cost of the company. In their evidence, McIntosh, Burke, Payne, and other directors and stockholders had expressed their great doubt as to the possibility of ever successfully treating the

ore. The argument pressed upon the court in the brief of counsel and in the evidence of Ritchie is that the fact that they then had knowledge from their own agents that these opinions were unfounded shows that they are guilty of bad faith in expressing such opinions, and in having acted thereon in the past. However formidable such an arrangement might be, were its premises sound, an examination of the record shows that it has no basis. The documentary evidence produced by Ritchie consists of letters and reports. All these letters and reports, except possibly one, were written and presented about a month after the last evidence for the appellees was taken, so that the opinions, the good faith of which is attacked, were necessarily formed without knowledge of the contents of the letters and reports, and before they were either written or communicated.

Appellant finds another ground for his charges of fraud against appellees in respect to the sale of nickel matte to the navy department and to Carnegie, Phipps & Co. It is said that Burke and his associates deliberately broke up the immediate prospect of a contract for the sale of \$750,000 of nickel to the United States government, and repudiated another valuable contract for the sale of a large amount to Carnegie, Phipps & Co. Ritchie testifies that the contract for the sale of 5,000 tons of nickel, at \$150 a ton, was just about to be signed, when the directors of the copper company telegraphed not to close the contract before Burke's arrival; that Burke came, visited the secretary of the navy in company with Ritchie, discussed the contract, objected to the price as too high, and said that his company did not think it well to charge a price so much above the cost of the nickel; that thereupon the secretary declined to close the contract, and the sale fell through; that some time thereafter the company did sell to the navy department a much less quantity of nickel, at a much less price; and that, if the sale had been allowed to go through on the terms first agreed upon, enough would have been realized to enable the copper company to declare dividends so large that Ritchie might have rid himself of much of his indebtedness. Burke denies Ritchie's account of their interview with the secretary of the navy in toto. He says that the contract proposed involved the sale of nickel matte to the department; that the matte contained both copper and nickel, and that the contract provided for the elimination of the copper at a cost of some cents per pound; that the secretary suggested that it could be done for less, and that the department ought to get the benefit of reduction in that cost, if there were any. To this, Burke assented, and in this respect only did he differ from Ritchie in the presence of the secretary. He said the contract was drawn up with the price of the nickel at \$150 a ton, and was to be signed the next day, but that the next morning the secretary had learned from other sources that the price was too high, and refused to sign. Burke concedes that, at the hotel, he did say to Ritchie that he thought \$150 was too high a price to charge, when it cost them less than \$60, and that his suggestion angered Ritchie exceedingly. Were we called upon to decide as to the comparative credibility of these two accounts, we should be inclined to credit the latter, because the record in this case shows to us that Ritchie's intensity of purpose and tendency to exag-

gerated statement are so great that everything he says must be taken with a grain of salt. But, even if his account were true, we should find it difficult to ascribe to motives of fraud the advocacy of a policy of sales of nickel at a price much nearer the actual cost than \$150 a ton. One great trouble with nickel property at this time was the contracted demand for the metal. It had comparatively so few uses that, when a new use was just being developed in the shape of armor plate, it would hardly seem wise to discourage its wider use by charging an excessive price, even if it be true, as claimed by Ritchie, that the Canadian Copper Company had a monopoly.

The charge of fraud in respect to the copper company's dealing with Carnegie, Phipps & Co. has so slight a basis that it surprises us that it should be made. Ritchie, on behalf of the copper company, agreed with Carnegie, Phipps & Co. to furnish to that company 2,000 tons of nickel matte at a good price whenever it should order the same. There was no obligation on the part of the Carnegie Company to take a pound, whereas, if it wished to do so, it could have required the delivery of an amount which might have taxed the capacity of the copper company. The directors did not like the terms of the so-called contract, and objected that under it they might be called upon to do more than they could do. Accordingly, a new arrangement was entered into for the sale, upon the request of the Carnegie Company, of a less quantity of matte at the same price. As it turned out, the Carnegie Company did not purchase a ton of nickel matte from the copper company. It is absurd to say that the directors' action interfered with the sale of the nickel, and still more so to contend that it was actuated by fraud. But the claim made only illustrates Ritchie's inability in painting the probabilities to distinguish between a completed sale and the mere taking of an option.

It is said that Burke, Payne, and Cornell purposely prevented subsidies for the extension of the Central Ontario Railway, and the sending of the circular letter of March 16, 1891, to influential Canadians is pointed to as their chief act effecting their object. We have already traced the cause of the letter of March 16, 1891. Ritchie's unwarranted interference in the business of the company required it to protect itself in some way, and perhaps this was as summary a way as any. The letter was improperly phrased, in that it said that Ritchie had no connection with the copper company, even as a stockholder. He was not a stockholder of record, but, as he had an equity in a very large amount of the stock, the letter was calculated to mislead. In so far as it denied him any authority to represent the company, it was certainly justified by his hostile attitude towards the company, and his officious and resentful intermeddling in the transaction of its regular and lawful business. As soon as the possible effect of the letter in preventing Ritchie from obtaining a subsidy for the railway extension was brought to Burke's attention, he and his associates promptly wrote a letter to neutralize any such effect, by expressing their hope that the extension would be built, and their belief that it would benefit both mining companies. There is ample proof in the case, especially in Ritchie's letters, to show that the subsidies

would not have been granted had the letter of March 16, 1891, never been written. It was not to be expected that the directors of the copper company, as such, would expend much of either time or energy or money to secure the railway extension. It could really aid the copper company but little. That company was well served by the Canadian Pacific Railway, and, while competition would doubtless have lowered freight rates, the benefit thus to be derived was not so great as to justify any great sacrifice to bring about the extension.

It is further charged, as an evidence of their fraudulent management, that the directors have not declared dividends for the copper company. It does appear that the directors used, in developing the plant, over \$500,000, raised by the sale of stock, and a sum only less than this derived from undistributed profits on the sales of matte, and that, until a short time before the entry of the decree below, no dividends had been declared. Until January, 1891, Ritchie was fully cognizant of everything done by the copper company, and had access to their books and accounts, and yet we find that he made no complaint whatever of the policy thus pursued. Since January, 1891, because of his obviously hostile attitude, he has not had access to the books, or any control of the company's affairs. The statement of the company's condition September 1, 1893, seems to show that the company has been very well managed, and that the capital stock is worth more than par, and the declaration of a dividend of 7 per cent. on a capital stock of \$2,500,000 for the year 1894 would indicate that it was only a properly conservative policy, in accordance with which the first profits had been used, not to pay dividends, but to improve the plant. It might have assisted Ritchie more to have profits all turned into dividends at once, but the other stockholders were under no obligation to do this. It must not be forgotten that all that Ritchie can complain of is a fraudulent policy adopted for the intention of depreciating his stock, and clearly the policy shown is not such a one. The improvement of the mining plant and the accumulation of a comfortable surplus would not depreciate the value of the stock, but would tend to have an opposite effect.

Another transaction, of which Ritchie complains in his amended answer and cross bill, as evidence of the combination to defraud and overreach him in the management of the copper company, is the arrangement by which nearly the entire capital stock in the Vermillion Copper Company was purchased and transferred to the copper company. The Vermillion Company owned some valuable copper and nickel mining land very near that of the copper company, and it was regarded by all, especially by Ritchie, as of great importance to the copper company to buy out the Vermillion company. In order to do this, it was necessary to expend about \$70,000 cash. It was agreed among the directors that, if Cornell would advance this money, the company would issue stock to him for it at the rate of 40 per cent. of par. Ritchie denies knowledge of or acquiescence in any such agreement; but the evidence that he not only knew of this agreement, but was most active in securing

its adoption, is so strong that his rather weak denial of some of the circumstances which prove it must go for nothing.

Complaint is made of the failure to develop the property of the Anglo-American Iron Company, and that is pointed to as an evidence of fraud. It is quite clear that the heavy advances of Burke, Payne, and Cornell to develop the copper company were all that they felt willing or able to make. They owed no obligation to any one to do this with respect to the iron company, and it would be ridiculous to predicate a charge of fraud on their unwillingness to do it. Ritchie remained a director and vice president of the iron company from its organization until January, 1891; and the record does not show that he made any effort to secure money for the development of its property, or that he ever complained that the others did not do so, or that he found any fault with its management. His charges on this head are mere afterthoughts.

Another act said to be in pursuance of the conspiracy against Ritchie was the beginning of a suit by the railway company to annul all its bonds and stock as illegally issued in June, 1892. When Ritchie was ousted from the presidency of the railway, an investigation was made into the accounts of the railway, and some of the directors were disposed to question the validity of many of the bonds and shares of the stock which had been issued; and, to clear up the matter, the board of directors directed a suit to be brought to annul the entire issues. The resolution was opposed by Burke and McIntosh, and in a very short time the resolution was rescinded at their instance, and the suit dismissed. It was an ill-considered action, growing out of heat against Ritchie and suspicion of him, but it lends no support to the claim that it was an act in furtherance of a conspiracy against him, because it harmed him in nothing, and only involved the company in blind and foolish litigation.

We have thus reviewed, with undue prolixity perhaps, the charge against Burke, Payne, and Cornell that their corporate management of the companies was fraudulently calculated to depreciate and temporarily to destroy the value of Ritchie's stock, and we find that the charge is wholly groundless, and that the acts complained of were the result of their honest differences in opinion from Ritchie as to the proper policies for the companies to pursue.

A consideration of the indictment framed against these former associates of Ritchie would neither be complete nor fair which did not also include an inquiry into the direct relation of these men to Ritchie, as pledgees of his stocks and bonds, and their acts as such. We have already referred to the fear of Ritchie and his pledgees that the McMullens, as soon as they obtained their judgment in the court below, would make an effort, by garnishment or otherwise, to reach the interest which Ritchie retained in the stocks pledged. Payne seems to have been as anxious as Ritchie to avoid this. Ritchie owed the Savings & Loan Association \$171,500, to secure which were pledged 418 bonds of the Central Ontario Railway and 2,000 shares of copper stock, as well as two notes of Payne himself, one for \$25,000, and the other for

\$15,000. The McMullens obtained their judgment in February, 1890. Payne expressed in his correspondence great anxiety in regard to the garnishment of this collateral at the loan association. He consulted with his agent, McIntosh, as to the wisdom of buying the collateral at private sale from the loan association, and learned that there was no power of private sale under the terms of the loan. He asked McIntosh to consult Burke and Cornell as to what they ought to do in view of the imminence of action by the McMullens. McIntosh replied by letter of March 6, 1890, that he had seen Burke and Cornell, and inclosed a statement of Ritchie's indebtedness to them, and the collateral securing the same. He reported that in the opinion of Burke and Payne, in order to escape garnishment proceedings, Ritchie ought to sell the collateral held by each to that one for the debt it secured, and that Payne should make this arrangement with Ritchie. It is upon this letter that counsel for Ritchie base much of their argument that Burke, Payne, and Cornell were in a conspiracy to acquire title to Ritchie's stocks at much less than their real value. The letter, if it correctly reports the views of Burke and Cornell, undoubtedly shows a willingness on the part of these appellees to take to themselves all of Ritchie's property in the stocks, and thus to wipe out all his interest in the enterprises, upon which he had spent so much of his time and energy; and it reveals a cold business view of their relations to him that has in it nothing much of generosity. The theory upon which they reached the plan doubtless was that there was not enough collateral, in any event, to leave anything to Ritchie after paying McMullen; and, as there was doubt about the value of the collateral and its selling for more than enough to pay them, it was the quickest and easiest way merely to change the pledges into sales, to cancel the debts, and to leave McMullen with nothing out of which to satisfy his debt. But, while the letter does show a spirit on the part of these associates of Ritchie which does not command our admiration, it lends no support to the view that they were engaged in managing the companies with the purpose of depreciating the value of the stocks. The occasion for their co-operation and consultation was McMullen's judgment, and it was only because the situation caused thereby seemed to require immediate action that they recommended such a drastic course. We perceive no relation whatever between the corporate management we have been considering and this letter of March 6, 1890. It is to be observed that neither Burke nor Cornell took any steps to secure from Ritchie such a sale as that proposed in the letter. Payne only did so. On March 10, 1890, he procured Ritchie to sign a paper purporting to sell the stocks and bonds held by the loan association, absolutely to Payne, in consideration of Payne's assumption of the debt of Ritchie to the association. By subsequent agreements, this transaction came to be recognized again as a mere transfer of a loan, rather than a sale. We need not further refer to them now.

Frequent reference is made in the briefs of appellant's counsel to the fact that Burke, Payne, and Cornell had transferred all the

stock held by them as collateral to their own names on the stock books of the corporations. It is not at all clear that this was not done at Ritchie's instance, to enable him to escape the McMullens; but, whether this be so or not, we cannot find evidence of fraud against Ritchie in such a cause. As the pledgees were very largely interested in the stock, it was not unnatural that they should wish to exercise such control of the companies as their possession and interest in it would give them.

Another source of complaint against Payne and Burke is their attempt to enforce collection of the railway bonds and coupons. The supplemental answer and cross bill aver that, since the filing of the bill below, Payne and Burke have each taken judgment against the railway company for the amount due on its bonds and coupons held by them as collateral from Ritchie,—Payne in the sum of \$630,000, and Burke in the sum of \$136,000,—and that this was done, not merely to collect the amount due Ritchie on these securities, but for the purpose of depressing the value of the securities of the company, by procuring the appointment of a receiver for the road and its sale. As Payne and Burke held these bonds and coupons as pledgees, they had the right to collect the same, and apply the proceeds thereof on Ritchie's debts to them, now long since due. Jones, Pledges, §§ 664, 665, 668. The usual mode of collecting such large mortgage debts against a railroad is to procure the sale of the road, and to secure the earnings pending the proceedings by the appointment of a receiver; and we see nothing in the conduct of Burke and Payne in this matter, as alleged, upon which an inference of a fraudulent motive can be predicated. The railway company is confessedly bankrupt. A sale and reorganization are the only means by which the property can be made useful or profitable to the bondholders who are its real owners. Of course, Payne's executors and Burke hold the bonds and coupons in trust to apply the proceeds to their debts, and to hold the surplus, if any, for the use of Ritchie. The decree orders the sale of these bonds and coupons. If they have been put in judgment, the purchaser or purchasers of them will take with them all the rights secured by these proceedings of Payne and Burke. In other words, he or they will buy a judgment on bonds and coupons, instead of the bonds and coupons; and, if any such change has taken place in the form of the securities, the circuit court, when it is brought to its attention, will, if it deems it necessary, have the power to modify the order of sale to conform to the present condition of the collaterals.

As has already been stated, the real dissension between Ritchie, on the one hand, and Burke, Payne, and Cornell, on the other, began late in 1890, and continued to grow more bitter during the year 1891. During that year Ritchie began a suit to dissolve the two mining companies, on the ground that they had not earned dividends. Soon after the episode concerning the Trenton subsidy, in October, 1891, it is clear that Burke and his associates concluded that it was of no advantage to them further to obstruct the McMullens in collecting their judgment out of the collaterals

pledged by Ritchie. Early in 1890, Ritchie had besought Payne to bring a suit claiming a large amount from the McMullens, and to garnishee Ritchie's debt to them, hoping thereby to prevent enforcement of their judgment. Payne had refused, because there was no ground for the suit, but Burke had brought such a suit on the part of the railway company. This suit was dismissed late in 1891. In October, 1891, Payne, and probably Burke and Cornell, acquiesced in a proposition which the McMullens made to Ritchie, namely, that all these collaterals should be placed in the hands of a trustee, to be disposed of at private sale, the proceeds to be first applied to the debts for which they were respectively pledged, and then to the payment of the McMullen judgment. This was refused by Ritchie, and then the bill herein was filed. It is charged that it was brought with the connivance of Burke, Payne, and Cornell, and that they furnished the data to the McMullens for the preparation of their bill. We should not regard it as important, if it were true. The discrepancies, however, between the debts and collaterals, as stated in the bill and the answers, make this improbable. But suppose it be true that Burke, Payne, and Cornell reached the conclusion that the filing of such a bill and the sale of the collateral by the court were the simplest mode of ending a relation which Ritchie must certainly have rendered irksome to them, and, therefore, that they invited McMullen to file the bill, or assisted him in its preparation. Their debts were all due. They were entitled to satisfy them by a sale and application of the proceeds. This bill asks no more, and only adds the protection of a court's order and confirmation to the sale. The dismissal of the garnishee suit of the railway company does not seem to us significant of anything but a refusal longer, on the part of Burke and his associates, to block the McMullens in collecting their judgment. Burke says the claim against the McMullens was of a most doubtful character. Ritchie does not show that it was substantial, and, if we can judge of its validity by the flimsy character of the claim upon which he urged Payne to bring a similar suit, we may be assured that the dismissal was only a retreat from the not honorable course of hindering the collection of a valid debt by the interposition of groundless and fictitious cross suits. We concur fully with the learned circuit judge, who heard the cause below, that neither McMullen's motive, nor that of Burke, Payne, and Cornell, in bringing on this litigation, if their rights are clear, as they are, can in the slightest degree affect the duty of the court to grant the relief they are entitled to. *Forrest v. Railroad Co.*, 4 De Gex, F. & J. 131; *Dering v. Earl of Winchelsea*, 1 Cox, Ch. 319; *Ex parte Wilbran*, 5 Madd. 2; *Thornton v. Thornton*, 63 N. C. 212; *Macey v. Childress*, 2 Coop. Ch. 442.

We have considered at great length the circumstances of this case, to discover whether there is any justification for the wholesale charges of fraud made against Burke, Payne, and Cornell, and we can find none. There may be some circumstances set forth in a supplemental answer and cross bill, tendered long after the evidence was concluded and the cause was submitted, which we

have failed to notice; but it suffices to say that there is nothing of more importance set out in that than those matters already discussed. It is objected that, until the filing of the answer and cross bill and issue made, it is unfair to weigh the evidence as if submitted on the issue; but we think that, in view of the delay of Ritchie in making the issues, he cannot complain if we treat the cause as we have. He certainly took all the evidence he could obtain, and his counsel treated the case as if the issues sought to be raised by the answer and cross bill were before the court. It is true that counsel for Burke and Payne and Cornell objected to this view, and in some cases advised their witnesses not to answer questions directed to the issues raised only by the unfiled amended answer, but an examination of the whole evidence will show that little was excluded in this wise. Again, it is complained that Ritchie had no chance to examine the books of the copper company to find evidence to prove his case. He wished to institute a fishing excursion through them, to determine whether they could furnish him ammunition. He asked for nothing definite that was not produced, except the current contracts of the copper company, and these were not produced, on the ground that he had already broken up existing contracts by threatening litigation with the company's customers. We do not pass upon Ritchie's right to examine the books on proper proceedings or after issue made. All we now decide is that, unless he can show some substantial basis for his charge of fraudulent management without being accorded a roving commission to search the books, he does not make a case for granting leave to file the amended answer when tendered so late in the cause. There was no reversible error, therefore, in the refusal of the circuit court to grant leave to file the amended answer and cross bill.

The next important assignment of error is based on the holding by the circuit court that Ritchie is not entitled to any compensation for the services rendered by him to the two mining companies. It is not contended by Ritchie or his counsel that there was any express agreement by these companies to pay for his services. If he can recover, it must be upon an implied contract. There are many circumstances tending to show that what Ritchie did for the benefit of the companies he did with the knowledge and acquiescence of the directors of the companies, and possibly in some instances at their request. The only issue really is whether what he did was done under such circumstances as to show that he expected to receive and the companies expected to pay compensation for it.

That Ritchie rendered most valuable services to these two companies in enlarging the nickel market, and in reducing the tariff on nickel matte, there can be no doubt. That he worked unceasingly for nearly five years in many directions to make them successful, no one who reads the correspondence in this record can for a moment question. And, if there is any obligation of a legal character on these companies to compensate him, the court would not hesitate to fix a large amount as his due. But the difficulty

with his claim is that the one fact of all others which stands out clearly in all the myriad of circumstances presented by this record is that, when Ritchie rendered the services, both he and his associates, the directors of the companies, clearly understood, before and during the work he did, that he did not expect to be paid for his services, except as he might reap a profit from the enhancement in value of the large amounts of stock which he held in each company. He stated over and over again that he did not expect anything for his services, and that, as his associates were advancing the money to help the enterprises, he would donate his labor. These declarations are proven by at least one of his letters, and by the testimony of four or five of the directors of the company; and it is not too much to say that Ritchie but faintly denies making them. In this condition of the evidence, however strong the moral obligation of those who have benefited from his services to reward him, we can find no ground in law or equity permitting us to decree compensation to him.

The next error assigned is to the finding of the court that Ritchie did not assign to Cornell, on January 29, 1890, as additional collateral for Ritchie's debt to him, the collateral held by the savings and loan association to secure Ritchie's debt to it of \$171,500. This was the collateral which Ritchie had assigned, subject to the rights of the loan association as pledgee, to Payne, in 1887, to secure Ritchie's indebtedness to Payne, and which, by the writing of March 10, 1890, he purported to sell outright to Payne, in consideration of his assuming the loan association debt. It appears that Ritchie did have drawn up in triplicate such an assignment to Cornell. It further appears that Cornell paid one installment of interest on the loan association debt in February, 1890, on the faith of the assignment. It further appears that he declined to make any further payments, because in some way he learned that the assignment had not been made to him, and that he communicated these circumstances to Payne before Payne assumed the debt of the loan association, and took title to the collateral. It further appears that no such assignment can be found among Cornell's papers. The witness whom Ritchie calls to prove the assignment is a lawyer named Allen, in whose office it was drawn. Allen says that the paper was not delivered in his presence, but that there was something said by Ritchie at that time indicating that the assignment would be useful to avoid the McMullen judgment. Ritchie says the assignment was delivered, and that he produced it to the county auditor when summoned as a witness in the matter of Cornell's taxes. The issue made is not free from doubt, but we reach the same conclusion as the court below, namely, that the assignment was never completed by delivery. It is difficult otherwise to see what motive Cornell would have to repudiate it, within a month after its execution, in a confidential communication to Payne, when he must have known that Payne intended to take action with respect to the same collateral. A desire to escape taxes furnishes no explanation for this. Ritchie's delay in setting up the assignment in this suit until after Cornell's

death does not strengthen the credibility of his evidence in regard to it. The importance the assignment has in the cause is that, if given effect, it increases Cornell's collateral received from Ritchie, and thus makes it more probable that Mrs. Ritchie's stocks held by Cornell as collateral may be exonerated from his debt by the application of Ritchie's stocks to its satisfaction. That he was aware of this effect appears from the first pleading he filed in the case, in which he made averments as to other collaterals to which Cornell had not asserted title in his answer, with the purpose of saving his wife's stocks. When asked why he waited for nearly 18 months, and until after Cornell's death, before mentioning or pressing the matter of this assignment, he utterly fails to give any explanation. The assignment of error cannot be sustained.

The action of the court below in fixing the amount of Ritchie's debt to Payne at \$605,382.06 is assigned for error, on the ground that a payment of \$60,000 was made on the same, which the circuit court refused to credit. Ritchie's statement is that Payne asked him to procure a note from the railway company as evidence of its indebtedness to him, and to transfer the note to Payne in reduction of his indebtedness to Payne; that he did procure such a note for \$60,000, and assign it to Payne as requested, thus reducing Payne's claim against him by the amount of the note. The note was given and assigned in 1887. Subsequent to that time, Ritchie admitted, in writing, his indebtedness to Payne to be such a sum that he could not have taken credit for the \$60,000 note. Payne says he took the note at Ritchie's suggestion, to enable Ritchie to deny an indebtedness of the railway company to him in Canada, in transactions in which the issue was material, and emphatically denies that it was anything but collateral, if, indeed, it could be considered that. The note was worth nothing, and it is absurd to suppose that Payne accepted it as payment for the amount of the face. The assignment is not sustained.

There remains to be considered but one other objection to the decree of the court below. It is not made the subject of a specific assignment, but may, perhaps, be included in the assignment, in which it is said the court erred in fixing the amount due Payne from Ritchie at \$605,382.06. In order to reach this sum, the circuit court charged Ritchie with \$100,000 and accrued interest from 1887, for failure to comply with a contract made by him with Payne on July 9, 1891, by which Ritchie agreed to buy from Payne 100 \$1,000 bonds of the Central Ontario Railway at par and accrued interest, being the same bonds which Payne had bought in 1888. Payne avers a tender of the bonds to Ritchie, and a refusal by him to pay for the same. The point made by counsel for Ritchie is that this agreement of Ritchie was without consideration, and not binding on Ritchie. To this it is responded that the counter promise of Payne to deliver the bonds for the price is quite enough consideration to support Ritchie's promise. We think that there is another principle enforced in equity, which, under the circumstances of this case, requires us to hold that Ritchie should not be held bound by this contract.

To explain our reason for this conclusion, we must refer in some detail to the history of the circumstances out of which this agreement of Ritchie to buy the bonds arose. We have already traced the causes leading to the contract of March 10, 1890, by which, in consideration of Payne's assuming the loan association debt, Ritchie sold or purported to sell outright to Payne 2,000 shares of copper stock and 418 bonds of the railway and some railway stock, the collateral taken from the loan association. Payne says that, in his judgment, this collateral was worth more than the debt for which it was sold, by from 50 to 100 per cent., but that it would not bring the debt at forced sale. Payne denies that there was any understanding that this transfer, absolute on its face, was really a mere transfer of the debt. He testified: "No such understanding, sir; none whatever. I am bound to say I think Mr. Ritchie expected something of that kind, but I abstained very carefully from making any contract that would involve me in any question of that sort." Again, Payne testifies: "I expected to hold onto those securities until I got my money and interest." "We made no disposition about that [i. e. the surplus], and no expectation."

On July 7, 1890, Ritchie and Payne entered into a contract curiously worded, the reason for which is not entirely clear. By it, Payne agreed to sell and deliver to Ritchie all the stocks and bonds acquired by Payne from the savings and loan association, and also those stocks and bonds held by Payne to secure Ritchie's original debt to him, on condition that Ritchie would, on or before September 7, 1890, pay the amount paid by Payne to the loan association, and about \$170,000 paid by Payne on account of Ritchie to other persons and banks. Payne's statement is that this paper agreeing to sell to Ritchie shows that he (Payne) was then the absolute owner of all these securities, and that he was merely giving Ritchie a chance to buy them back, because Ritchie said he would be in funds before the day fixed. Ritchie's statement is that, when Payne claimed to own the securities, there was a serious dispute as to the title of the stocks, and the matter was put in this doubtful form by Payne. Nothing was paid before September 7, 1890, and Payne extended the time until November 1, 1890. No payment then being made, Payne notified Ritchie that the contract was forfeited, and that he would put up for sale 1,000 shares of copper stock, at \$125 a share. Ritchie had not paid, and Payne had not sold, when, on the 9th of July, 1891, they came together again, and entered into their third and last contract, as follows:

"Dear Sir: I will take up and pay all my indebtedness to you, with lawful interest thereon until time of payment, amounting in the aggregate to about \$400,000. I will also purchase back from you \$100,000 of the bonds of the Central Ontario Railway, which you originally bought from the company at par, and the unpaid interest. You are to surrender to me \$653,000 of those bonds of the Central Ontario Railway, now held by you, and \$200,000 of the stock of said company, and also \$300,000 of the stock of the Canadian Copper Company. The above payments to be made within sixty days from its date.

S. J. Ritchie.

"Approved and accepted. H. B. Payne."

When Payne's attention on the stand was directed to the language of this offer as being inconsistent with his ownership of the stocks, he conceded it, and said:

"Mr. Ritchie, I think, was inclined to regard it all the way along—probably does to this time—as still an indebtedness, and as not having transferred the property; and this was in his own language. He sat down in my office, and wrote it in his own terms, without any limit. I allowed him to express himself as he pleased. I was willing to agree, while I owned it as the absolute owner, to hold it as pledgee. I was willing to do anything for him in consideration of his doing so and so."

Payne was asked, in respect to the agreement to buy back the \$100,000 of railway bonds, "whether there was any consideration ever passed from you to him." To this he answered:

"I stated to you a little while ago it was his own generous offer. I did not solicit nor expect that offer. He wrote it down, and put it into that agreement himself."

"Q. What do you say forms that consideration? A. I don't think it was due to a consideration. I am not certain, but there was some pricking of conscience back of it. I have heard—I don't care to have it go down as testimony—that he got those bonds of the company at seventy-five cents. He turned them over to me at par. So there might have been some little pricking of conscience. Q. That is the only thing you can think of that would bind this bargain? A. He bought those bonds, and I agreed to sell them. * * * I am setting up my claim on that agreement, \$100,000, and the interest on the bonds. * * * He insisted upon putting it in, and it was one of the most generous things I ever knew him to do. I mention it more cheerfully, for I think he deserves all the credit for it."

Payne denies that the consideration for the agreement to pay par for \$100,000 of bonds was Payne's agreement to consent to a consolidation of the companies.

It is very clear to us that, whatever the words of these contracts, a court of equity would refuse, under the circumstances, to give either of them effect as a sale of the stocks and bonds. Payne's naïve admission, that while he supposed that Ritchie thought the paper of March 10, 1890, was a mere colorable transfer, he was careful to say nothing which should bind him to such an interpretation, itself stamps the transaction as nothing more than a change of debtors. It is clear, however, that Payne, subsequent to this, insisted to Ritchie, down to the writing of July 9, 1891, that he was the absolute owner of the stocks and bonds, and that this permission to buy them back was a mere matter of grace. Indeed, this is the position he took upon the stand. We may reasonably infer that a large part of the consideration for Ritchie's agreement to buy back the bonds was the concession in the contract of July 9, 1891, that the relation of Ritchie to Payne was that of debtor and creditor, and not of vendee and vendor. The bonds and coupons were not worth more than 30 cents on the dollar, and yet Ritchie agreed to pay 100 cents. In other words, Ritchie was agreeing to pay from seventy to eighty thousand dollars for the privilege of redeeming, without a contest, stocks and bonds which were incontestably his. A court of equity scrutinizes with great care the contracts made between pledgee and pledgor, as to the transfer of title to the pledgee, and does not hesitate to set aside such a contract if there is any ground for thinking that it is a harsh contract, and one brought about by the position

of vantage that the pledgee occupies with reference to the pledgor. *Peagler v. Stabler*, 91 Ala. 308, 9 South. 157; *Linnell v. Lyford*, 72 Me. 280; *Marshall v. Thompson*, 39 Minn. 137, 39 N. W. 309; *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369; *Ford v. Olden*, L. R. 3 Eq. 461.

As the agreement to buy back these bonds was, in our opinion, the price paid by Ritchie to retain his equity of redemption,—a right which must have been accorded him without price,—we think that the bargain was an unconscionable one, and one which, considering the relation of pledgee and pledgor existing between Payne and Ritchie, and the latter's straitened circumstances, cannot be permitted to stand. The debt of Ritchie to Payne, as fixed in the decree below, must therefore be reduced by as much as was included therein, on account of the obligation of Ritchie to buy back the bonds. In other respects, the decree of the court below must be affirmed, except that the circuit court is directed to credit dividends declared and received by the pledgees since the entry of the decree below. The order of the court will be, therefore, that the decree of the court below be modified in accordance with this opinion, and the decree be enforced according to its provisions for advertisement and sale, as if entered upon the date upon which the mandate of this court shall be filed in the court below. The appellants will pay five-sixths of the costs of the appeal, and the executors of Payne will pay one-sixth.

MATTHEWS v. COLUMBIA NAT. BANK et al.

(Circuit Court, D. Washington, W. D. March 31, 1897.)

1. BANKS—INCREASE OF STOCK—RECOVERY OF MONEY PAID FOR STOCK.

Where a vote by the stockholders of a bank to increase the capital stock to a certain amount never became effective because only one-half the proposed increase was subscribed and paid for, the board of directors was not authorized to cancel one-half the proposed additional stock which had not been subscribed for, nor to give the assent of the corporation to an increase to any amount; the shareholders alone being authorized to determine whether there should be any increase, and to fix the amount. And a stockholder who subscribed and paid for new stock issued under the original plan is entitled to recover back the amount thus paid, even though there was afterwards a valid vote of the stockholders to increase the stock to the smaller amount, as he never assented to a subscription for stock under the new plan.

2. SAME—STOCKHOLDERS' MEETINGS.

Where the articles of association of a bank provided that meetings of shareholders might be called by the board of directors, or by any three shareholders, a resolution carried at a meeting called by the president and cashier was not a valid act of the corporation, all the shareholders not being present.

3. SAME—ESTOPPEL.

A stockholder in a corporation is not estopped from questioning the validity of a stockholders' meeting by reason of his participation in the proceedings by proxy, as his agent was only authorized to act at lawful meetings.

Action at law by L. P. Matthews against the receiver of the Columbia National Bank to establish a claim for money received by

the insolvent bank for plaintiff's use. Jury waived. Trial by the court.

T. W. Hammond, for plaintiff.

Philip Tillinghast, for defendants.

HANFORD, District Judge. From the evidence and admissions of the parties on the trial the facts of this case appear somewhat different from the allegations of the plaintiff's complaint heretofore considered upon a demurrer. 77 Fed. 372. The true history of the case, briefly stated, is as follows: In 1892, the Columbia National Bank was in operation with a capital stock of \$200,000. The shareholders voted to increase the capital to \$500,000, and new stock was subscribed and paid for to the amount of \$150,000. On account of the failure on the part of the shareholders to take the remaining one-half of the proposed new issue of stock, the matter hung fire until in the month of July, 1895, when the directors of the bank requested the comptroller of the currency to authorize and certify an increase of the capital stock to the amount which had been paid for. The comptroller of the currency did not take definite action by refusing to grant the certificate, but notified the officers of the bank that the increase of capital would be authorized and certified, provided the shareholders would vote in favor of an increase to that amount. A meeting of the shareholders, called by the president and cashier of the bank, was held in September, 1895, and at said meeting a large majority of the stock, but not all of it, was represented, and a resolution in favor of an increase of capital to the amount of \$150,000 was carried. This action was reported to the comptroller of the currency, and on the 23d day of October, 1895, he certified that the capital had been increased and paid up, and on the following day he declared the bank to be insolvent, and placed a bank examiner in charge of it. In the year 1892 the plaintiff subscribed for 23 shares of the proposed new stock, and made full payment therefor, and this action is to recover back the amount so paid. The plaintiff was not present at the meeting of the shareholders in September, 1895, although he was represented by one T. W. Bean, who assumed to act for him, and voted in his name under a proxy authorizing him to attend meetings of the shareholders, and represent the plaintiff's stock. The plaintiff did not at any time subscribe for new stock after the proposal to make the increase \$150,000 instead of \$300,000. The books of the bank at all times showed that the proposed increase of capital remained uncertified. Although one of the grounds for my ruling on the demurrer to the complaint in this action has been eliminated by the evidence showing that the comptroller of the currency did not exhaust his power to determine whether or not an increase of the capital of the bank to the amount of \$150,000 should be authorized by a definite refusal to grant the request of the board of directors, still enough of the plaintiff's case has been established upon the trial to entitle him to recover. The case is materially different from the cases of *Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39; *Aspinwall v. Butler*, 133 U. S. 595, 10 Sup. Ct. 417; and *Bank v. Eaton*, 141 U. S.

227, 11 Sup. Ct. 984,—for in those cases it was decided that the board of directors had power to make disposition of the increased capital of the bank in excess of the amount subscribed for, and that the action of the board of directors and the comptroller of the currency was binding upon all of the subscribers for new stock; and the court found as a fact that the corporation, through its board of directors, had given its assent to the proposed increase of capital in a manner authorized by law. But under the law existing at the time of the transactions involved in this case, and the ruling of the comptroller of the currency, the board of directors of the bank were not authorized to cancel one-half of the proposed additional stock, which had not been subscribed for, nor to give the assent of the corporation to an increase of any amount. The shareholders alone were authorized to determine for the corporation whether or not there should be any increase, and to fix the amount. The action of the shareholders in 1892 failed to become effective, because only one-half of the proposed increase was subscribed and paid for. The resolution authorizing an increase of the capital to the amount of \$150,000, carried at a meeting of the shareholders in September, 1895, was not a valid act of the corporation, because the meeting was not called by competent authority. The articles of association of the bank provide that meetings of the shareholders may be called by the board of directors, or by any three shareholders. The president and cashier are not empowered to call meetings of the shareholders. A meeting not called lawfully cannot act so as to bind the corporation, unless all the shareholders attend, which they did not in the case of the meeting referred to. The plaintiff is not estopped from questioning the validity of said meeting by reason of his participation in the proceedings by proxy. Mr. Bean was only authorized to act at lawful meetings. He could not bind the plaintiff by waiving objections to a meeting not lawfully called, and not attended by all the stockholders. Even if otherwise valid, the vote at said meeting in September, 1895, failed to become effective so as to bind this plaintiff, because it was the initiation of a plan to increase the capital of the bank, entirely different from the first attempt; and the plaintiff's subscription for stock to be issued under the plan of 1892 could not be carried over as a subscription for new stock under the plan for 1895, without his assent. There is no pretense that he ever did assent to any subscription for shares of an issue of \$150,000 of new stock. The argument advanced on the part of the receiver that effect must be given to the comptroller's certificate as a quasi judicial determination of a fact of the same character as where the comptroller decides that a national bank has become insolvent, and that the certificate is, therefore, not subject to collateral attack, is, in my opinion, unsound. Subscription for stock is a contract, and the elementary principles of the law of contracts make it impossible for a person to be bound as a subscriber for stock who has never assented to be thus bound. I hold that the plaintiff is entitled to recover back the amount of money which he paid into the bank for stock which he never received. Let there be findings and a judgment for the plaintiff in accordance with this opinion.

VOIGHT v. BALTIMORE & O. S. W. RY. CO.

(Circuit Court, S. D. Ohio, W. D. March 29, 1897.)

No. 4,932.

1. RAILROADS—INJURY TO EXPRESS MESSENGER.

While a railroad company is under no obligation to carry an express messenger as such, yet when under a contract with the express company it does carry him it is discharging its function as a common carrier of persons, and he does not lose his rights and character as a passenger because he travels in a special car provided by the railroad company.

2. SAME—CONTRACT EXEMPTING FROM LIABILITY.

A contract whereby a passenger on a railroad train agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants is void, as against public policy, and this rule applies to an express messenger carried by a railroad company in a special car, under a contract with the express company.

This was an action at law by William Voight against the Baltimore & Ohio Southwestern Railway Company to recover damages for personal injuries. The case was heard on demurrer to the answer.

Plaintiff's petition alleges that on the 30th of December, 1895, he was traveling as a passenger for hire, being an express messenger, on a train of the defendant company; that through the negligence of the defendant and its servants the train upon which he was collided with another train of the defendant, whereby he suffered serious and permanent injuries, for which he asks damages. The defendant answered, and its second defense was as follows: "(2) For a second and further defense this defendant says that on said 30th day of December, 1895, it was, and for a long time prior thereto had been, a corporation duly organized under the laws of the state of Ohio, engaged in the operation of its railroad extending from Cincinnati, Ohio, to St. Louis, Missouri, and to other places, and was so engaged at the time of the collision set forth in plaintiff's petition. Defendant says that theretofore, to wit, on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint-stock company duly authorized by law to carry on the express business, and to enter into such contract, whereby it was agreed between said express company and this defendant, among other things, that it would furnish for said express company on defendant's line between the city of Cincinnati and said city of St. Louis certain cars adapted to the carriage of such express matter as said express company should desire to have transported over said line in said cars. Defendant says it was part of said contract that one or more employés of said express company, known as messengers, should accompany said goods in said cars over the said line of this defendant's railroad, and for such purpose be transported therein free of charge, and that it was further provided in said contract that said express company should protect this defendant and hold it harmless from all liability it might be under to such employés for any injuries they might sustain while being transported by this defendant over its said line for the purpose aforesaid, whether said injuries were caused by the negligence of this defendant or its employés or otherwise. This defendant further says that in pursuance to its said contract with said express company it placed upon its line of railroad between Cincinnati and St. Louis for said express company certain cars known as 'express cars,' and was hauling one of said cars in one of its trains on said 30th day of December, 1895, at the time said collision occurred. Defendant says that prior to said 30th day of December, 1895, the said plaintiff made application to the United States Express Company in writing for employment by it as an express messenger; and in pursuance to said application said plaintiff was, prior to and at the time of said collision, so employed by said express company under a certain contract in writing, by the terms whereof plaintiff did assume the risk of all accidents and injuries which he might

sustain in the course of his said employment, whether occasioned by negligence, and whether resulting in death or otherwise, and did undertake and agree to indemnify the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part, or on the part of his representatives, for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay the said express company on demand any sum which it might be compelled to pay in consequence of any such claim; and did further agree to execute and deliver to the corporation operating the transportation line upon which he might be injured a good and sufficient release, under his hand and seal, of all claims, demands, and causes of action arising out of any such injury, or connected with or resulting therefrom; and did further ratify all agreements made by the said express company with any transportation line in which said express company had agreed, or might agree, that the employes of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company. Said plaintiff did further agree to be bound by each and every of such agreements as fully as if he were a party thereto, and did further agree that his said agreement should inure to the benefit of any corporation upon whose line said express company should forward merchandise, as fully and completely as if made directly with such corporation. Defendant says that at the time the plaintiff sustained the injuries complained of herein, if any such were sustained, he was in an express car being transported by this defendant over said line from Cincinnati to St. Louis, in pursuance to said contract between said express company and this defendant, and said plaintiff was at the time of said collision upon said car in pursuance to his said contract with said express company, and not otherwise." Plaintiff demurs to the foregoing, on the ground that it constitutes no defense in law to the case stated in the petition, and thus arises the issue here to be decided.

C. M. & E. W. Cist, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendant.

TAFT, Circuit Judge (after stating the facts). It seems to be well settled that an express messenger, though carried in a special car, when carried under a contract with a railroad company made by the express company for the transportation of express matter in his charge, is a passenger for hire. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Blair v. Railroad Co.*, 66 N. Y. 313; *Brewer v. Railroad Co.*, 124 N. Y. 59, 26 N. E. 324; *Kenney v. Railroad Co.*, 125 N. Y. 422, 26 N. E. 626; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Railroad Co. v. Thomas*, 79 Ky. 169; *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Railway Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116; *Chamberlain v. Railroad Co.*, 11 Wis. 238; *Railway Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280. Postal clerks, whose relation to the railroad company is analogous to that of the express messenger, are also accorded the same rights as passengers for hire. *Seybolt v. Railroad Co.*, 95 N. Y. 562; *Nolton v. Railroad Co.*, 15 N. Y. 444; *Magoffin v. Railway Co.*, 102 Mo. 540, 15 S. W. 76; *Mellor v. Railway Co.*, 105 Mo. 455-460, 16 S. W. 849; *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883; *Hammond v. Railroad Co.*, 6 S. C. 130; *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. 943; *Railroad Co. v. Kingman (Ky.)* 35 S. W. 265; *Baltimore & O. R. Co. v. State*, 72 Md. 36, 18 Atl. 1107; *Railway Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280; *Railway Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116; *Railroad Co. v. Shott (Va.)* 22 S. E. 811; *Collett v. Railroad Co.*, 16 Adol. & E.

(N. S.) 984; *Arrowsmith v. Railroad Co.*, 57 Fed. 165; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. 859. A passenger for hire is entitled to the highest degree of care and skill from the railroad company in the management of its trains and the preservation of his safety. If the plaintiff was a passenger for hire, then a stipulation by the common carrier whose passenger he was, exempting the carrier from responsibility for its negligence or that of its servants, was void, according to the unbroken line of authorities in the supreme court of the United States. *Railroad Co. v. Lockwood*, 17 Wall. 359; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *Inman v. Railway Co.*, 129 U. S. 128-139, 9 Sup. Ct. 249; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 322, 6 Sup. Ct. 750, 1176; *Hart v. Railroad Co.*, 112 U. S. 331-338, 5 Sup. Ct. 151; *Railway Co. v. Stevens*, 95 U. S. 655; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174-183; *Railroad Co. v. Pratt*, 22 Wall. 123, 124; *Express Co. v. Caldwell*, 21 Wall. 264-268. In the case at bar, according to the averments of the answer now under consideration, the express company guaranteed the railroad company against any damage to it arising from suits for personal injury by the employes of the express company. By contract between the express company and the plaintiff, the plaintiff agreed to release all right of action which he might have against the railroad company for negligence, and stipulated that his agreement with the express company should inure to the benefit of the railroad company. These two contracts are, in effect, the same as a contract made directly with the railroad company by the messenger, whereby he agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants. In so far as they have this effect, they are void, because against public policy. *Railroad Co. v. Lockwood*, 17 Wall. 359. They do not, therefore, constitute a valid defense to the action of the plaintiff, to recover damages for injuries caused by the negligence of the defendant company.

The argument of defendant's counsel against the demurrer may be stated thus: The rule of public policy which renders invalid a stipulation by a common carrier, restricting its liability for loss caused by its negligence or that of its servants, applies only to those duties which it is bound to perform as a common carrier. Whenever that which it engages to do is something which it is not under obligation as a common carrier to do, it has the same freedom of contract as a private carrier for hire, and may therefore exempt itself by stipulation from liability for its own negligence or that of its servants. In the case at bar, the defendant company was not under any common-law obligation to furnish express facilities to the express company whose employé the plaintiff was. If, then, the express business is not performed by the railroad company as a common carrier, but under special contract, it must be done by it as a private carrier. Hence the conclusion is said to follow that the messenger was carried by the railroad company as a private carrier, under a special contract with the express company, under which the railroad company might lawfully exempt itself from liability arising from negligence of itself

or that of its servants. The argument of counsel is sustained by the decision of the supreme court of Indiana in the case of *Railway Co. v. Keefer*, decided in October, 1896, and reported in 44 N. E. 796. The facts of that case are not to be distinguished from the one presented on this demurrer. With deference to that court, I find it impossible to follow the reasoning upon which this conclusion is based. It is based upon distinctions supposed to be established by the supreme court of the United States in the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628. The cases cited in the beginning of this opinion clearly establish the fact that the relation between the railroad company and the express messenger, where there is no contract exempting the railroad company from liability, is that of a public carrier to a passenger for hire. The supreme court of the United States in the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, did not decide that the express business was not the business of a common carrier. The plain intimation of the opinion of the court was that the express business had become such a necessity that it was the duty of a railroad company to furnish express facilities to the public; but the point in judgment was that a railroad company was not obliged to furnish to an independent express company means for carrying on the express business upon its road. The court held that the railroad company was not a common carrier of common carriers, and that it sufficiently complied with any obligation which it was under to the public to furnish to them express facilities, if it made a contract with one company to do all the express business upon its road. It follows from that case that, if a railroad company chooses to do its own express business, it may exclude all express companies from its line. The case does not decide that the railroad company, when it contracts to transport the express matter of an express company, is not discharging its duty as a common carrier in offering the public express facilities. It is true that it is under no obligation to carry an express messenger as such. It may stipulate with the express company that it will provide one of its own servants to take charge of the express matter while upon its trains. But when it does carry an express messenger, it is discharging its function as a common carrier of persons. An express messenger is not a different kind of freight from an ordinary passenger upon its passenger train, except that he travels in a special car provided by the railroad company. He would have the right to demand of the railroad company that he should be carried in the passenger train if he tendered his fare. If the company, in order to discharge its duty to the public to afford express facilities upon its line, agrees to carry him in a special car in a passenger train, he does not thereby lose his rights and character as a passenger. This may be seen from the ruling of the supreme court in an analogous case. A railroad company is a common carrier of cattle. It is under no obligation to carry drovers to attend the cattle. It may assume this duty itself, and provide servants of its own to water and care for the live freight. When it does, however, make a contract allowing a drover to ride upon its cattle train, furnishing as one of the terms of the con-

tract of affreightment free transportation for the purpose, he is carried as a passenger for hire by the railroad company as a common carrier. The reason is that the railroad company is bound to carry the drover if he presents himself and pays his fare upon its passenger trains, and if, for any purpose of its own, the railroad company sees fit to allow the drover to ride upon its freight trains, though it is not under any obligation to carry him upon such trains, in doing so it does not lose the character of a common carrier carrying a passenger for hire. *Railroad Co. v. Lockwood*, 17 Wall. 359. A common carrier is allowed to make any reasonable stipulation restricting its liability to a shipper or to a passenger, and in this wise it may cut down its liability to exactly that to which a private carrier for hire would be subject; but this does not make the common carrier a private carrier, so as to escape the rule of public policy which forbids the common carrier from stipulating against liability for its own negligence.

If, then, a railroad company in carrying an express messenger for an express company is a common or public carrier of a passenger for hire, the railroad company cannot, by restricting its liability for injury to the messenger, change its character as a common carrier.

In *Railroad Co. v. Lockwood*, Mr. Justice Bradley, in delivering the opinion of the supreme court, used this language:

"It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character, and becomes an ordinary bailee for hire, and therefore may make any contract he pleases; that is, he may make any contract whatever because he is an ordinary bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts also losses by means of any superior force and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, while the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, while at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made, is the company a public carrier as to the twenty parcels, and a private carrier as to the one? On this point there are several authorities which support our view, some of which are noted in the margin. A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of

specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

It is quite true that the railroad company is not obliged to furnish a special car for the express messenger, but when it does so then it assumes the relation of a common carrier to the messenger carried, because he is one of the public whom the railroad company is bound to carry in some kind of a car. There is no such difference in the risk of carrying the express messenger and the ordinary passenger in the same train as there is between the risk to the owner of a truck boat in carrying a keg of specie or a load of expensive furniture and that involved in carrying the produce which he holds himself out to transport. In *Bates v. Railroad Co.*, 147 Mass. 255, 17 N. E. 633, it was held that an express messenger who was riding on a ticket in the baggage car providing that, in consideration of being allowed to ride in the baggage car, the messenger would assume all risks of accident and injuries received by him while so riding, was a valid contract, exempting the railroad company from an injury received by the messenger through the negligence of the company; and a similar ruling was made in the case of *Hosmer v. Railroad Co.*, 156 Mass. 506, 31 N. E. 652. The conclusion of the court was based on the fact that the place where the plaintiff was riding was one in which the defendant was not under obligation to carry him. The contract gave him the privilege which he sought for his own convenience. I think that the *Bates Case* and the *Hosmer Case* are not in accord with the decisions of the supreme court of the United States. First, the contracts did not expressly exempt the railroad company from accidents occurring through its own negligence, and yet they were given that effect, which is in conflict with the decision of the supreme court in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 383. Secondly, the cases cannot be reconciled with the decision in *Railroad Co. v. Lockwood*, in which the plaintiff, a drover, was allowed to ride upon a freight train, a much more dangerous place than the passenger train, to which the railway company might have compelled him to resort had it seen fit to do so, and yet he was still treated as a passenger for hire, who on grounds of public policy was not permitted to barter away his right to the care of the railway company in his transportation. There is a class of cases upon which defendant's counsel rely, known as the "Circus Cases," the first of which is *Coup v. Railway Co.*, 56 Mich. 111, 22 N. W. 215. This is followed in *Railroad Co. v. Wallace*, 14 C. C. A. 257, 66 Fed. 506, and *Robertson v. Railway Co.*, 156 Mass. 525, 31 N. E. 650. In these cases the railroad company agreed to haul over its road the train of cars belonging to the circus proprietor, and containing the animals and the company of persons

engaged in the circus. It was held that the railway company might exempt itself from liability for the negligence of itself and its servants in the hauling of the circus train. Without deciding that, under the rules of public policy enforced in the federal courts, such a contract could be held valid, it is sufficient to say that the cases are clearly distinguishable from the one at bar. In them, the contract of the railway company was not one of carriage; it was merely one of hauling or towing cars by the locomotives of the railway company. The freight and passengers were not intrusted to the railway company in the manner in which the merchandise and passengers received by a common carrier are intrusted to it. *Transportation Line v. Hope*, 95 U. S. 297, 300; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 184. The railway company might refuse absolutely to receive the cars of the circus company and to haul them. The railway company did not hold itself out as engaging in the business of hauling or towing.

The demurrer to the second defense of the answer is sustained, and the case will stand for trial on the issues made by the other defenses.

BOARD OF COM'RS OF LAKE COUNTY v. PLATT.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 803.

1. BONDS ISSUED TO PAY JUDGMENTS CREATE NO DEBT.

The issue of municipal bonds in satisfaction of a valid judgment against a municipality does not create a debt; it merely extends the time for its payment.

2. HOLDERS OF SUCH SECURITIES ARE IN PRIVITY WITH THE JUDGMENT CREDITOR.

The holder of coupons cut from county bonds issued in satisfaction of a judgment is the owner of a part of the same debt evidenced by the judgment itself, and is in privity with the judgment creditor. In an action upon the coupons he may invoke every presumption and estoppel in support of his claim which the judgment creditor could call to his aid in an action upon the judgment.

3. JUDGMENT—COLLATERAL ATTACK.

The judgment of a court which had jurisdiction of the subject-matter and of the parties to the action is not void, nor can it be successfully attacked collaterally, either because it was erroneous, or because it was obtained by fraud and collusion.

4. JURISDICTION OF COURT—TEST.

The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong.

5. JUDGMENT—EXTENT OF ITS ESTOPPEL BETWEEN THE SAME PARTIES.

In an action between the same parties, or those in privity with them, upon the same claim or demand, the prior judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand.

6. JUDGMENT BY DEFAULT—EFFECT.

A judgment by default is as conclusive an estoppel upon all questions, the decision of which was necessary to the rendition of the judgment, as a judgment after contest and trial.

7. JUDGMENT UPON CONTRACT DETERMINES THE POWER OF A DEFENDANT CORPORATION TO MAKE THE CONTRACT.

In the rendition of every judgment against a corporation upon a contract, the court necessarily determines the question whether or not the corporation had power to make the contract.

8. CONSTITUTIONAL LIMITATION—JUDGMENT CONCLUDES QUESTION OF POWER TO CREATE DEBT THEREUNDER.

In an action to enforce the collection of bonds or coupons issued in payment of a judgment entered by default against a municipal or quasi municipal corporation, the judgment conclusively estops the corporation from making the defense that the indebtedness evidenced by the judgment was in excess of the amount which the corporation had the power to create under the limitations of the constitution of the state in which it was incorporated.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

This writ of error was sued out to reverse a judgment in favor of George W. Platt, the defendant in error, and against the board of county commissioners of the county of Lake, the plaintiff in error, upon certain coupons cut from judgment bonds issued by that corporation. The complaint contained allegations that on April 16, 1891, a judgment for \$60,000 was rendered against the plaintiff in error in favor of Daniel E. Parks, in the district court of Arapahoe county, in the state of Colorado; that the plaintiff in error, in pursuance of an act of the legislature of Colorado, approved April 17, 1889, which provided that "the board of county commissioners of any county in this state, against which a judgment has been or may be rendered in any of the courts of record in this state, may issue its bonds in satisfaction of such judgment and accrued interest thereon, dollar for dollar; such bonds to draw interest at not to exceed eight per centum per annum" (Sess. Laws Colo. 1889, pp. 31, 32, § 2), issued certain bonds and coupons in satisfaction of this judgment; that the defendant in error was the owner of certain of these coupons, and that they were past due, and unpaid. The plaintiff in error, by its answer, disclosed the facts that the judgment was rendered in favor of Parks and against the plaintiff in error in the district court of Arapahoe county on account of services, which he alleged in his complaint in that action he had rendered to the board of county commissioners of Lake county at various times between May 18, 1883, and March 28, 1890; that the summons in that action had been served, and that the board had duly appeared in it by the county attorney of the county of Lake before the judgment was rendered, but that it had not answered the complaint, and that the judgment had been taken by default. It alleged that it did not in fact owe Parks anything on account of services, or on any account, when that judgment was rendered; that the judgment was rendered, and the bonds were issued to pay it, in pursuance of a fraudulent and collusive agreement between Parks and the board that the latter should permit the judgment to be entered by default, and should issue its bonds, and that its members should receive a part of these bonds as compensation for permitting the judgment to be rendered. The answer contained the further plea that the original debt evidenced by the judgment, the judgment itself, and the bonds issued to pay it were all void, because they created an indebtedness in excess of that authorized by section 6, art. 11, of the constitution of Colorado, which reads: "No county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads or bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof, and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited,

unless when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided, that any county in this state which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness, providing the question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this state for the issuance of road, bridge and public building bonds, and the bonds authorized at such election shall be issued and provision made for their redemption in the same manner as provided in said law." The court below sustained a demurrer to this answer, and rendered a judgment against the county.

George R. Elder, for plaintiff in error.

H. B. Johnson, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The prohibition of the constitution of Colorado is against the creation of a debt in excess of the limit there prescribed. If the Parks judgment against the board of county commissioners of Lake county on April 16, 1891, evidenced a valid indebtedness of that county, the issue of the bonds from which the coupons in suit were cut in payment of that judgment was not the creation of a debt, and did not fall under the ban of the constitution. It was but the extension of the time of payment of a debt already existing and due, pursuant to plenary authority given to the board of county commissioners by the legislature of Colorado. Sess. Laws Colo. 1889, pp. 31, 32. Nor could the validity of the bonds be affected by any fraudulent agreement as to their issue, if the judgment evidenced a valid debt, because the judgment was satisfied by the delivery of the bonds. There is no claim that the county sustained any loss or injury by the mere extension of the time of the payment of the debt, and fraud without damage constitutes no cause of action, and no defense to a legal claim. Counsel for the plaintiff in error is thus driven to maintain the position that the judgment in favor of Parks was void, as a basis for his contention that the bonds created a debt. His complaint of the court below accordingly is that it should have held that the judgment in favor of Parks was void, because the debt evidenced by it was in excess of the limit prescribed by the constitution, and because it was procured by collusion and fraud. Let us consider the grounds of this

complaint in their order. The first contention is that the fact that the amount of the debt evidenced by the Parks judgment was in excess of the constitutional limitation rendered that judgment void, because the board had no power to incur such a debt, and the district court of Arapahoe county had no power to hold that such a debt did exist. The soundness of this position depends upon the jurisdiction of that court to hear and determine the question whether or not the board of county commissioners of Lake county had authority to create a debt to Parks for \$60,000 for his services during the series of years named in his complaint. Judgments of courts within the scope of their power to hear and determine are not void, whether right or wrong, and they are impregnable to collateral attack; but judgments of courts in cases beyond the scope of their power to hear and determine are nullities. Had the district court of Arapahoe county, by the law of its organization, authority to hear and decide the question of the power of the board under the constitution of Colorado to incur the debt of \$60,000 to Parks? The powers of every corporation are limited. No corporation has the power to do every act or to make every contract which an individual can do or make. Hence, whenever a corporation seeks to do an act by means of the judgment of a court, or is charged in a court with default in the performance of one of its contracts, the first question the court must hear and determine is whether the act or contract was within the powers vested in the corporation through its franchise. Nor does the rightfulness of its decision of this question affect the conclusiveness of its judgment. We had occasion to examine this matter with some care in *Foltz v. St. Louis & S. F. Ry. Co.*, 19 U. S. App. 576, 8 C. C. A. 635, and 60 Fed. 316. In that case the railway corporation, which had no power whatever to condemn land in the state of Arkansas, had obtained a judgment of condemnation of a tract of land in that state in an action in which the defendant appeared, but did not plead the want of the power of eminent domain in the corporation. After the railway company had taken possession of the land condemned, the defendant brought an action of ejectment for it, and the railway company brought a bill to enjoin that action. It was argued in that case, as it is in this, that since the court erroneously decided that the corporation had the power which it never did have, and inasmuch as the existence of that power lay at the foundation of the right to the judgment, that judgment was void. Our conclusion was expressed in these words:

"Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong; and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error

or appeal, or impeached for fraud. *Insley v. U. S.*, 14 Sup. Ct. 158; *Cornett v. Williams*, 20 Wall. 226; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217; *In re Sawyer*, 124 U. S. 200, 221, 8 Sup. Ct. 482; *Skillerns v. May's Ex'rs*, 6 Cranch, 267; *McCormick v. Sullivan*, 10 Wheat. 192; *Hunt v. Hunt*, 72 N. Y. 217; *Colton v. Beardsley*, 38 Barb. 30, 52; *Otis v. The Rio Grande*, 1 Woods, 279, Fed. Cas. No. 10,613; *Hamilton v. Railroad Co.*, 1 Md. Ch. 107; *Evans v. Haefner*, 29 Mo. 141, 147; *State v. Weatherby*, 45 Mo. 17; *Rosenheim v. Hartsock*, 90 Mo. 357, 365, 2 S. W. 473; *State v. Southern Ry. Co.*, 100 Mo. 59, 13 S. W. 398; *Hope v. Blair*, 105 Mo. 85, 93, 16 S. W. 595; *Musick v. Railway Co.*, 114 Mo. 309, 315, 21 S. W. 491. Wherever the right and the duty of the court to exercise its jurisdiction depend upon the decision of the question it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack, unless impeached for fraud."

The action which Parks brought against the plaintiff in error was a simple action upon contract. The court in which he brought it was a court of general jurisdiction of the state in which the parties resided, and in which the contract was made. The power of that court to hear and determine every question essential to the disposition of that action is beyond question. In every action for damages for the failure of a corporation to perform a contract, the court must decide these four questions before it can enter a judgment for the plaintiff: First. Had the corporation the power to make the agreement? Second. Did it make it? Third. Has it performed it? Fourth. What is the amount of the damages? The district court of Arapahoe county necessarily decided the first three of these questions in the affirmative, and found the damages to be \$60,000, before it entered the judgment for Parks. It was its right and its duty to determine these questions, and it did so. If its decision was erroneous, its judgment could be reversed on appeal. But its determination of the question, which the plaintiff in error is seeking to retry in this case, was the exercise by that court—and the rightful exercise—of its jurisdiction; and, whether its decision was right or wrong, it cannot be successfully attacked in this collateral proceeding.

Counsel for the plaintiff in error makes another attempt to escape from the effect of this judgment on the ground that it does not estop the board from showing in this action that the debt it evidenced was in excess of the constitutional limitation, because that defense was not pleaded in the original action, because the judgment in that action was by default, and because the parties and the demand in controversy are not the same in this case as they were in that case. The settled rule upon this subject was so clearly stated in the leading case of *Cromwell v. County of Sac*, 94 U. S. 351, 352, that it has been universally followed in the courts of the United States. It is that in an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand. But in a case in which the second action is upon a different claim or demand, the prior judgment is an estoppel as to those matters in issue or points of controversy upon the determination of which

the finding or verdict was rendered. In *Dickson v. Wilkinson*, 3 How. 57, 61, Mr. Justice McKinley, in delivering the opinion of the supreme court, said: "It is a universal rule of law that if the party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment." In *Dimock v. Copper Co.*, 117 U. S. 559, 565, 6 Sup. Ct. 855, the defendant procured his discharge in bankruptcy five days before a judgment was rendered against him in a state court of Massachusetts, but he did not plead it, or call it to the attention of that court. To an action upon this judgment brought in a state court of New York he pleaded this discharge. The supreme court held that his failure to plead it in the original action, and the original judgment against him in Massachusetts, estopped him from presenting the discharge as a defense in the action upon that judgment in New York, although it was a perfect defense to the original debt. In *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 691, 15 Sup. Ct. 733, the supreme court declared that "a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest." If, therefore, Parks or his assignees had sued the plaintiff in error upon his judgment, or upon the debt which it evidenced, that judgment would have conclusively estopped the plaintiff in error from making the defense that its indebtedness was in excess of the constitutional limitation. But this action is upon a part of the same debt represented by that judgment. The bonds and coupons issued in satisfaction of the judgment evidence the same indebtedness that the judgment represented, and the holder of each bond and of each coupon is, in legal effect, an assignee of the debt pro tanto. Thus the defendant in error is in privity with Parks, and is entitled to invoke every presumption and every estoppel in support of his claim which Parks could have called to his aid if he had brought this action upon his judgment. *Iron Co. v. Eells*, 32 U. S. App. 348, 15 C. C. A. 189, 201, and 68 Fed. 24, 36. Our conclusion is that in an action to enforce the collection of a judgment or the collection of bonds or coupons issued in payment of a judgment against a municipal or quasi municipal corporation, the judgment conclusively estops the corporation from making the defense that the original indebtedness evidenced by it was in excess of the amount which the corporation had the power to create, under the limitations of the constitution of the state in which it was incorporated. *Biddle v. Wilkins*, 1 Pet. 686, 692; *Dickson v. Wilkinson*, 3 How. 57, 61; *U. S. v. New Orleans*, 98 U. S. 381, 395; *Davenport v. County of Dodge*, 105 U. S. 237; *Louisiana v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648; *Boyn-ton v. Ball*, 121 U. S. 457, 461, 7 Sup. Ct. 981; *Franklin Co. v. German Sav. Bank*, 142 U. S. 93, 101, 12 Sup. Ct. 147; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 691, 15 Sup. Ct. 733; *Cutler v. Huston*, 158 U. S. 423, 15 Sup. Ct. 868; *Breeze v. Haley*, 11 Colo. 351, 355, 18 Pac. 551; *Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565; *Board v. Burpee* (Colo. Sup.; decided in 1897)

48 Pac. 539; *Aetna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329, 344; *U. S. v. Board of Auditors*, 28 Fed. 407; *Railroad Co. v. Baker* (Wyo.) 45 Pac. 494, 501; *State v. Gloyd* (Wash.) 44 Pac. 103; *Sioux City & St. P. R. Co. v. Osceola Co.*, 45 Iowa, 168, 175; *Id.*, 52 Iowa, 26, 2 N. W. 593; *Edmundson v. School Dist.* (Iowa) 67 N. W. 671; *Howard v. City of Huron* (S. D.) 59 N. W. 833, 834; *Id.*, 60 N. W. 803, 805. The cases of *Commissioners v. Loague*, 129 U. S. 493, 503, 505, 9 Sup. Ct. 327, and *Kelly v. Town of Milan*, 21 Fed. 842; *Id.*, 127 U. S. 139, 8 Sup. Ct. 1101,—are not in conflict with this conclusion. The opinion and the effect of the decision in the former case are explained and limited in *Franklin Co. v. German Sav. Bank*, 142 U. S. 93, 100, 12 Sup. Ct. 147. The latter case rests upon the proposition that the decree invoked was based upon an agreement of compromise by which the municipality contracted to admit the validity of certain bonds which it never had the power to issue, and the court held that the agreement was as void, for want of power, as were the bonds, and that, as there was no adjudication by the court of the validity of the bonds, the decree was not an estoppel upon the municipality from contesting them.

A single question remains: Was the fact, pleaded in the answer, that the judgment in favor of Parks was obtained by fraud and collusion, an avoidance of that judgment, or a defense to this action? No fraud was alleged which deprived the board of notice of the suit and of ample time to answer the petition of Parks therein before the judgment was rendered. A direct suit may undoubtedly be maintained in a proper case, to set aside a judgment for fraud in procuring it. *Gaines v. Fuentes*, 92 U. S. 10, 21; *U. S. v. Norsch*, 42 Fed. 417; 1 Black, Judgm. § 321, and cases cited. But until such a suit is brought, and until such a decree of avoidance is rendered, the judgment of a state court which had jurisdiction of the subject-matter and of the parties is conclusive upon the merits of the controversies determined by that judgment between the parties and their privies in every court of the United States, and such a judgment cannot be collaterally impeached for fraud or collusion. *Iron Co. v. Eells*, 32 U. S. App. 348, 15 C. C. A. 189, 201, and 68 Fed. 24, 35; *Christmas v. Russell*, 5 Wall. 290, 305; *Maxwell v. Stewart*, 22 Wall. 77, 81; *Anderson v. Anderson*, 8 Ohio, 108; *Mason v. Messenger*, 17 Iowa, 261, 272; *Smith v. Smith*, 22 Iowa, 516, 518; *Railway Co. v. Hall*, 37 Iowa, 620, 622. Moreover, this defense of fraud and collusion was barred by the statute of limitations. The judgment in favor of Parks was rendered in 1891. The statutes of Colorado provide that "bills for relief on the ground of fraud, shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards." 2 Mills' Ann. St. Colo. 1891, p. 1641, § 2911. The answer in this case was filed on September 19, 1895, and it shows that the plaintiff in error discovered the facts constituting the fraud it pleads in 1891. No appeal was ever taken from the Parks judgment, nor has it ever been reversed, modified, or set aside. Upon the principle to which we have adverted, it constitutes a complete estoppel against the plaintiff in error upon

every issue which was essential to its rendition, and the allegations of fraud and collusion in its procurement contained in the answer in this case were utterly immaterial, and present no issue in this case. The issue the plaintiff in error sought to tender thereby could not be tried in this collateral way, and the relief which the facts it pleads might once have warranted in a direct proceeding to avoid the judgment was barred by the statute of limitations of the state of Colorado.

A strong plea for the plaintiff in error was made in the brief and argument in this case on the ground that the upholding of the Parks judgment would open the door for corrupt municipal officers to permit unjust judgments to be rendered against their municipalities. But the great majority of municipal officers are upright, honest, and watchful of the public welfare. The actions of honest and faithful officials cannot be subjected to rules fit only for those who are dishonest and faithless. When a municipality is sued, and appears in court by its duly-authorized officers, that court must not presume that such officers are among the few who are untrue to their trusts, and refuse to give credence to their acts and statements. It is bound to presume that they are of the great majority that are honest, faithful, and worthy of credit. Moreover, municipal officers are the agents of the municipality. Under our system of government they are not selected by the creditors of the city or county, nor by the courts, but they are chosen by the municipality itself. If there is danger that such officers will violate their oaths, and corruptly barter away the rights of the people whom they represent, through the abuse of rules of action which have been established for honest men and faithful officials, the remedy is in the hands of the people. Let them elect honest and faithful agents, and the danger will disappear. It is a general rule of law that the principal, and not the opposite party, to a contract or transaction must suffer for the corrupt and fraudulent acts of the agent within the scope of his authority; and, whether or not this principle applies to a municipality to its full extent in law, it certainly does in morals, and no people who elect corrupt and dishonest officials to represent them can hope to entirely escape the natural and inevitable effects of their action.

The judgment below must be affirmed, with costs, and it is so ordered.

AETNA LIFE INS. CO. v. BOARD OF COUNTY COM'RS OF HAMILTON COUNTY.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 834.

1. TRIAL TO THE COURT—SPECIAL FINDINGS.

It rests in the discretion of a court to which a case is submitted without a jury to make a general finding, instead of special findings. The finding may be as general as the verdict of a jury, and have the same effect.

2. COURTS—POWER OVER JUDGMENT DURING TERM.

The court has full power over its judgments and orders to vacate them or correct them, on its own motion, during the same term; and the vacating of a judgment at the same term, because inadvertently entered, leaves the case as if the inadvertent judgment had never been entered.

3. TRIAL—SUBMISSION OF CASE—DISMISSAL WITHOUT PREJUDICE.

When the evidence is presented, the arguments made, and the case taken under advisement, this is a submission of the case; and the right of plaintiff to have the action dismissed without prejudice then ceases. Such dismissal cannot thereafter be made without the permission of the court in its discretion.

4. SAME.

The court may announce its findings in open court, and have them entered on the record, as well as to write them out and file them.

In Error to the Circuit Court of the United States for the District of Kansas.

This action was brought in the United States circuit court for the district of Kansas, Second division, to recover the amount of a large number of overdue coupons, pertaining to two issues of funding bonds of Hamilton county, Kan. One of such issues, of 20 bonds for the sum of \$1,000 each, purported to have been made on May 7, 1887, at Kendall, in said county, under the seal of the county, and to be signed by J. M. Neeland, chairman of the board of county commissioners, and attested and registered by J. M. Hicks, county clerk, by John S. Speer, deputy, and made payable at the fiscal agency of the state of Kansas in the city of New York, upon May 7, 1917. The other issue, of 40 bonds of like amount, purported to have been made on May 16, 1888, at the same place, under the seal of said county, and to be signed by C. H. Griffith, chairman of the board of county commissioners, and by James M. Hicks, county clerk, and were made payable at the said fiscal agency on May 1, 1918. Interest coupons were attached to the bonds of both issues for the semiannual interest at the rate of 6 per cent., payable at said fiscal agency. Those pertaining to the first issue matured on the 1st days of February and August; and those pertaining to the last issue, on the 1st days of January and July of each year. The bonds, upon the face thereof, contained a reference to the statute under which they purported to have been issued, and full recitals of compliance with all requirements precedent to their issue, and appeared to be regular and valid, and it was not disputed that the plaintiff was a bona fide holder, for value, of the bonds and coupons, without notice of any infirmity or defect. The defense pleaded and relied upon at the trial by the court (jury trial having been duly waived) was that the persons acting as, and assuming to be, the board of county commissioners of said county, and holding their meetings at Kendall during the time from April, 1887, until after June, 1888, and of which Neeland and Griffith successively claimed to be chairman, did not constitute, and were not during that time, the legal board of county commissioners of said county of Hamilton, and had no right to act as such, nor any authority to issue any such bonds; and hence that said bonds were not valid obligations of said county of Hamilton.

From the agreed statement of facts presented on the trial, it appears that Hamilton county was organized by a proclamation of the governor, January

29, 1886, designating Kendall as the temporary county seat, and appointing a temporary board of county commissioners and county clerk; that an election was called for April 1, 1886, to permanently locate the county seat and elect county officers; and that, upon canvass of the votes, it was declared that Syracuse was selected as such county seat, and thereupon the board of county commissioners removed their sessions to Syracuse. Later, in October, 1886, it was determined by the supreme court of Kansas that no town had been selected at said election as the permanent county seat, and that Kendall remained the temporary county seat. The question of locating the permanent county seat was again submitted to the voters of the county at the general election in November, 1886, and, upon a canvass of the votes, the election was again declared to have resulted in favor of Syracuse. This decision was not acquiesced in, and still another election to determine the selection of the permanent location of the seat of said county was held June 20, 1888, and Syracuse again declared to have been selected. On November 9, 1888, the supreme court of Kansas duly determined that the city of Syracuse was duly selected as such county seat at the election last referred to.

It is needless to follow in this statement, with particularity, the details of this prolonged dispute about the county seat of Hamilton county, and the attendant litigation. One result was that, from the beginning of the dispute, some of the commissioners, holding that Kendall continued to be the county seat, held their meetings there, and filled as vacancies the places of such as did not meet at that place. Other commissioners, holding that Syracuse was the county seat, met there, and filled the alleged vacancies in the same manner; so that during the most of the years 1887 and 1888 there were two full boards of county commissioners, one meeting at Kendall, the other at Syracuse, each assuming and transacting the business of the county, and claiming to be the only legal board. On the trial of the case, the court found generally for the defendant.

F. P. Lindsay (W. C. Webb and O. J. Bailey with him on brief), for plaintiff in error.

George Getty (C. N. Sterry with him on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. It rested in the discretion of the court to make a general finding, instead of special findings. The finding might be as general as the verdict of a jury, and have the same effect. Rev. St. U. S. § 649; *City of Key West v. Baer*, 13 C. C. A. 572, 66 Fed. 440.

2. The judgment entered on June 3, 1895, having, as appears by the statement of the judge, been inadvertently ordered to be entered, was properly, upon the judge's own motion, three days later in the same term, set aside and held for naught. The court had full power over its judgments and orders to vacate them or correct them during the same term. *Ex parte Lange*, 18 Wall. 163; *Goddard v. Ordway*, 101 U. S. 752. The vacating of the judgment at the same term, because inadvertently entered, left the case as if said inadvertent judgment had never been entered.

3. The transcript shows (page 92) that the evidence was presented to the court, the arguments made, and the case taken under advisement by the court on December 13, 1894. This was a submission of the case to the court, and the right of the plaintiff to have the action dismissed without prejudice then ceased. Such dismissal thereafter

could not be made without permission of the court, in its discretion. Code Civ. Proc. Kan. § 397; *Mason v. Ryus*, 26 Kan. 466.

4. The memorandum of Judge Riner, filed June 3, 1894, was, in substance, a general finding in favor of the defendant; but, if that finding was defective in form, the general finding set forth in the record of December 4, 1895, which was made when Judge Riner was on the bench, and which includes the ruling of the court upon the plaintiff's motion to dismiss, was a sufficient general finding in the case in favor of the defendant, and the judgment thereupon was full and complete. The court might announce its findings in open court, and have them entered on the record, as well as to write them out and file them. The submission of the cause to the judge continued until the case was finally decided and judgment entered.

5. There are no exceptions in the case in respect to evidence offered or admitted. It does not appear that any evidence offered on behalf of the plaintiff was excluded, or that objections on the part of the plaintiff to evidence offered by the defendant were called to the attention of the court by any request for a ruling thereon. Even in this record it is not indicated to what evidence the objections could have been pertinent. An objection, on whatever grounds, to "sundry records and books," etc., and to "oral and written testimony tending to establish all and every of the matters," etc., is uncertain and meaningless. The judgment is affirmed.

MORGAN v. ROGERS et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 839.

1. LAND GRANTS—PATENTS—CONDITIONS SUBSEQUENT.

The act of May 21, 1872, to enable the city of Denver to purchase certain land in Colorado for cemetery purposes, and authorizing the mayor of the city to enter the designated 160 acres at the land office at the minimum price, to be held and used as a burial place by said city and vicinity, did not operate to annex any condition to the grant so authorized; and as the patent issued pursuant thereto conveyed the title absolutely, without mention of any use, a condition subsequent will not be implied, and the subsequent appropriation of the land to other purposes than that expected does not work a forfeiture.

2. SAME.

After the government has parted with the absolute title to land, it cannot annex any condition to that title, nor limit the use to which the land may be devoted. And especially is this true after the title has passed from the original grantee to others.

3. SAME—NAKED TRUST.

Where a city, by its charter, was empowered, in its corporate name, to acquire and hold the title to lands for public purposes, and to sell and convey the same, the grant by a patent to the mayor of the city in trust for the city, and to his successors and assigns forever, created a mere naked, passive trust, under which the entire beneficial use, possession, and control vested at once and absolutely in the city, as, under the English statute of uses, which is part of the common law in this country, the use was executed on the delivery of the patent.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action of ejectment brought by Platt Rogers, as mayor of the city of Denver, and the city of Denver, against Samuel B. Morgan. Judgment was rendered in favor of plaintiffs upon demurrer to the answer, and defendant brought this writ of error.

Willard Teller (H. M. Orahood and E. B. Morgan with him on the brief), for plaintiff in error.

F. A. Williams (G. Q. Richmond with him on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge. This is an action of ejectment brought by the defendants in error against the plaintiff in error and numerous other persons to recover the possession of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 2 in township 4 S., of range 68 W., in the county of Arapahoe and state of Colorado, and comes here by writ of error to review the judgment of the circuit court rendered in favor of the plaintiffs below against the defendant, Morgan, upon demurrer to his answer to the plaintiff's complaint. The complaint alleges that by virtue of an act of congress approved May 21, 1872 (17 Stat. 140), a patent of the United States, on November 15, 1873, was duly issued, conveying to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, lands described, including the land aforesaid, in trust for the city of Denver. This patent was recorded March 26, 1875, in the office of the register of deeds of said county, and the defendants have entered upon and occupied the land in question. The answer of defendant Morgan admits the entry upon and occupation by the defendants of the land in dispute, and sets out in full the act of congress of May 21, 1872, referred to in the complaint, the title of which is, "An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes." It enacts "that the mayor of the city of Denver, Colorado territory, be, and is hereby authorized to enter through the proper land office, at the minimum price per acre, the following lands belonging to the United States [description], being 160 acres of land lying adjacent to the city of Denver, to be held and used as a burial place for the said city and vicinity." The answer then sets out a copy of the patent, which, after reciting payment for the lands made by Joseph E. Bates, mayor, in trust for the city of Denver, grants "unto said Bates, mayor, in trust for said city, and to his successors, the said tract." Habendum: "Unto said Bates, mayor, in trust for the city of Denver, and to his successors and assigns forever." The patent contains no reference to the act of May 21, 1872, nor any reference to any use of the land. The answer also sets out in full another act of congress of January 25, 1890, which refers to the previous act of May 21, 1872, and corrects an error in the description of a part of the land (not affecting the land in

question), and confirms the patent, which contained a correct description, and provides "that the city of Denver be, and it is hereby authorized to vacate the use of the said land, or any part thereof, as a cemetery, and to appropriate the use of the same for a public park or grounds, and to no other purpose." The answer further sets forth that upon the petition of the Right Reverend Joseph P. Machebeuf, catholic bishop of the diocese of Denver, representing that the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 2, township 4, range 68, had been used by the members of the Catholic Church of Denver and Arapahoe county as a burial place since 1863, and asking that the same land be conveyed to him, the said bishop and his successors in office, the city of Denver, by its mayor, by deed duly executed pursuant to vote of the city council of the said city of Denver, in consideration of \$50 then paid therefor, conveyed the land last above described to said Joseph B. Machebeuf, his heirs and assigns forever, which deed was duly recorded in the records of said county, February 7, 1874. The answer further avers that on April 25, 1887, the said Joseph P. Machebeuf, by deed, conveyed to said defendant, Morgan, the land in dispute, for the consideration of \$20,000, and that on May 2, 1887, the Colorado Catholic Loan & Trust Association, to whom Machebeuf had previously conveyed the same land, also deeded the same to said Morgan, who entered thereon, and platted the same as an addition to the city of Denver, and that the other defendants hold through conveyances of lots from said Morgan, and that the city of Denver levied and collected taxes on said lots for the four years from 1888 to 1891, inclusive.

1. The act of congress of May 21, 1872, to enable the city of Denver to purchase certain land in Colorado for cemetery purposes, and authorizing the mayor of the city of Denver to enter the designated 160 acres at the land office at the minimum price, to be held and used as a burial place by said city and vicinity, did not operate to annex any condition to the grant so authorized. Conditions subsequent are not favored, and the terms used must clearly show that it was intended that the grant should be on condition, or they will not be construed to have that effect. In this case, although the use to which it was expected the land would be put is mentioned, it is rather as an explanation of the reason for permitting such an unusual entry of the land by a municipal corporation, than for any other purpose. There are no words restricting the use to that mentioned, nor providing for forfeiture in case the land is put to other use.

2. The patent by which the title to this land was conveyed conveys the land absolutely, in fee, and without mention of any use whatever.

3. The later act of June 25, 1890, in terms, confirms and approves this patent; and the act was operative further in correcting a mistaken description in the former act, which had been corrected in the patent, and which affected another tract, and not the land here in dispute. The provision of this later act as to the use to which the land might be put is inoperative. After the government had parted

with the absolute title to the land, congress could not annex any condition to that title, nor limit the use to which the land might be devoted. Especially is this true as to the land in dispute here, as before the passage of that later act the title to such land had passed from the city of Denver by its deed to Machebeuf, and from Machebeuf to Morgan and his grantees.

4. The patent of November 15, 1873, conveyed and vested the legal title to the land described in the city of Denver, and not in Joseph E. Bates, the mayor, and his successors. Under the provisions of the charter of the city of Denver quoted in the answer in this case, the city of Denver was empowered, in its corporate name, to acquire and hold the title to lands for public purposes, and to sell and convey the same. It was under no disability, therefore, in respect to the power to receive and hold the title to the land conveyed by this patent. Although the grant by the patent was in terms to "said Bates, mayor, in trust for the city of Denver, and to his successors and assigns forever," such trust was a mere naked, passive trust, under which the entire beneficial use, possession, and control vested at once and absolutely in the city of Denver. Under the English statute of uses (27 Hen. VIII. c. 10), which is part of the common law in this country, the use was executed on the delivery of the patent, and the complete legal title, at law and in equity, passed at once to, and vested in, the city of Denver, as the *cestui que use*.

5. It follows that, if the allegations of the answer are true, the title to the land in question passed by the deed of the city of Denver to Machebeuf, and from Machebeuf, by deed, to Morgan. The demurrer should have been overruled. The judgment is therefore reversed, and the cause remanded for further proceedings.

LANYON v. EDWARDS et al.¹

(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 545.

CONSPIRACY AND COLLUSION—TRESPASS.

A petition in an action for alleged conspiracy and collusion, from which it appeared that the acts complained of as trespasses were committed by defendants in the execution of the judgment of a state court and in enforcing a valid mortgage, *held* not sufficient to state a cause of action.

In Error to the Circuit Court of the United States for the Western District of Texas.

W. H. Brooks, for plaintiff in error.

H. P. Drought, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges.

¹ Petition for rehearing denied April 14, 1897.

PARDEE, Circuit Judge. This is an action brought by the plaintiff in error against the defendants in error for alleged conspiracy and collusion. The prayer for relief is as follows:

"Plaintiff prays citation to issue in due form to defendants (if same has not already been done) to answer this petition and cause of complaint, and that on final hearing thereof plaintiff have and recover judgment of defendants for the various sums and amounts sued for herein, and for all costs, and for special and general relief, and to be restored to his proper rights in the possession of his estate, or, in the alternative, have judgment for his several causes of damage, as set forth in this petition."

The second amended original petition on which this prayer for relief is based is voluminous in immaterial, if not irrelevant, history, is redundant in conclusions of law and of fact, and is deficient in specific facts sufficient to constitute a cause of action. As well as we can understand the petition, the plaintiff seeks to recover for damages to real estate and for the conversion of personal property, resulting from, as alleged, the conspiracy, collusion, force, and fraud of the defendants in prosecuting and procuring a certain judgment to be rendered against him in the state court, and in obtaining the possession by assignment of a certain mortgage bearing on petitioner's lands, but conceded to be due and owing, which judgment and mortgage the defendants caused to be enforced through seizure of the petitioner's lands and personal property, to the injury of the lands and the loss of the personal property.

The most effective attempt at reciting the facts in relation to his claim is the following paragraph from his petition:

"That to further harass and persecute the plaintiff the said defendants, Edwards and Brought, by collusion, force, and fraud, did seek to oust plaintiff from his rightful and lawful possession of said lands and personal property as aforesaid; did institute suit, or cause said suit to be instituted, in the 45th district court of Bexar county, Texas, on the — day of —, 1890, to harass and persecute plaintiff, and did so of the 4th day of November, 1892, by force, fraud, and collusion, and by means of undue local influence on the jury, or some of the jurors, trying the said cause in the 45th district court of Bexar county, Texas, by having one of the jurors, named C. P. Coch, to remonstrate with one of the witnesses sworn for plaintiff, viz. A. W. Smith, that he had given in his estimate of the value of the land too low, which remonstrance was given while the jury were considering of their verdict; and by sundry acts of collusion and of fraud not known to plaintiff did further carry on said suit in the 45th district court of Bexar county, Texas; and by and together with such acts of collusion and fraud did procure a judgment in said 45th district court of Bexar county, Texas, on the 4th day of November, 1892, against the plaintiff for nine thousand nine hundred and ninety-three (\$9,993.63) dollars and sixty-three cents."

The facts actually stated in the petition with reference to the trespass to the lands and the conversion of the personal property, while perhaps sufficient to warrant an action for damages, yet clearly appear by the context to have been acts committed by the defendants in the execution of the judgment of the state court, and in enforcing the mortgage above referred to. To the second amended original petition the circuit court sustained a general exception and 11 special exceptions and, as the plaintiff declined to further amend, dismissed the suit. The petitioner below sued out this writ of error, and assigned for our consideration the following:

"The court erred in sustaining defendant's general exception and defendant's eleven special exceptions to plaintiff's second amended original petition filed herein, and dismissing said cause, and rendering judgment final against the plaintiff."

We have given careful consideration to the brief filed by the learned counsel for the plaintiff in error, and have considered in the most favorable light the plaintiff's second amended original petition, but we do not find reversible error in the ruling assigned, nor any error patent on the face of the record. The judgment of the circuit court is therefore affirmed.

NATIONAL BANK OF COMMERCE v. RIETHMANN et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 828.

STATUTES—RETROACTIVE OPERATION—ATTACHMENT.

The Colorado act of 1887 amending the statute relative to attachments by dropping out one of the grounds of attachment, does not have a retroactive operation, so as to affect pending attachments.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action at law brought by the National Bank of Commerce of Kansas City, Mo., against John J. Riethmann, George W. Riethmann, and Napoleon Wagner upon a promissory note, in which an attachment was issued. The court sustained a motion by defendants to quash the attachment, and plaintiff brought this writ of error.

This action was begun in October, 1894. The Colorado statute relative to attachments (Sess. Laws Colo. 1887, p. 121, §§ 91, 92) provided that upon issuing the summons or filing the complaint in an action on contract, or at any time afterwards before judgment, a writ of attachment against the unexempt property of the defendant might issue, upon filing in the office of the clerk of the court an affidavit of the plaintiff, his agent or attorney, or some creditable person for him, setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of the indebtedness, as near as may be, and alleging one or more of the several enumerated causes for attachment, one of which causes was as follows: "Thirteenth. That the action is brought upon an overdue promissory note, bill of exchange, or other written instrument for the direct and unconditional payment of money only, or upon an overdue book account." After the filing of the complaint, and upon the filing in the office of the clerk of the court of an affidavit for attachment conforming to all the requirements of said statute, and alleging as cause for the attachment that the promissory note of the defendants upon which the action was founded, and which was also described in said affidavit, was overdue from a date prior to the filing of the complaint, a writ of attachment in due form in said action was on October 25, 1894, duly issued, under the seal of the United States circuit court for the district of Colorado, wherein said action was pending, directed to the marshal of said district, and that said marshal on the same day, in obedience to and by virtue of said writ, duly attached and levied upon property, real and personal, of one of the defendants in said action. Afterwards the legislature of Colorado, by an act approved April 8, 1895, and which took effect July 6, 1895 (Sess. Laws Colo. 1895, p. 143), purporting to amend the aforesaid act of 1887 "so as to read as follows," re-enacted the said act of 1887 verbatim, except that the thir-

teenth subdivision of section 92, above quoted, was wholly omitted from and left out of said act of 1895. Afterwards, on the 18th day of January, 1896, a petition was addressed to said United States circuit court by the defendants below asking the court to vacate, quash, and set aside the said attachment, upon the ground that the action was upon an overdue promissory note, and that by virtue of said act of 1895 the provision allowing an attachment to issue on an overdue promissory note was repealed. Thereupon the court adjudged that, as the statute upon which the writ was issued had been repealed, the said writ was thereby abated and obsolete.

Elijah Robinson (W. W. Anderson with him on brief), for plaintiff in error.

George P. Steele (Charles Hartzell with him on brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. An attachment is an ancillary remedy provided by statute, by means of which a contingent lien is obtained and impressed upon property of a defendant, which becomes vested and perfected on entry of judgment and levy of execution. Being a remedy provided by statute, and resting on the statute alone, an unconditional repeal of the statute before judgment, and while the lien still remains contingent, destroys the lien. But such lien, though pertaining to the remedy given by statute, is a substantial and valuable security, and, upon a repeal of the statute, would be preserved and continued by a saving clause excepting pending attachments from the effect of the repealing statute.

2. The act of 1895 did not abolish the remedy by attachment, nor purport to affect the lien, or the validity of attachments theretofore lawfully issued and then existing. It simply, and as to the future, dropped out of the statute one of the causes for issuing the writ; so that, after the act went into effect, that ceased to be a ground upon which an issuance of such writ could be claimed. The act did not provide that writs lawfully issued upon that ground, while it was a lawful ground for attachment, should abate, or that acts done under such writs should be held void, or that liens obtained under them should lapse. Full effect is given to the statute by allowing to it prospective operation. The existing writ in this case, and the lien of such writ, were not affected by any of the terms of the statute. The stated cause upon which it was issued, valid at the time, and effectual then to obtain a valid writ, was a thing of the past, which had served its purpose at the proper time, and was no longer material, except to show that the writ was, when issued, lawfully issued.

3. But while we think it clear that it was not intended by the legislature that this act of 1895 should have a retroactive operation, and affect attachments then outstanding, and that the act will not bear that construction, the constitution of Colorado, by section 11 of the bill of rights, ordaining that no law retrospective in its oper-

ation shall be passed, is conclusive. The supreme court of Colorado in *Railway Co. v. Woodward*, 4 Colo. 162, and in *Lundin v. Railway Co.*, Id. 433, holds that section 11 of the bill of rights operates as a saving clause in repealing statutes. The subject is carefully examined in the first of these cases, and in the other it is applied to a case where the right derived from the repealed statute had not become fixed and established by judgment. The judgment that the writ of attachment is abated is reversed, and the cause is remanded for further proceedings.

UNION PAC. RY. CO. et al. v. YATES.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 802.

1. EVIDENCE—MEDICAL BOOKS.

Medical books cannot be read to the jury as independent evidence of the opinions therein expressed. Therefore, in an action against a railroad company to recover for personal injuries, in which it was contended that the plaintiff sustained a severe shock, which affected the nerves of the spine, and had produced a dangerous and progressive disease of the spinal cord, it was error to permit plaintiff to read to the jury certain extracts from a medical book relating to such diseases, especially as some of the medical experts stated that it was not regarded as an authority, and the fact in question was susceptible of proof by competent living physicians.

2. SAME—FEDERAL COURTS—BINDING EFFECT OF STATE DECISIONS.

While the federal courts sitting within a state must enforce the provisions of a local statute prescribing rules of evidence, unless it is in conflict with some law of the United States regulating the same subject, yet the decisions of the state courts construing common-law rules of evidence are not obligatory on the federal courts, though they will be followed when the question at issue is balanced with doubt.

3. SAME.

McClain's Code Iowa, § 4903, providing that "historical works, books of science or art, and published maps or charts, when made by persons in different between the parties, are presumptive evidence of facts of general notoriety or interest," does not authorize medical works to be read in evidence for the purpose of establishing the probable effects of a physical injury.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

John N. Baldwin, for plaintiffs in error.

James McCabe (Charles M. Harl and George E. Hibner with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. Horace W. Yates, the defendant in error, sued the Union Pacific Railway Company and its receivers, who are the plaintiffs in error, for injuries sustained in a railway collision, which occurred on November 22, 1892, near the town of Alda, in the state of Nebraska, on the line of the Union Pacific Railroad. The plaintiff below was a mail agent in the service of

the United States, and he was riding in that capacity on one of the trains at the time of the collision. The injuries which the plaintiff sustained in consequence of the collision, to all outward appearances, were not serious. One of his arms and one of his legs were bruised, but not broken, and his left ear was cut, but beyond this his body appears to have borne no visible marks of injury. It was contended at the trial, however, that the plaintiff sustained a severe shock, which affected the nerves of the spine, and had produced a dangerous and progressive disease of the spinal cord, which had permanently disabled him, and was liable to prove fatal. In support of this contention, the plaintiff offered in evidence, and was allowed to read to the jury, over the objection of the defendant company, certain extracts from a book or monograph, which was published by Dr. John Eric Erichsen, entitled "On Concussion of the Spine and Nervous Shock and Other Obscure Injuries to the Nervous System, in Their Clinical and Medico-Legal Aspects." The material parts of the extracts thus read were as follows:

"It is well known to every surgeon of experience that no injury to the head is too trifling to be despised. This observation, made of old by Hippocrates, may be applied with equal, if not greater, justice to injuries of the spine; for, if the brain is liable to suffer serious primary lesion and protracted secondary disease from the infliction of slight, and perhaps, at the time, apparently trivial, injuries to the head, the spinal cord is at least equally prone to become functionally disturbed and organically diseased from injuries sustained by the vertebral column.

"My object in these lectures will be to direct your attention to certain injuries of the spine that may arise from accidents that are often apparently slight, from shocks to the body generally, as well as from blows inflicted directly upon the back, and to describe the train of progressive symptoms that lead up to the obscure, protracted, and often dangerous diseases of the spinal cord and its membranes, that sooner or later are liable to supervene thereon. These injuries of the spine and spinal cord occur not unfrequently in the ordinary accidents of civil life, in falls, blows, horse and carriage accidents, injuries in gymnasiums, etc., but in none more frequently or with greater severity than in those which are sustained by persons who have been subjected to the violent shock of a railway collision. And if, in these lectures, I speak more of the injuries of the spine arising from this than from any other class of accidents, it is not because I wish to make a distinction in injuries of the spine according to their causes, and still less to establish anything like a speciality of 'railway surgery,' but rather because injuries of the nervous system of the kind we are about to discuss have become of much practical importance from the great frequency of their occurrence, consequent on the extension of railway traffic, and because they are so frequently the cause of litigation. There is also a special and painful interest attaching to them from the distressing character of the symptoms presented by the sufferers. Moreover, in these cases there is always a peculiar difficulty, which is often greatly increased by the absence of evidence of outward and direct physical injury, by the obscurity and insidious character of the early symptoms, the slowly progressive development of the secondary organic lesions, and the functional derangements entailed by them, and the very uncertain nature of the ultimate issues of the case. Thus, they constitute a class of injuries that often tax the diagnostic skill of the surgeon to the very utmost. * * *

"I wish particularly and very specially to impress upon you that, although I shall have frequent occasion to speak of 'shocks' to the nervous system arising from railway accidents, I do not consider that these injuries stand in a different category from accidents occurring from other causes in civil life; and it will be one of the main objects of these lectures to show you that precisely

the same effects may result from other and more ordinary injuries. It must, however, be evident to you all that in no ordinary accidents can the shock, physical and mental, be so great as those that occur on railways. The rapidity of the movement, the momentum of the persons injured and of the vehicle that carries them, the suddenness of its arrest, the helplessness of the sufferers, and the natural perturbation of mind that must disturb the bravest, are all circumstances which increase the severity of the resulting injury to the nervous system, and which have led surgeons to consider these cases as somewhat exceptional and different from ordinary accidents. There is, in fact, much the same difference between these and the more ordinary injuries of the nervous system as there is between a gunshot wound and other contused and lacerated wounds of the limbs. The cause is special, and the results are peculiar; but, though peculiar, they are not so unlike those arising from other accidents as to justify us in regarding them as being in any essential respect distinct and different. The peculiarity of those obscure shocks is sufficiently great, however, to warrant us in grouping them together and considering them as a whole in a separate chapter in the great book of surgery. Perhaps the one circumstance which more than any other gives a peculiar character to a railway accident is the thrill or jar—the 'ébranlement' of French writers; the sharp vibration, in fact—that is transmitted through everything subjected to it. It is this vibratory shock or jar which by some is compared to an electric shock, by others to setting the teeth on edge, that causes a carriage to be shattered into splinters, and occasions the sharp, tremulous movements that run through every fiber of its occupants, and that constitutes the shock. In addition to this, the body of the traveler is thrown to and fro often five or six times, without any power of resistance or self-preservation. * * *

"In considering these injuries, I shall adopt the following arrangement: (1) The effects of severe blows directly applied to the spine, but without obvious lesion of the bone or ligament. (2) The consideration of the effects of slight and apparently trivial injuries applied directly to the spine. (3) The effects that injuries of distant parts of the body, or that shocks of the system, unattended by any direct blow upon the back, have upon the spinal cord. (4) The effects produced by sprains, wrenches, or twists of the spine. * * *

"My object in the present lecture is to direct your attention to a class of cases in which the injury inflicted upon the back is either very slight in degree, or in which the blow, if more severe, has fallen upon some other part of the body than the spine, and in which, consequently, its influence upon the cord has been of a less direct and often of a less instantaneous character. Nothing is more common than that the symptoms of spinal mischief do not develop for several days after heavy falls on the back. The symptoms arising from these accidents have been very variously interpreted by surgeons, some ignoring them entirely, believing that they exist only in the imagination of the patient, or, if they do admit their existence, they attribute them to other conditions of the nervous system than any that could arise from the alleged accident. And, when their connection with and dependence upon an injury have been incontestably proved, no little discrepancy of opinion has arisen as to the ultimate results of the case, the permanence of the symptoms, and the curability, or not, of the patient.

"I have often remarked that in railway accidents those passengers suffer most seriously from concussion of the nervous system who sit with their backs turned towards the end of the train which is struck. Thus, when a train runs into an obstruction on the line, those who are sitting with their backs to the engine will probably suffer most; whilst, if a train is run into from behind, those who are facing the engine will most frequently be the greatest sufferers. * * * Those who are facing the engine are in the first instance thrown suddenly and violently forward off their seats against the opposite side of the compartment; hence they will frequently be found to be cut about the head and face, and more especially across the knees and legs, by coming in contact with the edge of the opposite seats. They then rebound, and in the rebound may sustain that concussion of the spine which they escape in the first shock. Those, on the other hand, who are sitting with their backs to the engine, being carried backward, when the momentum of the carriage is suddenly arrested, are struck at once, and, if traveling rapidly, are jerked violently against the

backs of their seats, and thus suffer, in the first instance and by the first shock, from concussion of the spine. The force with which they strike the partition between the compartments with their shoulders or loins is greatly augmented by their opposite fellow travelers being thrown upon them. In the oscillation and to and fro movement to which the carriage is subjected, they are apt to be thrown forward, and, rebounding, to be struck again about the posterior part of the body. They are more helpless than those who are facing the engine, who frequently have time to stretch out their hands in order to save themselves, or to clutch hold of the side of the carriage when in the act of being thrown forward. When a carriage is run into from behind, the reverse of this takes place, and the carriage is driven, as it were, against those passengers who have got their backs turned towards the hind part of the train. In the violent oscillations that take place, a passenger is thrown backward and forward by a kind of shuttlecock action, and frequently, coming in contact with others on the opposite side, may become seriously injured, especially by contusion about the head. The oscillations to which the body is subjected in these accidents are chiefly felt in those parts of the vertebral column that admit of most movement, viz. at the junction of the head and neck, of the neck and shoulders, and of the trunk and pelvis. Hence it is that the spine so frequently becomes strained and injured in these regions by railway injuries."

The admission of the aforesaid extracts from the writings of Dr. Erichsen constitutes the chief error that has been assigned. We think that the testimony in question was clearly incompetent when judged by common-law rules of evidence. The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authoritative, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps a more important, reason for rejecting such testimony, is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease, or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truths of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons it is very generally held that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts, it is safer to rely on the testimony of competent witnesses, who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury. *Collier v. Simpson*, 5 Car. & P. 73; *Ashworth v. Kittridge*, 12 Cush. 193; *Ware v. Ware*, 8 Me. 42, 56, 57; *State v. O'Brien*, 7 R. I. 336, 338; *People v. Hall*, 48 Mich. 482, 490, 12 N. W. 665; *Gallagher v. Railway Co.*, 67 Cal. 13, 6 Pac. 869; *Epps v. State*, 102 Ind. 539, 549, 550, 1 N. E. 491; *Com. v. Wilson*, 1 Gray, 337; *Melvin v. Easley*, 1 Jones (N. C.) 386; *Payson v. Everett*, 12 Minn. 217 (Gil. 137); *Fowler v. Lewis*, 25 Tex. 380; *Railway Co. v. Jones* (Tex. Sup.) 14 S. W. 309, 310; *Lawson*, Ev. pp. 169-171, and cases cited.

In the following cases, to wit, *Bowman v. Woods*, 1 G. Greene, 441, *Stoudenmeier v. Williamson*, 29 Ala. 558, 566, 567, and *Merkle*

v. State, 37 Ala. 139, 141, certain medical works of standard authority were received in evidence, and were held to be admissible. But, so far as we have been able to ascertain, these cases are at variance with the well-settled rule which prevails elsewhere. In this connection it should be observed that while the prevailing rule is, as above stated, that medical books cannot be read as independent evidence of the opinions which they contain, yet, under some circumstances, such books may be referred to. For example, a physician is sometimes allowed, while testifying, to fortify an opinion which he may have expressed, by referring to medical works of standard authority on which his opinion is in part predicated; and, when a medical expert has thus indicated the source of his opinion, the books themselves may be offered subsequently, for the purpose of showing that they do not support the opinion expressed, or that they contradict it. *Ripon v. Bittel*, 30 Wis. 619; *Pinney v. Cahill* (Mich.) 12 N. W. 862. In some states, also, the practice prevails of permitting counsel, while addressing the jury, to read extracts from law books and from scientific works as a part of their argument. This latter practice is approved in some jurisdictions, and strongly condemned in others, while in some jurisdictions the practice in this respect is regarded as a matter which rests entirely in the sound discretion of the trial judge. *Reg. v. Courvoisier*, 9 Car. & P. 362; *State v. Hoyt*, 46 Conn. 330; *Lawson, Ev.* pp. 178, 179. All the authorities agree, we believe, that standard works which deal with the exact sciences, including herein interest and annuity tables, and tables compiled from well-established data showing the average duration of human life, are receivable in evidence to establish the facts to which they relate. *Schell v. Plumb*, 55 N. Y. 598; *Mills v. Catlin*, 22 Vt. 98; *Munshower v. State*, 55 Md. 11; *Green v. Cornwell*, 1 City H. Rec. 11. We can perceive no reason why the truths of exact science to which all intelligent persons assent, and well-established historical facts, should not be proven by the writings of competent authors, and all courts agree that they may be so proven. But beyond this the rule does not extend of allowing a contested issue of fact to be established by the unsworn declarations of third parties.

It is contended, however, that in the state of Iowa the practice is approved of permitting medical books to be read to the jury as independent evidence of the opinions therein contained, and that the practice in that respect which prevails in the state courts of Iowa is obligatory upon the federal courts sitting in that state. Reference is also made to a recent statute of the state of Iowa which reads as follows:

"Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." *McClain's Code Iowa*, § 4903.

We concede it to be the law that the federal courts sitting within a state must enforce the provisions of a local statute prescribing rules of evidence, unless the local statute is in conflict with some law of the United States regulating the same subject. *McNeil v. Holbrook*, 12 Pet. 84, 88, 89; *Wright v. Bales*, 2 Black, 535;

Potter v. Bank, 102 U. S. 163, 165. But the decisions of the courts of a state construing common-law rules of evidence are not obligatory on the federal courts. Such decisions are merely persuasive authority, and, while the federal courts will follow them when the question at issue is balanced with doubt, yet they will not be governed by such decisions when they appear to be at variance with the great weight of authority. **Burgess v. Seligman**, 107 U. S. 20, 2 Sup. Ct. 10; **Railroad Co. v. Baugh**, 149 U. S. 368, 372, 13 Sup. Ct. 914; **Ryan v. Staples**, 40 U. S. App. 427, 23 C. C. A. 541, and 76 Fed. 721, 727; **Railroad Co. v. Hogan**, 27 U. S. App. 184, 11 C. C. A. 51, and 63 Fed. 102. The decision above referred to in **Bowman v. Woods**, 1 G. Greene, 441, was a decision construing the common law, and, for the reasons last stated, we do not feel compelled to follow it.

With reference to the statute of Iowa above quoted, it is only necessary to say that, by its express provisions, "books of science or art" are only made "presumptive evidence of facts of general notoriety or interest"; and we are unable to find that it has ever been held that the provision in question was intended to cover medical works of all kinds, and to make them independent evidence of whatever medical opinions or theories are therein expressed or formulated. In the case of **Brodhead v. Wiltse**, 35 Iowa, 429, the statute in question was referred to, but it was simply held that the statute was not intended to render inadmissible proof which before was admissible. In **Quackenbush v. Railway Co.**, 73 Iowa, 458, 462, 35 N. W. 523, a passage appears to have been read from a medical work on diseases of the throat and nose, which passage was objected to on the ground that it was "too indefinite"; but the court ruled that the objection, on the ground stated, was not well taken. In another Iowa case (**Peck v. Hutchinson**, 55 N. W. 511, 512), a medical work which was read in evidence was objected to, for the reason that it was an old edition, and therefore incompetent. The court ruled that, if an error was committed in reading passages from the book in question, it was not prejudicial to the complaining party, and therefore declined to reverse the judgment. On the other hand, the statute now under consideration received a definite construction by the supreme court of California in the case of **Gallagher v. Railway Co.**, 67 Cal. 13, 6 Pac. 869; and it was there held that the statute does not authorize standard medical works to be read in evidence for the purpose of establishing the probable effects of a physical injury. It was further held that the expression "facts of general notoriety or interest" means "historical facts, facts of the exact sciences, and of literature or art," all of which, when relevant to a case in hand, may be proven by the production of books of standard authority, rather than by the mouths of living witnesses. We are of the opinion, therefore, that the authorities which have been invoked by the defendant in error are insufficient to establish such a settled construction of the Iowa statute as would justify a ruling that the evidence complained of in the case at bar was properly admitted.

under the provisions of that statute, the evidence being, in our judgment, clearly inadmissible under the common law.

Only one medical expert who testified at the trial pronounced the book of Dr. Erichsen, from which the foregoing excerpts were taken, to be a standard work, and so recognized by the medical profession. The same witness admitted, however, that some of the greatest physicians and surgeons in the world had disputed the theories of Dr. Erichsen, as contained in the book in question. Five other medical experts who were sworn testified, in substance, that the monograph written by Dr. Erichsen was not regarded by the profession as a modern or standard work, and some of them stated that it was not regarded as an authority on the subject of which it treats. We think that a work of that kind, concerning the merits of which there is such a wide difference of opinion among members of the medical profession, should not be accepted in a court of justice as competent evidence to establish the fact that a certain ailment, from which the plaintiff below appeared to be suffering, was the result of a nervous shock sustained some years previously in a railway collision. The case disclosed no apparent necessity for resorting to testimony of such a doubtful and uncertain character. The fact alleged is susceptible of proof by the opinions of competent living physicians, who may be subjected to a careful cross-examination, and compelled to state in the presence of the jury, in an intelligible way, the reasons upon which their opinions are founded; and we think that the defendants were entitled to insist that it should be so established. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

McPECK v. CENTRAL VT. R. CO.

(Circuit Court of Appeals, First Circuit. March 23, 1897.)

No. 187.

1. TRIAL—DIRECTION OF VERDICT.

The rule applied that a verdict may be directed for defendant on a mere question of fact when the proofs are insufficient to support a verdict for plaintiff if he should recover one.

2. MASTER AND SERVANT—FAILURE OF MASTER TO REPAIR.

Where a servant of a railroad company was injured as the result of a defect in the management of trains, the fact that he had given notice of the defect does not relieve him of the risk he assumed in entering the service, when fully 20 days elapsed between his complaint and the injury without any change having been made in the methods of the company, and this fact was known to him.

3. FELLOW SERVANTS.

The foreman of a gang of railroad track builders and the engineer of a train are fellow servants, and the master is not liable for an injury to one by the negligence of the other.

4. SAME—CONTRIBUTORY NEGLIGENCE.

The rule that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care, have avoided the consequences of such negligence, or that

the act of the defendant was willful, has no application to an action against the master to recover damages for an injury to one of two fellow servants by the negligence or willful act of the other, where the master had no such notice of the plaintiff's supposed negligence, or of the alleged willfulness, that he could guard against them.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Henry McPeck against the Central Vermont Railroad Company to recover damages for personal injuries. The court directed a verdict for defendant, and plaintiff sued out a writ of error.

Barron C. Moulton and Victor J. Loring, for plaintiff in error.

Chester W. Witters and Forrest C. Manchester, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. No controversy has arisen as to the pleadings in this case, and therefore it is not to be inferred that we either approve them or disapprove them.

The case was opened to a jury in the circuit court, and, at the close of the evidence in behalf of the plaintiff, that court, on the motion of the defendant, directed a verdict for it. The plaintiff duly excepted, and sued out this writ of error. He assumes that the ruling below was necessarily erroneous unless it involved a "matter of law" or a "conclusion of law." This is a mistaken assumption. A verdict may thus be directed on a pure issue of law raised by the parties, or, which may be substantially the same thing, on an application of the law to admitted facts, or on a mere question of fact when the proofs are insufficient to support a verdict. As was said by us in *De Loriea v. Whitney*, 11 C. C. A. 355, 361, 63 Fed. 611, 617:

"When a verdict in one direction ought to be set aside as against the weight of evidence, then, under the rule as now understood, the court ought to direct a verdict in the other direction."

The time has gone by when the federal courts sit, at their own loss of time, and at the expense of the parties, to take verdicts which they can foresee ought not to have been taken. *Meehan v. Valentine*, 145 U. S. 611, 618, 12 Sup. Ct. 972; *Railroad Co. v. Gentry*, 163 U. S. 353, 365, 16 Sup. Ct. 1104; *Monroe v. Insurance Co.*, 3 C. C. A. 280, 52 Fed. 777, 787.

The case of the plaintiff in error, as stated by him, is as follows:

"This was an action of tort for injuries received June 9, 1893, on the defendant's railroad, between St. Albans and Swanton Junction, Vermont, between seven and eight o'clock in the morning. It appeared in evidence that plaintiff was in the employ of the defendant, and was foreman of a gang of Italians, and employed with them in building a new track west of the old track going north from St. Albans. On the morning of the 9th day of June, the plaintiff was ordered to clean the dirt from the ends of the ties on the old track, on the east side of the roadbed, in order that the new rails might be laid thereon near Jewett's Crossing, a public highway about three miles north of St. Albans; and in order to show the Italians with him how to shovel

the dirt from the ties, as he could not speak Italian, and the Italians could not speak English, he got a shovel, and facing towards the north, with his back towards St. Albans, lifted and threw a shovelful of dirt from the ties; then looked back towards the south, in the direction of St. Albans, to see if the train was coming, and, seeing no train coming, took another shovelful, and, while in the latter act, was struck. No signal by bell or whistle, or otherwise, was given on that train, although it was downgrade from St. Albans to the place of injury, and the railroad crossed five highways at grade, went round quite a curve, where bushes and telegraph poles prevented plaintiff from seeing the approach of it before it struck the plaintiff. No signal was given to warn the plaintiff, nor even the brakes applied, nor was the train slowed up until after the engine struck the plaintiff. The train was running at the rate of from thirty to forty miles an hour. The engineer could see the plaintiff at a distance of eight or nine hundred feet, or more. This train had frequently, prior to this date, failed to give proper signals of warning to men upon the track and at the crossing, and had killed one man. The plaintiff had known of three instances where signals were not given, and had complained to the road master twice in regard to the absence of signals, and that, in running trains, the signals were not given, as required by the rules of the road and the laws of Vermont. The road master, the first time, said he would regulate it, but the second time he said 'ringing the bells and blowing the whistles was all a farce.'"

The first complaint was made about the 15th or 20th of May. The second complaint was made in June, just before the plaintiff was hurt. Plaintiff supposed from the first answer that the neglect would be corrected, but he claims he did not understand what was meant by the second. The plaintiff had had several years' experience at railroad work in various capacities, and was in good health, and not lacking in the ordinary intelligence suiting him to the position of oversight and control which he held. The train in question was made up at St. Albans, and had for some time been irregular as to its time of starting, as the plaintiff knew; and it was 12 minutes late the morning of the injury. That morning the plaintiff commenced work on the track before the due time of the train to pass; so he had undoubted opportunity to know whether it had passed or not. Indeed, according to his own testimony, he must be presumed to know that it had not passed. His testimony as to his conversations with the road master, as given in his direct examination, was as follows:

"Q. Whether or not you made any complaint to any official of the road or to the road master in regard to this absence of signals to which you have just testified? A. I did, to Mr. Shanks. Q. Mr. Shanks was the road master? A. Road master. Q. What did Mr. Shanks say to you? A. He said he would see that things would be altered, and that they would run according to time. Q. What did you say to Mr. Shanks? A. I told him they come near killing one of my Italians; that I couldn't understand them, nor they me. Consequently, they came near killing one of them at that time, and one they did kill. Q. Whether or not you told him of the absence of these signals? A. Yes, sir; I did. Q. What did he say? The Court: He has answered that. Mr. Loring: I didn't understand. The Court: He told him he would regulate it. Q. How long before this time you were hurt was this that you made this complaint to Mr. Shanks? A. It was somewhere along, I should think, between the fifteenth or twentieth day of May that I first talked with him about it. I talked a second time, understand, with Mr. Shanks, about this business, and he told me in reply that— Q. Now, Mr. McPeck, when did you first notice any absence of any signals on this particular train? A. When did I what? Q. First notice absence of signals. A. Well, it was along about the fifteenth or twentieth of May, I should think, that I first noticed these

things. Q. You were about to state what Mr. Shanks said in answer to your second complaint. A. He told me that blowing the whistle and ringing the bell had got to be all a farce now. That was what he told me. That was the reply I got."

In reply to interrogatories by the court, he testified further in regard to this matter, as follows:

"Q. Then you knew at that time that the place— Your statement is that you knew at the time that they failed to whistle for these crossings? A. Yes, sir. Q. And you complained to Mr.— A. Shanks. Q. To Mr. Shanks. Well, and he replied that this matter of whistling and ringing of bells was all a farce? A. He stated it was all played out now; it was all a farce. That was the words and substance he said to me. Q. Did he say anything further? A. No, sir; that was the last words he said. Q. Now, what did you understand he meant by that? A. What he understood? Oh, yes, your honor, he said the road had a charter to run, and it made no difference whether they used a bell or whistle. He said the road had a charter to run, and it made no difference whether or not they used a bell or whistle. Q. What did you understand he was going to do? That he was going to regulate it, or that he was not? A. At first I did, and the last time I thought he was careless when he did it. Q. You say, when he spoke about the regulating of the trains, he was going to do it, but, when you complained the second time that the men failed to whistle, he said it was all a farce? A. Yes, your honor, that is the words. Q. Did you understand that he was going to require the engineer to whistle, or that he was going to let it run along as it had run? A. I couldn't, your honor, say what he meant by it, because that was the words passed. I couldn't, your honor, understand what he said by the words. He said the company had a charter to run the road, and the blowing of the whistle and the ringing of the bell were all played out and all a farce. Q. Played out and all a farce? A. That was the words. Q. Now, what was your understanding as to what he meant by that? A. Your honor, I couldn't take any meaning by the word that I could see was right or wrong; only just listen to it. Q. Did you understand that he was going to regulate it? A. I understood so the first time. Q. I mean the second time. A. Your honor, I didn't pay much attention to what he said the last time. Q. You at that time were in good health? A. Yes, sir. Q. When he told you that they had a right to run the road, and that the matter of whistling and ringing bells at the crossing was all a farce, why didn't you quit work? A. That is where I was wrong, I suppose. I suppose he was always— Q. Did you make any reply to him? A. No; none at all."

He gave some further testimony on this point, but nothing which we can see tends to strengthen his position.

The plaintiff claims that he was entitled to go to the jury on the questions whether or not the road master's second answer was equivocal or evasive, whether or not he was misled thereby, and whether or not, in view thereof, he could be held to have assumed the risks of the case. But, as the record shows no circumstances to support such contentions, it is plain the jury would not have been justified in finding in his favor on any of them.

The case is wholly unlike *Railroad Co. v. Babcock*, 154 U. S. 190, 200, 14 Sup. Ct. 978. In that case some delay had elapsed between the time when the person employed gave notice of the defect and the time of the injury; but he had had no reasonable opportunity to ascertain whether repairs had been made, and was himself guilty of no negligence. But here fully 20 days elapsed between the first complaint and the injury; yet no change in the methods of the defendant corporation or in the management of its trains had been made, and the plaintiff knew this. *Hough v. Rail-*

way Co., 100 U. S. 213, 225; Bevan, Neg. (2d Ed.) 756. Besides, the second conversation with the road master put him on his guard, and was equivalent to a notice that he could not rely on any relief.

The presiding judge prefaced his ruling with a statement of his reasons therefor, the essential portions of which were as follows:

"It does not seem to me to be necessary to consider all the questions raised by the grounds stated in the defendant's motion. It has not been suggested in argument, and I do not recall any evidence tending to show, that the road-bed on which the plaintiff was employed was unsafe or dangerous; and the act of negligence which the plaintiff claims to have caused the injury was the failure of the train which left St. Albans northbound, about 7:30 a. m., to signal its approach by whistling, or ringing a bell, at the highway crossings between St. Albans and the point where the plaintiff was injured. The evidence of the plaintiff tends to show that there were three or more street and highway crossings, the last being something like 60 feet south of the point where the plaintiff was at work, and that the crossing signals were not given at any of these places.

"In respect to this situation, the plaintiff claims, first, that the injury resulted from the omission of the engineer to blow the whistle or ring the bell on this particular morning, which care and prudence required him to do, and that the defendant is responsible for such want of care on the part of its engineer. Assuming, as we must for the purpose of disposing of this motion, that the signal was not given, we must treat it as an omission or want of care of a fellow servant, for which the defendant is not liable, upon the reasons stated by the circuit court of appeals for this circuit in *Railroad Co. v. Hyde*, 5 C. C. A. 461, 56 Fed. 188. This doctrine proceeds upon the idea that persons, when they enter upon perilous and hazardous employments, assume the risk incident to the want of care of fellow servants. So, it follows that, if the injury resulted from the want of care of the engineer on this particular occasion, it was caused by the carelessness of a fellow servant, and was not an act for which the company can be held liable under the law as we are bound to administer it. *Railroad Co. v. Hambly*, 154 U. S. 349, 356, 357, 14 Sup. Ct. 983.

"The plaintiff claims, further, that the failure to signal the approach of trains was habitual, and of so long standing that the defendant company either knew, or ought to have known, that its servants on this particular train were failing to perform their duty, and that the company was therefore liable, on the ground that it continued in its employment improper and unsuitable servants. Against the defendant's objection, the plaintiff was permitted to show that on several occasions highway crossings in this locality were approached by this train without giving the signals required by the statutes of Vermont and by the rules of the road. The defendant contends that the statutes and the rules and regulations of the company in respect to highway crossings are for the protection of the public who have occasion to use the highway in crossing the railroad; that they have therefore no application to the case of an employé; while the plaintiff contends that the servants of the road have a right to assume that the signals which the law and the rules and regulations of the company require at highway crossings will be given, and that they may govern themselves accordingly in the performance of their duty, and that, if injury is sustained, they may invoke the aid of the statutes and rules in establishing the right of recovery in their behalf. At the time this evidence was received, it was stated to counsel that its effect must be treated as an open question, to be determined later on. Now, without determining the effect of the statutes, or of the rules or regulations, or the question of their applicability to this case, if we assume (which is doubtful) that it was all matter on which the plaintiff might rely for his protection, we are confronted with the fact that the plaintiff, according to his own statement, had full knowledge that it was not a signal on which he could in fact rely. Therefore, if there was an omission or want of care so habitual that the company either knew or ought to have known the situation, it was a defect in management, or a want of care, of which the plaintiff himself was fully advised; and under the doctrine expressly held by the supreme court in *Tuttle v. Railway*, 122 U. S. 189, 7

Sup. Ct. 1166, the plaintiff, by continuing in the service, assumed the risk incident to such service and such management. As said by the supreme court in the case referred to, he continued in the employ of the defendant with a full knowledge of all these things,—the condition of the track, the character of the curves, the hazards incident to a management where, he says, the failure to give the crossing signals was habitual.

"I do not understand that counsel for the plaintiff contends against the application of this doctrine of assumption of risk to the plaintiff's case, in view of his knowledge of the situation, except to say that he is relieved from its operation by reason of a conversation with the road master. As to that, the plaintiff says he talked with the road master, and complained of the irregularity of the trains, as I understand it, in respect to the time of arrival, and he received assurance that such irregularity would be remedied; and that, at a subsequent conversation, he complained of a want of signals at crossings, and was informed by the road master that such signals were all a farce, and played out. The plaintiff, being an intelligent and vigorous man, in the prime of life, must have understood, if such conversation took place, that the road master, at least, did not intend to make any change, and that the old condition would continue. As is said in the Tuttle Case, everything was open and visible, and the employé had only to use his senses and his faculties to avoid the dangers to which he was exposed. It was his duty to look out for this, and avoid it. In that case there was no evidence of actual knowledge, but the court assumed that, as the defect in that case was open and visible, it must have been known to him. The knowledge was presumed, the employé being an experienced man; while, in the case we are now considering, actual knowledge of the dangerous condition is established by the plaintiff's admission. It must therefore be held that, by voluntarily continuing in the service, he assumed the risk incident to a fault of which he was full advised."

Looking, therefore, at the contentions of the plaintiff and the statements of the presiding judge, and without committing ourselves to the precise terms used, it is plain that the rules of law applicable were all well settled, as to which there could be no real controversy, and that they were correctly applied to a state of proofs which would not have supported a verdict for the plaintiff if he had recovered one.

Smith v. Baker [1891] App. Cas. 325, which relates to the question of the liability of an employer to his employé for continued carelessness in giving warnings, might perhaps be relied on to sustain the proposition that this case, in some of its aspects, should have gone to the jury; but the rule of Smith v. Baker is certainly not the rule of the federal courts. Moreover, an examination of the history of that case from its origin shows that the great weight of authority was contrary to the conclusion of the house of lords, reported as stated. In the house of lords the only lords concurring in holding the employer liable on account of the want of proper warnings were Lord Halsbury, L. C., Lord Hershell, and Lord Watson. On the other hand, the case, which, so far as the supreme court of judicature was concerned, commenced in the divisional court of the queen's bench division, went from there to the court of appeal, and from the court of appeal to the house of lords. The ruling in the divisional court was formal, but Mr. Justice Wills, as appears at page 343, expressed the opinion that the employé accepted the risk of the employment. In the court of appeal, Lord Coleridge, C. J., and Lord Justices Lindley and Lopes concurred in the views of Mr. Justice Wills; and in the house of lords Lord Bramwell and Lord Morris also concurred in those views, although

Lord Morris concurred in the result in the house of lords on the ground that, according to the verdict of the jury in the county court, the employer's machinery was not reasonably fit for its purpose, and the plaintiff below did not know that fact, also stating that, under the statute, no fact found by the jury was appealable. This gives a sum of six learned judges against the conclusions of the house of lords, and only three in its favor, with the weight of learning and experience averaging at least as favorably for the former as for the latter.

It is claimed that the case is governed by the local judicial decisions. We perceive no essential differences to result even if it were; but that, as to the mutual relations of master and servant, we are not controlled by such decisions, has been fully settled since *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914. Neither are we required to pass on the question whether the plaintiff had a right to rely on the course of business of the defendant corporation, as presumed to exist in consequence of the statutes and rules as to signals at public crossings.

The plaintiff also urges the rule announced in *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, and again in *Railway Co. v. Ives*, 144 U. S. 408, 429, 12 Sup. Ct. 679, that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care, have avoided the consequences of such negligence; and he also claims that the conduct of the locomotive engineer of the defendant corporation was willful in running his locomotive knowingly against the plaintiff. Passing by the question whether these propositions were so urged at the trial that we can take jurisdiction of them, it is plain that there is nothing in them with which the defendant itself can be charged. It had no such notice of the plaintiff's supposed negligence or of the engineer's alleged willfulness that it could guard against them; and, as to each proposition, the condition is purely that of the relations of employes among themselves.

While it is true that under many circumstances a servant may, by giving notice of defects in machinery, or in the course of business, relieve himself from the risks which he ordinarily assumes, yet this relates more particularly to the question of the negligence of the employer; and the question of the contributory negligence of the servant, nevertheless, always remains to some extent. He cannot perhaps be charged with negligence merely because he continues in the service for a time not unreasonable after he gives the notice, but he is always bound to use reasonable care under all the circumstances known to him. The distinction is recognized in *Hough v. Railway Co.*, 100 U. S. 213, 224, 225, already cited, and in *Railroad Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044. But, as stated by the learned judge who tried the cause, we have no occasion to determine its application here. The judgment of the circuit court is affirmed, with costs.

HOLT v. HOLT ELECTRIC STORAGE CO.

(Circuit Court, E. D. Pennsylvania. March 25, 1897.)

1. PLEADING—AFFIDAVITS OF DEFENSE.

The allegation, in an affidavit of defense filed by a corporation, that the plaintiff "never paid into the treasury of the said defendant company" the money for which the instruments in the statement of claim were given, is not good, as the allegation may be true, and yet the plaintiff entitled to recover.

2. CORPORATIONS—BREACH OF PROMISE MADE TO SERVANT.

The breach of a promise made by plaintiff to a servant of the defendant corporation, who in accepting that promise in no way acted for or represented the corporation, cannot be set up in defense to an action against the corporation itself.

3. SAME—SET-OFF OF STOCK LIABILITY.

To entitle a corporation to set off a stock liability, it is requisite that the stock should have been issued as full paid, or that a regular call should have been made; and an affidavit of defense filed by a corporation, alleging that the plaintiff has not "fully paid" for stock which he holds, is not sufficient.

Albert B. Weimer, for plaintiff.

Walter E. Rex, for defendant.

DALLAS, Circuit Judge. "The law requires affidavits of defense to be so specific as to inform the plaintiff of the character of the defense he is required to meet, and to enable him to take judgment for such balance of his claim as is not covered by the defense set up." *Balph v. Rathburn Co.*, 21 C. C. A. 584, 75 Fed. 971. Tested by this requirement, the affidavit of defense in this case is manifestly insufficient. If not purposely evasive, it, at least, is lacking in reasonable clearness and precision. The allegation, several times repeated, that the plaintiff "never paid into the treasury of the said defendant company" the money for which the instruments set forth in the statement of claim were given, may be true and yet the plaintiff be entitled to recover. The breach of a promise made by the plaintiff to a person who was the electrician of the corporation defendant, but who, in accepting that promise, in no way acted for or represented the corporation, cannot be set up in defense to an action against the corporation itself. The allegation that the plaintiff has not "fully paid" for stock which he holds is entirely consistent with the existence of the fact that the stock was duly issued without being fully paid, and that no assessment or call for further payment has been made. To entitle the defendant to set off a stock liability, it is requisite that the stock should have been issued as full paid, or that a regular call should have been made; and the affidavit is not as specific as it should be upon this point, because it wholly fails to state either the one or the other of the facts upon which any presently due indebtedness with respect thereto is dependent. Affidavits of defense must state facts; the effect of the facts stated is for the court. The allegation that the plaintiff, as president of the corporation, incurred debts on its behalf, "without consulting with the directors,

and directly against their wishes and authority," is also made in very general and somewhat equivocal terms, although specific statement of particular facts would not have been difficult; and, as respects this allegation, no information whatever is given "to enable him [the plaintiff] to take judgment for such balance as is not covered by the defense set up." The plaintiff's rule for judgment is made absolute.

NEW DUNDERBERG MIN. CO. v. OLD et al.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 838.

1. LAND DEPARTMENT OF THE UNITED STATES—JUDICIAL POWER.

The land department of the United States (including in that term the secretary of the interior, the commissioner of the general land office, and their subordinates) is a quasi judicial tribunal, whose judgments upon questions within its jurisdiction are impregnable to collateral attack.

2. PATENT TO LAND—LEGAL EFFECT.

A patent to land or mineral lodes within the jurisdiction of the land department conveys the legal title to the property, and constitutes a judgment of that tribunal upon the questions involved in its issue.

3. JURISDICTION.

The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong.

4. PATENT TO MINING CLAIM—ACT MAY 10, 1872.

A patent issued in accordance with the provisions of the act of May 10, 1872 (17 Stat. 91, 94, c. 152, §§ 3, 9; Rev. St. §§ 2322, 2328), to a mining claim located before the passage of that act, under the act of July 26, 1866 (14 Stat. 251, c. 262), conveys the legal title to every vein or lode whose apex is within the exterior boundaries of the mining claim extended downward vertically, and is not subject to collateral attack in an action at law, either on the ground that there was a claim adverse to that patented when the act of May 10, 1872, was passed, or on the ground that adverse rights were affected by its issue.

5. LOCATION AND ENTRY OF MINING CLAIM—EFFECT.

One who locates and procures a patent to a mining claim under the act of May 10, 1872 (17 Stat. 91, 94, c. 152, §§ 3, 9; Rev. St. §§ 2322, 2328), thereby renounces and abandons all rights and privileges which do not pertain to his specific location under the provisions of that act.

6. LOCATION AND ENTRY OF MINING CLAIM, UNDER ACT MAY 10, 1872—THEIR EFFECT UPON RIGHTS PREVIOUSLY ACQUIRED UNDER ACT JULY 26, 1866.

A claimant, who discovered and located a lode mining claim under the act of July 26, 1866 (14 Stat. 251, c. 262), renounces and abandons all right to follow his lode or vein on the course of its strike beyond the exterior lines of his patented claim extended downward vertically, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the act of May 10, 1872 (17 Stat. 91, 94, c. 152, §§ 3, 9).

7. MINING CLAIM—LIMIT OF RIGHT TO FOLLOW LODE BEYOND SIDE LINES.

When the course of the strike of a lode or vein, on which a patented mining claim is based, crosses both side lines thereof, the side lines become end lines, and the owner has no right to the possession of the lode without those lines.

8. PATENT—STRANGER MAY NOT ATTACK.

One who is not in privity with the United States, and who did not acquire any right to be preferred in the acquisition of a mineral lode or claim before the same was patented to another, and whose grantor was never

in such privity, and never acquired any such right, cannot successfully attack such patent, either at law or in equity.
(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

On July 12, 1894, Robert O. Old and Ellen Old, the defendants in error, brought this action against the New Dunderberg Mining Company, a corporation, the plaintiff in error, to recover the possession of the Frostberg lode mining claim, survey lot No. 111, which was 1,400 feet in length and 50 feet in width, and of all the lodes and veins of mineral the tops or apexes of which lay within the exterior boundary lines of that claim. They alleged that they were the owners and entitled to the possession of the demanded premises, and that the plaintiff in error had wrongfully entered upon a lode or vein whose apex lay within the exterior boundaries of their claim, and withheld it from them. The Dunderberg Company answered. It denied that the defendants in error had any title or right to the possession of the Frostberg lode claim. It admitted that it was, and had been for some years, in possession of, and had been removing ore from, a vein, whose apex was within the boundaries of the Frostberg claim; but it alleged that on May 29, 1879, the defendant in error Robert O. Old sold and caused this claim to be delivered to one Brown as a part of the Dunderberg lode, which had been discovered, located, and patented by him in the name of another, for his own benefit; that he then gave Brown and his grantee a license to work this vein; that he represented to Brown that this lode, which the plaintiff in error subsequently followed within the boundaries of the Frostberg claim, was a part of the Dunderberg lode, and that he was conveying this part of the lode by the deeds which he delivered to Brown; that he delivered the possession of the part of the lode within the Frostberg claim to Brown at the same time that he delivered the deeds; and that he induced Brown to pay him \$107,000 for the deeds he received, by means of these representations and this license. The Dunderberg Company alleged, in effect, that the plaintiffs in error were estopped by these representations and this license from claiming the premises in controversy as against Brown, and that, through mesne conveyances, it had succeeded to all Brown's rights and title. The defendants in error replied to this answer that Robert O. Old never made the representations alleged; that he never delivered to Brown, or represented that he delivered to him, the possession of any vein whose apex lay within the exterior boundaries of the Frostberg claim, and never gave him any license to work any vein there, but that in 1879, and ever since, the defendants in error, and those under whom they hold, were in the open and notorious possession of the Frostberg claim, and of all the lodes and veins whose apexes were within its boundaries.

At the trial, the defendants in error introduced in evidence, over the objection of the Dunderberg Company, a patent to the Frostberg mining claim, and to all the veins and lodes of mineral whose apexes lay within its exterior boundaries, issued under the act of congress approved May 10, 1872 (17 Stat. 91, 94, c. 152, §§ 3, 9; Rev. St. §§ 2322, 2328), and traced their title from the patentees to themselves. This patent was founded on a location made in August, 1866, and upon an entry made on February 27, 1872. The plaintiff in error deraigned its title from the patentee of the Dunderberg mining claim, which was 3,000 feet long and 50 feet wide, and was patented on September 16, 1873, under the act of May 10, 1872. This patent was based on a location made on November 15, 1867, and on an entry made on November 20, 1872. The claims were in the form of a parallelogram. The Frostberg claim extended in an easterly and westerly direction from its discovery shaft. The Dunderberg claim extended in a northerly and southerly direction from its discovery shaft, and the two claims crossed each other almost at right angles near the west end of the Frostberg claim. The discovery shaft of the Dunderberg claim was some 500 feet south of the south line of the Frostberg. The Dunderberg lode or vein lay diagonally across the Dunderberg claim. It crossed each of the side lines of that claim on its strike, and left the claim on its east side at least 300 feet south of the south line of the Frostberg.

From that point it extended northeasterly on its course across the intervening tract between the two claims, and entered the Frostberg claim on its strike at least 300 feet east of the point where the east line of the Dunderberg claim intersected the south line of the Frostberg. Within a few feet of the point where the Dunderberg lode crossed the south line of the Frostberg claim, there was at the time of the sale to Brown in 1879 a shaft and crosscut, called the "Tyler Shaft," and "Tyler Crosscut." The premises in controversy lay within the boundaries of the Frostberg claim, and northeasterly of this shaft. Both Old and Brown knew at the time of the sale that the Dunderberg lode passed out of the Dunderberg claim across its easterly side line, in the manner we have described, and Old had entered and patented between the years 1877 and 1881 the Subtreasury and Silver Chain mining claims, which covered the surface of the ground between the east line of the Dunderberg claim and the south line of the Frostberg claim, under which the Dunderberg lode lay. Old sold these two claims to Brown at the same time that he sold the Dunderberg claim, and caused them to be conveyed to him. The plaintiff in error succeeded to Brown's rights to these claims. Under this state of the facts, counsel for the plaintiff in error requested the court to hold that since both the Frostberg and Dunderberg claims were located, and the former was entered under the act of congress approved July 26, 1866 (14 Stat. 251, c. 262, which gave to the discoverer the right to the lode or vein which he found, and to that only), the defendants in error could not recover, unless they proved that the lode in the possession of the Dunderberg Company within the boundaries of the Frostberg claim was the same lode which was originally discovered and located within the Frostberg claim. The court refused to make this ruling, and instructed the jury that the patent to the Frostberg claim entitled the defendants in error to every vein or lode whose apex lay within its exterior boundaries, whether that lode or vein was the one originally discovered or located within them or not. This ruling is the chief error assigned. There was conflicting testimony relative to the alleged license and estoppel, and some of the rulings of the court upon the admission of evidence in rebuttal upon that question are assigned as error. There was a verdict and a judgment for the defendants in error.

Willard Teller (Harper M. Orahood and E. B. Morgan with him on the brief), for plaintiff in error.

Edwin H. Park and Jacob Fillius, for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The patent under which the defendants in error hold grants all the lodes or veins of ore the apexes of which are within the exterior boundaries of the Frostberg mining claim which it conveys; and the apex of the lode or vein in issue, at the place here in controversy, is within those boundaries. The patent to the Dunderberg claim, under which the plaintiff in error claims the title to the demanded premises, is couched in the same terms; but the apex of the vein in controversy, at the place in dispute, is not within the exterior boundaries of that claim. Upon the face of the patents, therefore, the charge of the court below, that the defendants in error held the title to the property, was right.

But both these claims were located under "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26, 1866 (14 Stat. 251, c. 262). That act gave the lawful claimant who complied with the provisions of the statute the right to the single lode or vein which he

found, and to no other. It is insisted that under the local laws of Colorado, to which this act of congress referred, the claimant was not required to mark the boundaries of his claim upon the surface of the ground when he located it, but was permitted to hold and follow the lode for a distance of 1,400 feet in any direction in which it lay from his discovery shaft, on condition that he should mark his claim at the point of discovery by a substantial stake, post, or stone monument, having inscribed thereon the name of the discoverer and the name of the lode or vein. 14 Stat. 251, §§ 1, 2; Laws Colo. 1866, p. 72, §§ 1, 2; 2 Mills' Ann. St. Colo. 1891, § 3142. There was evidence at the trial that the lode in the possession of the plaintiff in error, within the boundaries of the Frostberg claim, was the same lode which was originally discovered and located in the Dunderberg claim in 1867. The act of congress of May 10, 1872 (17 Stat. 91, 94, c. 152, §§ 3, 9; Rev. St. §§ 2322, 2328), under which the patents to both claims were issued, provided "that the locators of all mining locations heretofore made, * * * where no adverse claim exists at the passage of this act, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically" (section 3); that sections 1, 2, 3, 4, and 6 of the act of July 26, 1866, be repealed, but that such repeal should not affect existing rights; that applications for patents for mining claims then pending should be prosecuted to a final decision in the general land office; and that, where adverse rights were not affected thereby, patents should issue in pursuance of the act of May 10, 1872. The contention of the counsel for the plaintiff in error is that the grant in the Frostberg patent of every vein whose apex lies within its exterior boundaries was void, except as to the original Frostberg vein discovered therein, because that claim was located under the act of 1866, which allowed the discoverer but a single lode or vein; and the location of the Dunderberg vein in 1867 constituted a claim adverse to the Frostberg, when the act of 1872 was passed, and in that way deprived the officers of the land department of all power to make a grant to the owner of the Frostberg of any other vein than that which he originally discovered. If this proposition is sound, the plaintiff in error was entitled to the vein on the premises in dispute, if it was in fact the original Dunderberg vein, and was not the original Frostberg vein, and the court should have submitted this question to the jury. It refused to do so, and the correctness of this ruling is the most important question in this case.

If it be conceded, however, that there was an adverse claim to the property described in the Frostberg patent, when the act of May 10, 1872, was passed, that fact could not render void any part of the grant made by that patent. Congress did not remit the determination of the questions whether or not there was an adverse claim to the Frostberg, or whether the patent to it under the act of 1872 would affect adverse rights, to the courts of law or of equity, in the first instance. On the other hand, it vested the officers of

the land department with the judicial power, and imposed upon them the duty to decide these questions, and to issue the patent to the Frostberg mining claim in accordance with the decision which they should render. It is true that a patent issued by the land department of the United States to land over which that department has no power of disposition, and no jurisdiction to determine the claims of applicants for, under the acts of congress, is absolutely void, and conveys no title whatever. Land the title to which has passed from the government of the United States to another before the claim on which the patent was based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and land for the disposition of which acts of congress had made no provision, is of this character. *U. S. v. Winona & St. P. R. Co.*, 32 U. S. App. 272, 15 C. C. A. 96, 67 Fed. 948; *Polk v. Wendall*, 9 Cranch, 87; *Stoddard v. Chambers*, 2 How. 284, 318; *Easton v. Salisbury*, 21 How. 426, 432; *Reichart v. Felps*, 6 Wall. 160; *Best v. Polk*, 18 Wall. 112, 117, 118; *Sherman v. Buick*, 93 U. S. 209; *Iron Co. v. Cunningham*, 15 Sup. Ct. 103; *Doolan v. Carr*, 125 U. S. 618, 624, 8 Sup. Ct. 1228; *Wright v. Roseberry*, 121 U. S. 488, 519, 7 Sup. Ct. 985; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 528, 11 Sup. Ct. 628; *Deffeback v. Hawke*, 115 U. S. 392, 406, 6 Sup. Ct. 95. But the Frostberg claim was not of this character. Jurisdiction of the subject-matter is the power to deal with the general abstract question. The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong. *Foltz v. Railway Co.*, 19 U. S. App. 576, 8 C. C. A. 635, and 60 Fed. 316.

The act of July 26, 1866, provided that any claimant of a lode or vein might file a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and might enter such tract, and receive a patent therefor, with a right to the vein or lode; that upon the filing of this diagram and the posting of the same and of a notice of intention to apply for a patent, the register of the local land office should post and publish the notice for 90 days; that, if no adverse claim had then been filed, the surveyor general should, on the application of the party, survey the premises, make a plat thereof, designate the number and description of the location and the improvements and character of the vein, and indorse his approval thereon; and that, upon the filing of this plat and of proof that the diagram and notice had been duly posted, the register should transmit the plat, survey and description to the general land office, and the applicant should receive a patent for the lode and land claimed. 14 Stat. 251, 252, c. 262, §§ 2, 3. The claimant of the Frostberg lode had done all this before the act of 1872 was passed. He had designated the boundaries of his claim. It had been surveyed and marked on the ground. His notice of intention to apply for a patent for it had been given. No adverse claim had been filed in the land office, and on February 27, 1872, he had entered it for patent. When the act of 1872 was passed, he was already entitled to the Frostberg

lode, and to the surface described in his claim under the act of 1866. Section 3 of the act of May 10, 1872 (17 Stat. 91, c. 152), provided that all locators of mining locations theretofore or thereafter made, where no adverse claim existed at the time of the passage of that act, should have the exclusive right to all veins or lodes whose apexes were within their surface boundaries. Section 9 of that act provided that sections 1, 2, 3, 4, and 6 of the act of July 26, 1866 (14 Stat. 251, c. 262), were repealed; that such repeal should not affect existing rights; and that "applications for patents for mining claims now pending may be prosecuted to a final decision in the general land office, but, in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act." These provisions of the acts of congress leave no doubt that the land department had jurisdiction to hear and determine the claims of applicants for and to dispose of this mining claim, and every vein or lode whose apex lay inside of its surface lines extended downward vertically. When the act of May 10, 1872, was passed, the Frostberg claim had been located, and the application for the patent to it was pending. That act, by its very terms, imposed upon the officers of the land department the duty of hearing the evidence upon, and deciding, the questions whether or not any claim adverse to that location existed at the time of its passage, and whether or not any adverse rights would be affected by issuing the patent according to the provisions of the act of 1872. These questions were necessarily determined by the officers of that department before they issued this patent. The patent which the department issued in 1876 was a judgment of that tribunal that no such claim did exist on May 10, 1872, and that no adverse rights would be affected by issuing it in accordance with the provisions of the act of that date. It is at the same time a judicial determination of these questions, and a conveyance of the legal title to every lode or vein whose apex lay within the surface boundaries of the patented claim extended downward vertically.

If this action of the land department resulted from fraud, mistake, or erroneous views of the law, a court of equity might set aside the patent, or declare it to be held in trust for him who had a better right to it. *Bogan v. Mortgage Co.*, 27 U. S. App. 346, 11 C. C. A. 128, and 63 Fed. 192; *U. S. v. Winona & St. P. R. Co.*, 32 U. S. App. 272, 15 C. C. A. 96, 107, and 67 Fed. 948, and cases cited. But in this action at law it is, like the judgments of other special tribunals vested with judicial power, impervious to collateral attack. In the case of *Steel v. Refining Co.*, 106 U. S. 447, 451, 1 Sup. Ct. 389, which was an action of ejectment in which the plaintiffs' title depended on a patent issued upon a claim for mineral lands within the limits of a town site, and the defense was that the patent was void, because the land was not mineral, and the patentee was not a citizen, and had not declared his intention to become such, the supreme court held that proof of these facts was inadmissible to attack the patent, and declared that the land department necessarily "must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the

land, and whether it is of the class that is open to sale. Its judgment in these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation." To the same effect are *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030; and *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 524, 11 Sup. Ct. 628. In *French v. Fyan*, 93 U. S. 169, 172, the supreme court held that parol evidence was inadmissible to show that land patented to the state of Missouri as swamp and overflowed land was not in fact swamp or overflowed land, and that on that account the patent was void. In *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, that court held, on the other hand, that parol evidence was inadmissible to show that land patented to a pre-emptor was swamp or overflowed land, and was therefore included in the grant to the state of California, and that the patent to the pre-emptor was void on that account. A patent to land or mineral lodes, over which the land department of the United States has the power of disposition, and the jurisdiction to determine the claims of applicants for, under the acts of congress, is impregnable to collateral attack, whether the decision of the department on which it is based was right or wrong, and the patent conveys the legal title to the property to the patentee. *U. S. v. Winona & St. P. R. Co.*, supra; *Minter v. Crommelin*, 18 How. 87, 89; *U. S. v. Schurz*, 102 U. S. 378, 401; *French v. Fyan*, 93 U. S. 169, 172; *Quinby v. Conlan*, 104 U. S. 420; *Smelting Co. v. Kemp*, 104 U. S. 636, 645-647; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380; *Knight v. Association*, 142 U. S. 161, 212, 12 Sup. Ct. 258; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030. If a more careful analysis of the authorities upon and a more exhaustive consideration of these questions are sought, they will be found in *U. S. v. Winona & St. P. R. Co.*, 32 U. S. App. 272, 15 C. C. A. 96, and 67 Fed. 948, which was decided by this court in 1895.

Our conclusion is that a patent issued under and in accordance with the provisions of the act of May 10, 1872 (17 Stat. 91, c. 152; Rev. St. §§ 2322, 2328), to a mining claim located before the passage of that act, conveys the legal title to every vein or lode of mineral whose apex is within its surface lines extended downward vertically, and is not subject to collateral attack in an action at law, either on the ground that there was a claim adverse to that patent when the act of 1872 was passed, or on the ground that adverse rights were affected by its issue under the provisions of that act.

Moreover, neither the plaintiff in error nor its immediate or remote grantor was ever in a position to attack the Frostberg patent, either at law or in equity, at any time after the patent to the Dunderberg claim was issued, on September 16, 1873. Conceding, but not deciding, that the locator of the Dunderberg claim, in 1867, then had the right, under the act of 1866, to follow the Dunderberg lode in any direction from his discovery shaft in which it lay, he renounced that right when he availed himself of the benefits of the act of 1872, and accepted his patent under that statute. That act provided that he

might obtain a patent according to its terms, or that he might retain the rights he had acquired under the act of 1866. He could not obtain a patent, however, under either act, until he located the boundaries of his claim upon the surface of the ground, and limited his claim by those boundaries. We have already seen that the act of 1866 required such a location before a patent could issue. The act of 1872 required the applicant for a patent to file his application with a plat or field notes of the claim made by the surveyor general, showing accurately the boundaries of his claim. It required him to post a copy of the plat and of the notice of his application for a patent on the land claimed, and it required him to file a copy of this notice and proof of the posting in the local land office. The register of that office was then required to post and publish notice of the application for 60 days, and thereupon a patent issued, if no adverse claim was filed. 17 Stat. 91, 92, c. 152, § 6; Rev. St. § 2325. That act provided that the patentee under it should have the right to all lodes and veins whose apexes were within the surface boundaries of his claim. The patentee of the Dunderberg lode located his claim, and accepted a patent for it, under the terms of this act. He located it upon a tract of land which included his discovery shaft, and was 3,000 feet long from north to south, and 70 feet wide from east to west. It may be that he could have held the Dunderberg lode within the surface boundaries of the Frostberg claim if he had so located his claim upon the surface of the ground that the apex of the Dunderberg lode within the Frostberg claim would have been within the exterior boundaries of the Dunderberg claim upon the surface. But he did not do so. He chose to so locate it that his lode crossed both the side lines of his claim diagonally on its strike and passed out of the claim more than 300 feet before it entered the Frostberg claim. The claim of his grantee now is that it can renounce this location and the limitations of the law and the patent upon which it is based, and follow the lode wherever it leads, as the discoverer might have done when he first found it, and before he located his claim to the surface at all. It bases this claim upon the provision of section 9 of the act of May 10, 1872 (17 Stat. 91, c. 152), that the repeal of sections 1, 2, 3, 4, and 6 of the act of July 26, 1866 (chapter 262, 14 Stat. 251), shall not affect existing rights. But it was not the repeal of these sections of the act of 1866 that affected the rights of the owner of the Dunderberg lode. That repeal did not deprive him of any right he had to follow his lode into the Frostberg claim. It was his location, entry, and patent of his claim, from which the lode departed on its strike 300 feet before it reached the Frostberg, that affected his rights. The act of 1872 required the applicant for a patent to locate his claim on the surface of the ground as a condition precedent to its issue, and it declared what rights he should acquire thereby, for the express purpose of defining, fixing, and limiting his claims and his rights. Under that act, the location of a mining claim on the surface of the ground, and its entry for patent, is a notice to the government and the public that the owner claims all the exclusive rights and privileges granted by the act; but it is no less a notice, and a legal notice, that he renounces and aban-

dons to the government all other rights and privileges pertaining to his discovery of the lode for which he asks the patent. It would work manifest injustice to permit one who has located, and excluded all others from a claim of the full size allowed by the acts of congress, and from all veins whose apexes lay within its surface, to follow the lode upon the discovery of which that claim was based at right angles to his location, and without its side lines, for a distance equal to the length of his claim. In our opinion, the acts of 1866 and 1872 confer no such privilege. A claimant who discovered and located a lode mining claim under the act of 1866 renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the act of May 10, 1872.

Since the side lines of the Dunderberg claim crossed the course of the strike of the vein, they constitute end lines; and, under the patent to it, the owner of that claim was without right to the possession of that lode outside of those lines, after he obtained his patent, in 1873. *Mining Co. v. Tarbet*, 98 U. S. 463; *Iron Silver-Mining Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 207, 6 Sup. Ct. 1177; *King v. Mining Co.*, 152 U. S. 222, 228, 14 Sup. Ct. 510. The owner of the Dunderberg claim, therefore, had no right or interest in any lode or vein in the demanded premises at any time after 1873, and the plaintiff in error acquired no such right or interest from him. It acquired none by its deeds of the Subtreasury or Silver Chain mining claims, because those claims were not initiated until after the Frostberg claim was located and patented. All its claims, therefore, are under grantors, immediate and remote, not one of whom was in privity with the United States, or had acquired any right to the property in controversy when it was patented to the grantors of the defendants in error in 1876. This fact is fatal to its claim to avoid the patent to the Frostberg claim, in equity as well as at law. One who was not in privity with the United States, and who had acquired no right to the land or lode when it was patented to another, cannot successfully attack such a patent, either at law or in equity. *Deweese v. Reinhard*, 19 U. S. App. 698, 706, 10 C. C. A. 55, 59, 60, and 61 Fed. 777, 781; *Hartman v. Warren*, 40 U. S. App. 245, 22 C. C. A. 30, and 76 Fed. 157, 163.

It is assigned as error that the court admitted in evidence testimony given, and leases made by the defendants in error and their grantors in 1882, 1884, and 1888, which tended to show that they were in possession and exercising acts of ownership over the demanded premises subsequent to the sale of the Dunderberg, Subtreasury, and Silver Chain claims by Old, in 1879; and that it also admitted in evidence two letters from the defendant in error Robert O. Old, one to B. C. Catron, superintendent, and the other to C. A. Cameron, secretary, of the Dunderberg Company, which were written in 1883, and in which Old asked permission to use the Tyler crosscut and shaft to enable him to lease a part of the Frostberg lode, commencing at or near the line between that lode and the property of the Dunderberg Company, and running easterly 250 feet, together with

the answer of Catron that he might use the crosscut, but could not use the shaft, and the answer of Cameron that he had referred the matter to Catron and the trustees of his company. But this evidence was introduced to rebut the plea and proof of license and estoppel which the plaintiff in error had made. The Dunderberg Company had answered that it entered within the boundaries of the Frostberg claim by the express license and assent of the defendant in error Robert O. Old; that when he sold the Dunderberg, Subtreasury, and Silver Chain mining claims to its grantor, Brown, he had represented to him that he thereby sold and caused to be conveyed to him, and that he thereby delivered, all the ore in the Dunderberg lode, whether within the side lines of the Frostberg claim or not, and that the Dunderberg Company had followed and worked the Dunderberg vein for 300 or 400 feet within the lines of the Frostberg claim, and had been in notorious and uninterrupted possession of the Dunderberg vein, both within and without the lines of the Frostberg claim, from May 29, 1879, until the commencement of the action, with the full knowledge and assent of the defendants in error. These allegations had been denied. The Dunderberg Company had introduced evidence which tended to sustain them,—notably the testimony of Mr. Catron, its superintendent, that a lessee of Old, who held a lease of 200 feet within the Frostberg lines on May 29, 1874, surrendered it, and said that he took it of Old on condition that he should deliver possession to Brown if the sale of that date was consummated; the testimony of the same witness that in 1882 he stopped the shipment of some ore which had been taken from the Frostberg claim by miners who claimed to have a lease upon it from Old, that he notified Old of this fact, and the latter denied that he had given them any lease, and said that that was not his ground; and the testimony of Brown that, when he purchased, Old took him down into the Tyler crosscut, and delivered to him the possession of a drift, where men were working, which extended into the Frostberg claim a distance of from 40 to 60 feet. In fact, the plaintiff in error tendered the issue of its exclusive possession of the ore in the Dunderberg vein within the Frostberg claim, from 1879 until the action was commenced, with the assent of the defendants in error, and it introduced evidence to sustain its side of that issue. It could not have been irrelevant to this issue for the defendants in error to prove that during this period they were in possession of the premises; that they leased them to miners, who removed the ore; and that they notified the plaintiff in error that they were doing so, and obtained permission to use its crosscut for that purpose. That appears to have been the only effect of the evidence that is here challenged, and, in our opinion, it was not incompetent to rebut the testimony which the plaintiff in error had introduced in support of the issue of license, estoppel, and possession which it had tendered. The judgment below must be affirmed, with costs; and it is so ordered.

SWENSON et al. v. MYNAIR et al.¹

(Circuit Court of Appeals, Fifth Circuit. February 20, 1897.)

No. 546.

1. DEEDS—MISDESCRIPTION.

The fact that a deed erroneously describes the land conveyed as part of a certain grant does not render it any less a deed to the land therein otherwise unmistakably described.

2. TRESPASS TO TRY TITLE—PROOF OF PAYMENT OF TAXES.

Under Rev. St. Tex. 1895, art. 3342, to sustain a plea of limitation in an action of trespass to try title to land, it is not necessary to prove the payment of taxes by the production or help of tax receipts or of the assessment roll, but it may be done by the testimony of one who knows the fact, or by circumstantial evidence; and it is not necessary that the rendition for taxes should be made by, or even in the name of, the one claiming under the statute, and a mistake in the name of the original grantee is immaterial.

Maxey, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action of trespass to try title, brought by S. M. Swenson against Frank Mynair, E. Tinsley, J. R. Tinsley, T. B. Cox, W. L. Smith, Paul Nemec, and E. H. Dickson. Judgment was rendered for defendants, and, plaintiff having subsequently died, this writ of error was prosecuted by his legal representatives.

D. W. Doom, M. C. H. Park, and T. W. Gregory, for plaintiffs in error.

L. W. Campbell, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. S. M. Swenson, a citizen of New York, brought this action February 18, 1895, against Frank Mynair, E. Tinsley, J. R. Tinsley, T. B. Cox, W. L. Smith, Paul Nemec, and E. H. Dickson. It is the Texas real action of trespass to try title. The petition is in the statutory form. The defendants, in addition to the general issue, presented pleas under the statute of five years' limitation. On the trial the judge charged the jury that the plaintiff had shown title to the land in controversy, but that the defendants had established their pleas of limitation, and directed a verdict to be returned for the defendants. On this verdict judgment was entered May 13, 1896, that plaintiff take nothing, and that defendants have judgment and execution for their costs. S. M. Swenson, the plaintiff, died June 13, 1896, and his legal representatives prosecute this writ of error. They concede that the defendants had actual adverse possession of the land in controversy for more than five years prior to the institution of the suit, and that during all of this period they claimed the land under deeds duly registered, which described the lands by metes and bounds; and the plain-

¹ Rehearing denied April 14, 1897.

tiffs say that the only question here presented and relied on by them is the question of the payment by the defendants of the taxes. The land in controversy is a narrow strip, about 540 varas wide, running along the east side of the east boundary line of a large survey called in the record the "University Land." This large survey was located in 1841. The northern half, or two-thirds of its east boundary line, is in the open prairie. At its beginning point, namely, at the northeast corner of the survey, natural objects were scarce in 1857 and 1858. In December, 1857, a number of smaller surveys were located, beginning some distance east of the University survey, and projected successively on, or in connection with, each other towards the large location. One of these was the Rees D. Price survey, the original field notes of which, filed in the land office, show that this survey was made December 15, 1857. April 4, 1870, a resurvey of this location was made, on which patent issued April 15, 1870. The field notes, as corrected by this resurvey, and carried into the patent, are as follows:

"Said survey is situated on the waters of Tehuacana creek, in the N. E. portion of McLennan Co., about $19\frac{1}{2}$ miles N., 15 E., from Waco. Beginning at the N. W. cor. of an 800-acre survey for J. M. Henrie; thence N., 30 W., 264 vrs.; thence S., 60 W., passing the S. E. cor. of McKenny and Williams surveys at 151 vrs., at 979 vrs. the S. W. cor. of same, in all 1,075 vrs., to the east line of the University land; thence S., 30 E., 3,138 vrs., to stake in prairie for corner; thence N., 60 E., at 520 vrs. branch, at 1,075 vrs. a stake in prairie for corner; thence N., 30 W., 2,874 vrs., to beginning."

The land-office map of this section of the country of date December, 1868, shows that the Rees D. Price survey overlaps the University survey at its northeast corner, and throughout the whole length of the Price survey. A land-office map of the same section dated May, 1877, shows a vacancy between the Price survey and the University survey. On April 20, 1881, a patent was issued to the heirs of Gideon Pace, embracing the vacancy apparent on the map of 1877, including the land in controversy in this suit. The survey for the Gideon Pace location was made August 3, 4, and 5, 1874, and the field notes filed in the land office October 20, 1874. In making the survey of the University land in 1841 the northeast corner was not marked or witnessed by natural or artificial objects, and, if the east boundary line was run on the ground, the steps of the surveyor could not be found in 1858. In that year, Thomas J. Oliver, then a surveyor of the Robertson land district, subdivided the University survey into sections, in the course of which work he established and marked the northeast and the southwest corners of that survey, run and marked the east boundary line so that its place on the ground has been substantially recognized ever since that, and as then located and marked by him is now known and respected. On March 17, 1885, E. E. McDaniel, admitted to have been at that time the owner of the whole of the Rees D. Price survey, sold and conveyed to T. B. Cox, one of the defendants, the land in controversy, which the deed described as a part of the Rees D. Price grant, with metes and bounds, beginning at the northeast corner of the University land, and running with its east boundary line 3,138 varas to a stake for the southwest corner of the tract

thereby conveyed to Cox, with other calls to include all the land here in controversy. On the 10th of August, 1885, Cox conveyed an undivided one-third interest in the same tract of land to W. M. Walston, describing it with the same metes and bounds, identically, as were set out in the deed from McDaniel to Cox. These deeds were filed for record in the proper office August 26, 1885. The other defendants, respectively, hold under deeds from Cox or Walston, in all of which deeds to and from Cox and Walston the description above set out is preserved, with the recitation that the land is a part of the Rees D. Price survey.

The proof was full that the parties had paid the state and county taxes on this land regularly during all the time of their occupancy, the land rendered being shown on the assessment roll as "abstract No. 711; certificate No. 4/93; original grantee, R. D. Price"; and the receipt for the taxes given the defendants by the collector describe the land as so many acres, "abstract No. 711; certificate No. 4/93; original grantee, R. D. Price." The Gideon Pace survey, under which the plaintiff claimed, was abstract No. 702, certificate No. 30/165. The plaintiffs contend that, as the judge instructed the jury that the R. D. Price survey did not include the land in controversy in this suit, the payment of taxes as shown above cannot be held to have been made on the land which the defendants occupied, and which was clearly described in their duly-recorded deeds. The possession requisite to support these pleas is defined in the statute to be the "peaceable adverse possession of land, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered." Rev. St. Tex. 1895, art. 3342. The deeds in this case describing the land as a part of the Price grant does not make it so, nor does such description render the instrument any less a deed to the land therein otherwise unmistakably described. *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786. It is settled that the payment of taxes may be proved by the testimony of one who knows the fact, or by circumstantial evidence, and without the production or help of tax receipts or of the assessment roll. The state revenue laws provide that land rendered for taxes shall be described by the number of acres, the abstract number of the survey, the number of the certificate, and the name of the original grantee. It is also provided that the list of one's property returned to the assessor for taxation shall be verified by the oath of the person making the return. The common conscience, as well as the most enlightened equity, forbids that any one should make oath to what he does not know, or have reasonable ground to believe, to be true; and both the common conscience and enlightened equity abhor the affiant whose oath is contradicted by his daily conduct and professions. These defendants, therefore, could not return the lands for taxes otherwise than as they did. Suppose they had returned it as so many acres, "abstract No. 30/165, original grantee, Gideon Pace," besides thereby denouncing themselves as patent swindlers, and proving it by their own oath, such rendition, and the record thereby made, would be variant from their deeds. *McCurdy v. Locker*, 2 Tex. Civ. App. 220, 20 S. W. 1109. The stat-

ute prescribing the five-year limitation says nothing about the assessment, or the form of the assessment roll, or of the collector's receipt for taxes. It is not necessary that the rendition should be made by, or even in the name of, the one claiming under this statute. *Cantegrel v. Von Lupin*, 58 Tex. 570.

The statement we have made of this case, construing the record with our utmost care, brings it within the letter and equity of the statute. *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612. The later Texas cases do not overrule or question the authority of the cases we have cited, and, if they did, this court might well follow the earlier cases which are consonant with justice and sound reason. The judgment of the circuit court is affirmed.

MAXEY, District Judge, dissents.

BUCKSTAFF et al. v. RUSSELL & CO.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 841.

1. SALES—RESCISSION.

Assuming that a contract for the sale of machinery authorized the buyers to rescind if they were in fact dissatisfied with the machinery after a fair trial, although there was no reasonable ground for such dissatisfaction, the fact that they used the machinery for 3½ years after they claimed to have notified the seller of their election to rescind, and then sold it, and appropriated the proceeds to their own use, constituted an abandonment of their right of rescission, and remitted them to their right to damages for alleged breach of the warranties. It is immaterial that the sale took place after the seller instituted his suit for the contract price, as he had the right to show, as an answer to the plea of rescission, that by a course of conduct which began before the suit was filed, and continued thereafter, the defendants had manifested an intention to abandon their alleged right of rescission.

2. SAME.

Where a written contract for the sale of machinery specifically describes the kind, amount, and size thereof, with express warranties as to its capacity, no other warranties will be implied, and oral statements and representations made prior to the execution of the contract are properly excluded.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was a suit consisting of three counts, which was brought by Russell & Co., the defendant in error, against John A. Buckstaff and John E. Utt, the plaintiffs in error. By the first count of the petition the plaintiff below sought to recover the price agreed to be paid by the defendants for certain machinery which had been delivered to the defendants under the following contract:

"This agreement, made and entered into this 22d day of June, A. D. 1888, by and between Russell & Co., of Massillon, Ohio, by its agent, H. W. Young, party of the first part, and J. A. Buckstaff and J. E. Utt, parties of the second part, witnesseth: That the said Russell & Co. agree to furnish the following machinery, delivered on cars at Lincoln, Nebraska: Three (3) boilers, 60 inch x 14 feet; one (1) automatic cut-off engine, 125 horse power; one (1) automatic cut-off engine, 50 horse power; one Gordon Maxwell Duplex Pump, one (1) Garfield Injector; one (1) heater, and any necessary fittings of sufficient size and dimensions to properly run such a plant; also two (2) smoke-

stacks, 32 inch diameter, 60 feet long, made of No. 12 iron, with fancy tops, guy rods, and stays. Hereto attached, and made a part of this contract, proposals marked Exhibits A, B, C, & D. For and in consideration of and in payment of the same, the said J. A. Buckstaff and J. E. Utt agree to pay four thousand nine hundred and fifty dollars (\$4,950.00), as follows: One-third when machinery is steamed up ready to run; the balance in six (6) and twelve (12) months, with interest at the rate of 7 per cent. per annum from the time of erection in Lincoln; providing that, with proper and careful management, said engines, boilers, and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel and as durable as a Corliss noncondensing engine. It is also understood and agreed that said Buckstaff & Utt shall use fair and honorable means to satisfy themselves, before payments are due, that said engines, boilers, and pumps are working to their entire satisfaction, and, should they not be, then, in that event, the said Buckstaff & Utt are to notify said Russell & Co., and said Russell & Co. must at once comply with the terms of this contract within sixty days, and, in the event they do not, the said Buckstaff & Utt may declare this contract paid in full, or said Russell & Co. shall pay back to said Buckstaff & Utt all money paid to them, and said Russell & Co. shall pay said Buckstaff & Utt such damage as shall be declared fair by competent judges, and, after paying such damages, may remove said machinery without cost to said Buckstaff & Utt. It is hereby agreed that said Russell & Co. shall ship said machinery not later than July 15th, 1888. This contract signed in duplicate."

By the second and third causes of action the plaintiff sought to recover the value of certain iron piping and grate bars, which were sold and delivered by the plaintiff company to the defendants subsequent to the execution of the aforesaid contract, but no controversy arises in this court with respect to the latter claims.

As a defense to the first cause of action, the defendants pleaded, in substance, as follows: First. That with proper and careful management the engines and boilers supplied under the aforesaid contract were incapable of producing the horse power specified in the contract; that they were not as economical of fuel as the Corliss noncondensing engine; and that there was a breach of the warranty contained in said contract in both of these respects. Second. That the defendants used all fair and honorable means to satisfy themselves that the engines, boilers, and machinery supplied under the contract were capable of fulfilling the warranties therein contained; that, notwithstanding repeated efforts on the part of the plaintiff and defendants, after the erection of said machinery, to cause the same to fulfill said warranties, the same had at all times failed to do so; that by reason thereof the defendants had notified the plaintiff company that said boilers, engines, and machinery were defective and insufficient, and had demanded of the plaintiffs the removal of the same from the property of the defendants, and the payment to the defendants of the amount of money, to wit, \$690.68, which had been paid by them to the plaintiff under said contract, and the damage by them suffered in consequence of the foregoing facts. In addition to the aforesaid plea, the defendants interposed a counterclaim, whereby they sought to recover the damages sustained in consequence of the foregoing alleged breaches of warranty. There was a trial to a jury, in which the issues were fairly presented as to whether the engines and boilers, when properly and carefully managed, developed the amount of horse power specified in the contract, and as to whether they were as economical in the consumption of fuel as the Corliss noncondensing engine. There was a verdict for the plaintiff company, from the amount of which it appears that both of the aforesaid issues were decided in favor of plaintiff, and that the jury found against the defendants on their counterclaim.

John H. Ames and Charles O. Whedon, for plaintiffs in error.

J. W. Deweese (F. M. Hall with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal contention on the part of the plaintiffs in error, who were the defendants below, is that the trial court should have allowed the jury to determine whether they had used "fair and honorable means" to determine if the engines, boilers, and pumps worked satisfactorily, and whether, after the use of such means, the defendants were in fact dissatisfied with the machinery in question, and had duly notified the plaintiff company to that effect. It is urged, in substance, that the contract on which the suit is founded gave the defendants the right, if they were dissatisfied with the machinery after a fair and honorable trial thereof, to rescind the agreement for the purchase of the same, upon due notice to the plaintiff, and to demand a return of such part of the purchase money as had been paid, and the payment of all such damage as had been sustained in consequence of the attempt to make use of the machinery. The trial court did refuse to submit the aforesaid issue to the jury, but we are unable to say that its action in that regard was erroneous. Assuming, but not deciding, that the contract in question was of such a nature that it did authorize the defendants below to rescind the agreement, if they were in fact dissatisfied with the machinery after a fair trial thereof, although there was no reasonable ground for such dissatisfaction, yet we are of opinion that the record discloses that such right of rescission under the provisions of the contract had been lost. It was shown on the trial that the defendants continued to use the engines, boilers, and their appurtenances for $3\frac{1}{2}$ years after they claimed to have notified the plaintiff company of their election to rescind the agreement because of their dissatisfaction, and that at the end of that period they sold all of the machinery, and appropriated the proceeds to their own use. Such conduct on the defendants' part, which was proven without objection, amounted, we think, to an abandonment of the contract right of rescission, and remitted the defendants to their common-law right to recover such damages as they had sustained, if, in point of fact, the engines and boilers lacked the prescribed amount of horse power, or were not as economical as they ought to have been in the consumption of coal. The trial court appears to have taken that view of the case, and to have instructed the jury on that theory.

It is suggested, arguendo, that, inasmuch as the abandonment of the contract right of rescission by the use and sale of the machinery took place after this suit was instituted, the plaintiff company cannot take advantage of such use and sale as an answer to the plea of rescission, and that the testimony tending to show such use and sale was immaterial and incompetent. It is a sufficient answer to this suggestion to say that the testimony was received without objection, and the defendants thereby admitted its relevancy and competency, and should not be allowed to now urge that it ought to have been excluded. Furthermore, one of the acts constituting an abandonment of the contract right of rescission, to wit, the use of the machinery as their own after the notice of rescission had

been given, was not wholly done and performed subsequent to the commencement of the action. The proof shows that the defendants used the machinery as their own, after giving notice of their election to rescind the contract, for two or three months before the present suit was filed. They continued to so use it thereafter for several years, until it was sold. We think, therefore, that upon the issue as to whether the contract right of rescission had been lost, the plaintiff below had the right to show that the defendants, after giving notice of rescission, had used the machinery for several months before the present suit was brought; that they had at no time ceased to use it, and had eventually sold it, and appropriated the proceeds. These undisputed facts clearly demonstrated that the contract right of rescission had been lost, and was no longer available to the defendants as a defense. It matters not, we think, that some of the acts evidencing an intention to abandon the contract right of rescission were committed after the suit was filed. It is well settled that a plaintiff is not confined in his recovery to those damages which had become manifest, and which he could have shown on the day his suit was commenced, but that he may recover those which have become apparent subsequently, up to the day of the trial. For like reasons we think that the plaintiff company was entitled to show that by a course of conduct which began before the suit was filed, and continued thereafter, the defendants had, in an unmistakable manner, manifested an intention to retain the machinery in controversy, and to abandon their alleged right of rescission.

The view taken of the question last considered renders it unnecessary to notice any of the assignments of error relative to the measure of damages. Counsel concede, as we understand, that the rule for the assessment of damages was correctly applied by the trial court, provided the defendants had lost their right of rescission, and could only claim compensation because the engines and boilers were deficient in horse power, and consumed too much fuel. We are satisfied that the defendants were only entitled to demand damages for the breach of the last-mentioned warranties, and that the rule for estimating the damages, in case a breach of these warranties was established, was correctly stated by the trial court. In any event, it is now immaterial whether the instructions on this subject were technically correct, since the jury found that the warranties in question were not broken, and that no allowance on account of a breach thereof ought to be made.

It is further urged in the brief that some evidence offered by the defendants was erroneously excluded. The testimony to which this assignment relates was, in the main, calculated to show that prior to the execution of the contract in suit the plaintiff company was advised that the boilers, engines, and other machinery which it proposed to furnish were being contracted for by the defendants for the purpose of operating a factory for the manufacture of paper, which was to be provided with paper-manufacturing machines having a capacity to manufacture from 10 to 12 tons of paper daily. The object of offering this proof seems to have been to lay

the foundation for raising an implied warranty on the part of the plaintiff company that the engines and boilers which it proposed to furnish would generate sufficient power to work such a plant in all of its departments successfully, and the necessary amount of steam to cook the paper. The trial court ruled, in substance, that, inasmuch as the kind, amount, and size of machinery agreed to be furnished were specifically described in the agreement, and inasmuch as certain express warranties with respect to its capacity were incorporated into the agreement, no other warranties would be implied. It accordingly excluded the oral statements and representations made by the parties prior to the execution of the contract, on the theory that they were merged therein. In so ruling no error was committed. The action of the trial court in that respect was substantially in accordance with the views of this court as expressed in the case of *Hotel Co. v. Wharton* (decided at the present term) 79 Fed. 43. Finding no error in the record of which the defendants below are entitled to complain, the judgment of the circuit court is hereby affirmed.

In re NEWMAN.

(Circuit Court, N. D. California. March 15, 1897.)

1. RIGHT OF APPEAL TO SUPREME COURT.

Where, upon an application in the circuit court for a writ of habeas corpus, the only question arising under a treaty was as to whether the petitioner was seeking an asylum in the United States, and no question arose as to the construction or validity of the treaty, or as to the jurisdiction of the circuit court, the petitioner was not entitled, under Act March 3, 1891, § 5, to an appeal to the supreme court of the United States.

2. SAME—BOND FOR COSTS.

The circuit court has no authority to grant an appeal to the supreme court of the United States without requiring bond for costs.

Alfred L. Black, for petitioner.

H. S. Foote, U. S. Atty., and Denis Donohoe, Jr., opposed.

MORROW, District Judge. In the matter of John Newman, alias Butler. Application for an appeal to the supreme court of the United States. The writ of habeas corpus in this case having been discharged, the petitioner applies for an appeal to the supreme court of the United States, under section 5 of the act of March 3, 1891, providing for circuit courts of appeal. This section provides:

"That appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified for decision. * * * In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question."

I do not understand from the application for an appeal or the assignment of errors in this case that the proposed appeal involves any question concerning the jurisdiction of the circuit court in

which the application for writ of habeas corpus was heard. Nor do I find from the assignment of errors that the question involves the validity or construction of any treaty made under the authority of the constitution of the United States. By article 10 of the treaty of 1842 between this country and Great Britain, it was provided that, upon mutual requisitions, all persons should be delivered up to justice "who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either shall seek an asylum or shall be found within the territories of the other." Section 5270 of the Revised Statutes provides for the apprehension of any person found within the limits of any state, district, or territory, charged with having committed within the jurisdiction of any such foreign government any of the crimes provided for by treaty or convention. The proposed appeal and assignment of errors raise the question whether Newman was seeking an asylum in the United States at the time of his arrest. The commissioner determined, as a question of fact, that he was seeking an asylum. Therefore the matter decided by the commissioner and by the circuit court was a question of fact, as to whether or not he was seeking an asylum. The commissioner found as a fact that Newman was seeking an asylum in this country. The circuit court, on the hearing of the writ of habeas corpus, found, not only that he was seeking an asylum in this country under the provision of the treaty, but also that he was found in the United States, under the provisions of section 5270 of the Revised Statutes. I do not understand that this application for a writ of error involves any one of the questions that entitle the petitioner to take an appeal to the supreme court of the United States.

He also asks for an appeal without bonds for costs. That is a matter that the court is not authorized to grant. I am not able to find any statute which permits this court to allow an appeal to the supreme court of the United States without giving bonds for costs.

The other application, that pending the appeal the petitioner be retained in the custody of the court, is not necessary to decide, in view of the fact that I must deny the application for an appeal in this case.

WEBB, Sheriff, et al. v. YORK.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 796.

1. EXTRADITION—SUFFICIENCY OF INDICTMENT—CONFLICT OF LAWS.

A requisition for the return of a fugitive from justice cannot be denied, when the indictment or affidavit of which a copy is attached to the requisition would be held sufficient by the courts of the state where the offense was committed, though it would not be held good by the courts of the state where the accused has taken refuge.

2. SAME—EMBEZZLEMENT.

Under the Criminal Code of California, which provides that an indictment or information must charge the commission of the offense with such certainty "as to enable a person of common understanding to know what is intended," it is not necessary that an affidavit charging the accused with having embezzled money which he held as bailee should describe the precise character of the bailment.

3. SAME—HABEAS CORPUS.

In a proceeding by habeas corpus, an extradition warrant for the arrest of a fugitive from justice ought not to be pronounced void, merely because of some technical defect in the foreign indictment or affidavit, provided the offense is substantially alleged or described.

Appeal from an Order in Chambers made by the District Judge of the United States for the District of Colorado.

This was a petition by Emma G. York for a writ of habeas corpus. The district judge discharged the petitioner from custody, and Elias H. Webb, as sheriff of Arapahoe county, Colo., and others, prosecuted this appeal. A motion to dismiss the appeal was denied in an opinion reported in 21 C. C. A. 65, 74 Fed. 753.

Emma G. York, the appellee, being in the custody of Elias H. Webb, the sheriff of Arapahoe county, state of Colorado, applied by petition to the Honorable Moses Hallett, United States district judge for the district of Colorado, for a writ of habeas corpus, alleging that she was wrongfully restrained of her liberty by the aforesaid sheriff. The writ of habeas corpus as prayed for was duly issued and served. The sheriff made return to the same that he held the petitioner as a fugitive from justice, under and by virtue of a warrant issued by the governor of the state of Colorado, in obedience to a requisition of the governor of the state of California. Appended to said return was a copy of the executive warrant, together with a copy of the requisition made by the governor of California, and the documents accompanying the requisition, on the strength of which the executive warrant had been issued. The papers thus appended to the return, so far as they are material, are as follows:

"State of Colorado, Executive Department.

"The People of the State of Colorado to any Sheriff or Peace Officer of any County in said State, Greeting: Whereas, it has been represented to me by the governor of the state of California that Emma York stands charged with embezzlement, a crime under the laws of the said state of California, committed in the county of San Francisco, in said state, and that she has fled from the justice of the said state, and has taken refuge in the state of Colorado, and the said governor of the said state of California has, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said Emma York to be arrested; and whereas, the said representation and demand is accompanied by a certified copy of the complaint, warrant, and affidavit duly returned and filed in the office of the police court of said city and county of San Francisco, in the said state of California, whereby the said Emma York stands charged with said crime, which said copy and facts aforementioned are duly certified by the governor of the state of California to be true and authentic: You are therefore hereby commanded and required to arrest and take the body of the said Emma York wherever she may be found within this state, and her convey to the county jail of any county in this state, and her there safely keep, or cause to be kept, to be dealt with according to law. Herein fail not, and due return of this writ make to this department, showing your acts and doings thereunder. In testimony whereof I have hereunto set my hand and affixed the great seal of the state, at the city of Denver, this 20th day of April, A. D. 1896.

"[Seal.]

"By the Governor.

Albert W. McIntire.

"A. B. McGaffey, Secretary of State."

"State of California, Executive Department.

"James H. Budd, Governor of California, to His Excellency, the Governor of the State of Colorado: Whereas, it appears by the annexed exemplification of record, consisting of a certified copy of complaint filed in the police court of the city and county of San Francisco, state of California, warrant of arrest and affidavits of Charles Crockett and Adella A. Gibson and William C. Cook, which I certify are authentic and duly authenticated, in accordance with the laws of this state, that Emma York stands charged with the crime of embezzlement, committed in the city and county of San Francisco, in this state, and it has been represented to me that she has fled from the justice of this state, and has taken refuge in the state of Colorado: Now, therefore, pursuant to the provisions of the constitution and laws of the United States, in such case made and provided, I do hereby request that the said Emma York be apprehended and delivered to Charles Crockett, who is hereby authorized to receive and convey Emma York to the state of California, there to be dealt with according to law, and to be tried for the offense herein designated. In witness whereof I have hereunto set my hand and caused the great seal of the state to be affixed at Sacramento, this 11th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

"[Seal.]

James H. Budd, Governor of California.

"By the Governor.

"L. H. Brown, Secretary of State,

"By W. T. Sesnon, Deputy."

"In the Police Court of the City and County of San Francisco, State of California. Department No. 3.

"The People of the State of California vs. Emma York.

"State of California, City and County of San Francisco—ss.: Personally appears before me this 4th day of April, A. D. 1896, Adella A. Gibson, who on oath makes complaint and deposes and says that on the 29th day of March, A. D. 1896, in the city and county of San Francisco, state of California, the crime of, to wit, embezzlement, was committed, to wit, by Emma York, who then and there was intrusted as bailee by C. F. Gibson with the following personal property of his, the said C. F. Gibson, namely, twenty-two thousand five hundred (\$22,500), of the value of twenty-two thousand five hundred dollars (\$22,500) in lawful money of the United States of America, and the said Emma York then and there received the said personal property as bailee as aforesaid, and while said personal property so intrusted as aforesaid was in the possession, care, custody, and control of the said Emma York, she, the said Emma York, did then and there, to wit, on said 29th day of March, A. D. 1896, at said city and county of San Francisco, willfully, unlawfully, feloniously, and fraudulently convert, embezzle, and appropriate the same to her own use, contrary to her said trust as such bailee, as aforesaid, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California. And this complainant, upon oath, accuses the said Emma York of having committed the said crime, and prays that the said accused may be brought before a magistrate and dealt with according to law.

Adella Gibson.

"Res. or Place of Bus., 1206 Market St.

"Subscribed and sworn to before me this 4th day of April, A. D. 1896.

"H. L. Joachimson,

"Judge of the Police Court of the City and County of San Francisco."

Indorsed: " * * * Filed in the police court of the city and county of San Francisco, department No. 3, this 4th day of April, 1896.

"Jacob Shaen, Clerk."

"Warrant.

* * * * *

"State of California, City and County of San Francisco—ss.: Charles Crockett, being duly sworn, deposes and says that he was, on the 5th day of April, A. D. 1896, and still is, a police officer of said city and county, and that as such police officer he received the above warrant of arrest for Emma York, charged with the crime of felony,—embezzlement; and deponent deposes and

avers that he thereupon made due and diligent search for the said Emma York, in said city and county, to wit, sought for her at [her] last known place of residence and at her place of business, and in the market place and at the exchange, and that he could not find said Emma York; and deponent deposes and avers, upon his information and belief, that the said Emma York has fled from justice in the state of California, and taken refuge in the state of Colorado.

Charles Crockett.

"Subscribed and sworn to before me this 5th day of April, 1896.

"H. L. Joachimson,

"Judge of the Police Court of the City and County of San Francisco, State of California."

Indorsed: " * * * Filed in the police court of the city and county of San Francisco this 5th day of April, 1896.

"H. L. Joachimson, Judge of said Court."

"Office of District Attorney, City and County of San Francisco.

"San Francisco, April 5, 1896.

"To His Excellency, the Governor of the State of California—Sir: I have the honor to make herewith application for a requisition upon the governor of the state of Colorado for Emma York, who is charged in this county with the crime of felony, to wit, embezzlement; and who, as appears by the affidavit of William C. Cook, herewith submitted, is a fugitive from the justice of this state. In support of the application, I inclose herewith, in duplicate, exemplified copies of the complaint and warrant of arrest against the said Emma York, and affidavits alleging the fact required to be established, and respectfully certify: First, that, in my opinion, the ends of public justice require that the said Emma York be brought back to this state for trial at the public expense as a charge upon this state; second, that I have, as I believe, within my reach, and will be able to produce upon the trial, evidence sufficient to secure conviction; third, no other application has been made, nor has any requisition been issued, for this person, growing out of the transaction set out in the present exemplification of record; fourth, I believe that the criminal named is now under arrest in the state of Colorado awaiting requisition; fifth, the said Emma York, at the time she fled therefrom, was a resident of this state. I name Charles Crockett as a proper person to be designated as agent, and certify that he has no private interest in the arrest of the fugitive.

"I am, sir, very respectfully,

William S. Barnes,

"District Attorney, City and County of San Francisco."

* * * * *

"In the Police Court of the City and County of San Francisco, State of California.

"The People of the State of California vs. Emma York, alias Emma Brewer.

"William C. Cook, being duly sworn, deposes and says that he is a resident of the city and county of San Francisco, state of California. That on the 29th day of March, 1896, he was the business partner of one C. F. Gibson, in the said city and county of San Francisco, and had so been for a period of about ten years next preceding said last-named date. That between the 17th day of March, 1896, and the said 29th day of March, 1896, one Emma York was engaged in nursing and caring for C. F. Gibson, who was during said last-named period in a dying condition. That said C. F. Gibson died on or about said 29th day of March, 1896. That between said 17th day of March, 1896, and said 29th day of March, 1896, there came into the custody and care and control of said Emma York, as the agent and trustee and bailee of said C. F. Gibson, the sum of twenty-two thousand five hundred dollars, in lawful money of the United States, the personal property of said C. F. Gibson, and during his lifetime; and she, the said Emma York, after the said sum of money heretofore set forth had come into her possession, care, custody, and control as aforesaid, did, on or about the said 29th day of March, 1896, at said city and county of San Francisco aforesaid, willfully, unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate the same, and the whole thereof, to her own use. That immediately after said 29th day of March, 1896, said

Emma York departed and fled from the state of California, and has taken refuge, and is now, as affiant is informed and believes, and so states the fact to be, in the state of Colorado, and without the jurisdiction of the laws of the state of California. All of which acts of said Emma York hereinbefore set forth are contrary to and in violation of the laws of the state of California in such cases made and provided.

William C. Cook.

"Subscribed and sworn to before me this 5th day of April, A. D. 1896.

"H. L. Joachimson,

"Judge of the Police Court, City and County of San Francisco, State of California.

"Filed in the police court, city and county of San Francisco, state of California, department number 3, this 5th day of April, 1896.

"H. L. Joachimson, Judge of said Court."

The foregoing documents were duly authenticated by the certificate of Tim R. Sullivan, clerk of the police court of the city and county of San Francisco, state of California, and were further authenticated by a certificate of C. F. Curry, clerk of the superior court of the city and county of San Francisco, with the seal of said court attached, showing that H. L. Joachimson, whose name was subscribed to the foregoing documents, was at the time of signing the same police judge in and for the city and county of San Francisco, duly elected and qualified, and that Tim R. Sullivan was the qualified clerk of said police court, and that the signatures of both of said officers were genuine signatures. The case having been submitted to the United States district judge for the district of Colorado on the aforesaid documents, the petitioner, Emma G. York, was discharged from custody. The case is before this court on appeal from said order.

James H. Blood (Gustave C. Bartels with him on brief), for appellants.

Tyson S. Dines (Charles J. Hughes and Branch H. Giles with him on brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

In *Ex parte Reggel*, 114 U. S. 642, 649, 5 Sup. Ct. 1148, it was said by Mr. Justice Harlan, in substance, that, in proceedings under sections 5278 and 5279 of the Revised Statutes of the United States, it is the duty of the executive, upon whom a demand is made for the arrest and return of a fugitive from justice, to comply with the requisition when it appears—First, that the demand is accompanied by a copy of the indictment or affidavit made before a magistrate, charging the accused with the commission of treason, felony, or other crime within the state from whence the requisition comes, and that said indictment or affidavit is certified as authentic by her governor; second, that the person demanded is a fugitive from justice. In the present case the requisition was accompanied by an affidavit duly authenticated, which at least attempted to charge Emma York, the appellee, with the crime of embezzlement, committed in the state of California, and the proof laid before the governor of Colorado that she was a fugitive from justice was certainly adequate to warrant him in finding that such was the fact. No reasons are disclosed, therefore, which would have warranted the governor of Colorado in refusing to honor the requisition, or on account of which the executive warrant which was issued by the gov-

error of Colorado can be held void, unless it be that the affidavit filed in the police court for the city and county of San Francisco, which was attached to the requisition, fails to charge a crime. This, we think, is the sole question which deserves notice.

It is well settled that, in so far as the sufficiency of this affidavit is open for consideration in this proceeding, its sufficiency must be tested by the Code of Criminal Procedure of the state of California, rather than by common-law rules. Every state has the right to regulate the forms of pleadings and process in civil and criminal cases, and to determine what shall be deemed a sufficient indictment, information, affidavit, or declaration in its own courts. A requisition for the return of a fugitive from justice cannot be denied when the copy of the indictment or affidavit attached to the requisition is held sufficient by the courts of the state where the offense was committed, although it would not be held good by the courts of the state where the accused has taken refuge. *Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. 1148; *Pearce v. Texas*, 155 U. S. 311, 15 Sup. Ct. 116, and cases there cited. The particular objection made to the affidavit charging the appellee with embezzlement, which was filed in the police court of the city and county of San Francisco, seems to be that it did not describe the particular character of the alleged bailment. It is urged that, because the accused was alleged to have embezzled money which she held as bailee, it was essential to have described the precise character of the bailment, and that because the affidavit fails in this respect it was insufficient, and subject to a demurrer or motion to quash. An early case in California, decided in 1857 (*People v. Cohen*, 8 Cal. 42), supports that view; but since then the Code of Criminal Procedure in that state has been very much changed, and, as we understand later legislation and later decisions in that state, the affidavit in question would now be held sufficient. The Criminal Code of California now provides that "the indictment or information must contain: * * * (2) A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." 4 Deering's Ann. Codes & St. Cal. p. 203, § 950. In *People v. King*, 27 Cal. 507, it was said, in substance, that the Criminal Code of that state was designed to work the same change in pleading and practice in criminal actions that is wrought by the Code of Civil Procedure in civil actions, and that, therefore, it was not always necessary to state the facts constituting the offense with the same particularity as would be required in indictments by the common law. To the same effect was the decision in *People v. Cronin*, 34 Cal. 191. It has been held repeatedly in that state that an indictment or information, charging an offense in the language of the statute creating it, is sufficient. *People v. Girr*, 53 Cal. 629; *People v. De La Cour Soto*, 63 Cal. 165. And in *People v. Tomlinson*, 66 Cal. 344, 5 Pac. 509, *People v. Treadwell*, 69 Cal. 226, 10 Pac. 502, and *People v. Mahlman*, 82 Cal. 585, 23 Pac. 145, the doctrine last stated was applied to indictments charging the offense of embezzlement; that is to say, it was held that an indictment

charging a person with the embezzlement of money intrusted to his care, as an agent or as an officer of an incorporated company, was good if the charge was couched substantially in the language of the statute, although it did not describe the nature of the agency. In the absence of these decisions, we should entertain no doubt that the information or affidavit quoted in the statement charged the offense of embezzlement with sufficient certainty to put the accused on trial, in view of the liberal provisions of the California Code of Criminal Procedure above cited. It must be conceded, we think, that the affidavit charges the commission of an offense with such certainty "as to enable a person of common understanding to know what is intended," and that is the test prescribed by the statute.

Aside from these considerations, we think it is the better view that, in a proceeding by habeas corpus, an executive warrant for the arrest of a fugitive from justice should be upheld, when the foreign indictment or affidavit on which it is based is properly authenticated, and charges an offense committed within the foreign state with reasonable fullness and accuracy. In such a proceeding the executive warrant ought not to be pronounced void, merely because of some technical defect in the foreign indictment or affidavit, provided the offense is substantially alleged or described. Such we understand to be the view that was expressed by the supreme court of the United States in *Roberts v. Reilly*, 116 U. S. 80, 94, 95, 6 Sup. Ct. 291, and the same view has been adopted by some other courts. *Ex parte Pearce*, 32 Tex. Cr. App. 301, 23 S. W. 15; *In re Roberts*, 24 Fed. 132; *In re White*, 45 Fed. 237; *In re Keller*, 36 Fed. 681; *Kurtz v. State*, 22 Fla. 36. The order appealed from is accordingly vacated and annulled, and the case is remanded, with directions to enter an order committing the petitioner, Emma G. York, to the custody of the appellant, the sheriff of Arapahoe county, state of Colorado, to be dealt with by him in accordance with the warrant for her apprehension, which was issued by the governor of the state of Colorado.

In re **NEWMAN.**

(Circuit Court, N. D. California. March 11, 1897.)

1. HABEAS CORPUS—JURISDICTION OF COMMISSIONER.

Upon an application for a writ of habeas corpus by one who has been committed to custody by a commissioner, the finding of the commissioner in favor of his jurisdiction is not conclusive upon the circuit court.

2. EXTRADITION—ARREST OF BRITISH SUBJECT UPON BRITISH VESSEL.

Upon an application for extradition made on behalf of the British government, the arrest of a British subject who is seeking an asylum within the United States may be made upon a British vessel within our territory.

3. SAME.

Upon an application for extradition, the accused being found within the territory of the United States, the court, in passing upon his plea to the jurisdiction, will not enter upon an inquiry as to whether he came here voluntarily or against his will.

This was an application by John Newman for a writ of habeas corpus.

Alfred L. Black, for petitioner.

Henry S. Foote, U. S. Atty., and Denis Donohoe, Jr., for respondent.

MORROW, District Judge. The petitioner, John Newman, alias Frank Harwood, otherwise called S. Burgess, otherwise called Butler, otherwise called Sampson, otherwise called Clare, otherwise called Lee Weller, upon complaint of the British consul general at San Francisco, was by the United States commissioner committed to the custody of the marshal, to await the action of the executive upon the demand of the British government for his extradition upon two charges of murder, alleged to have been committed in the colony of New South Wales, Australia, within the jurisdiction of said colony, and of the government of Great Britain. He thereupon sued out this writ of habeas corpus to obtain his discharge. To this writ the United States marshal has made his return that the petitioner is detained in obedience to two warrants of commitment directed to him as said marshal by the commissioner, copies of which are annexed to and made a part of this return. The first of these warrants recites that the accused, on or about the 31st day of October, 1896, at Glenbrook, within the colony of New South Wales, Australia, within the jurisdiction and government of Great Britain, committed the crime of murder,—that is to say, did feloniously, willfully, unlawfully, and of his malice aforethought, kill and murder one Lee M. Weller, a human being; that the said Frank Harwood, otherwise called S. Burgess and other aliases, was a fugitive from justice of said Great Britain, and did on or about “the ——— day of ———,” 1896, flee into the jurisdiction of the United States, for the purpose of seeking an asylum; and that the crime of which the said Frank Harwood, otherwise called S. Burgess and other names, was charged, was one embraced within the treaty of extradition between the United States and Great Britain, concluded August 9, 1842, and the said Frank Harwood, otherwise called S. Burgess and other names, having been brought before him in pursuance of a warrant of arrest issued upon said complaint, and having been examined concerning the charges alleged against him, the commissioner finds that the evidence is sufficient in law to justify the commitment of the said Frank Harwood, otherwise called S. Burgess and other names, on the said charge. The second warrant is in the same form as the first, except that the charge is that the petitioner did on or about the 22d day of October, 1896, at Linden, within the colony of New South Wales, Australia, feloniously, willfully, and of his malice aforethought, kill and murder one Arthur Thomas Osborne Preston. To this return the petitioner has filed a traverse and answer to the return, in which he denies that the commissioner had any power, authority, or jurisdiction to issue said commitments, or either of them, and denies the facts set forth in each of said commitments, reciting that the petitioner is a fugitive from justice of said Great Britain, and did,

on or about the ——— day of ———, 1896, flee into the jurisdiction of the United States for the purpose of seeking an asylum. And, as an affirmative matter, the petitioner alleges that he was not found in the territory of the United States or the state of California at the time of the commencement of said proceedings, or of any of them, and in fact was not in said territory; that the petitioner was a British subject, in British territory, passing and going from one portion of British territory to another portion thereof, and at all times in British territory, and at no time seeking an asylum in the territory of the United States or in the state of California. And, as an avoidance of said return, the petitioner avers that if, during the pendency of any of the proceedings referred to in said return, he was found in the territory of the United States or of the state of California, he was brought within said territory by force and against his will, and at the instance of the British government, and of the officers of the United States, acting under the direction of the British government.

No question is raised as to the sufficiency of the testimony to authorize the commissioner to determine that there was reason to believe that the petitioner is the person charged by the complaint as having committed the crimes therein alleged, nor is any question raised as to the sufficiency of the testimony to authorize the commissioner to determine that there was sufficient cause to believe that the accused was the person who committed the offense charged. The only question raised is as to the jurisdiction of the commissioner over the subject-matter and the person of the accused, and this question is based upon the claim that the petitioner was, in the first instance, arrested on board the British ship *Swanhilda*, in the port of San Francisco, on the charge of having murdered Lee Weller; that the complaint was filed and the warrant issued while the petitioner was on board the vessel on the high seas; that he was taken to the city prison, and, while still in custody, he was served with and arrested upon a second warrant issued by the commissioner, charging him with the same crime as described in the first warrant. Thereafter, on the 10th day of February, 1897, while he was still in custody, he was again arrested upon a warrant of the commissioner, charging him with the crime of the murder of Preston. It is the usual practice in these cases to bring up the testimony taken before the commissioner by writ of certiorari; but, as it was claimed that the record would be unnecessarily voluminous to present the facts necessary to determine the question placed in issue by the pleadings, the petitioner was allowed to introduce original testimony in support of his petition. In support of the traverse and answer, the accused thereupon introduced testimony showing that on the 17th day of November, 1896, he signed shipping articles at Newcastle, New South Wales, and shipped on board the British ship *Swanhilda*, bound for San Francisco; that the vessel arrived at San Francisco on the 2d day of February, 1897, and, having come within the harbor, he was arrested on board the vessel by an officer, and taken to the city prison, where he was afterwards served and arrested upon a second warrant issued by the commis-

sioner; and thereafter, on the 10th day of February, 1897, while he was still in custody, he was again arrested upon a warrant of the commissioner charging him with the crime of murder of one Preston; that the first complaint was filed on the 4th day of January, 1897, and the first warrant issued on the same day. In rebuttal, counsel on behalf of the British government introduced testimony showing, among other things, that when the petitioner applied to Capt. Fraser, of the *Swanhilda*, at Newcastle, New South Wales, to be shipped as a seaman, he asked if the vessel was going to San Francisco direct. He was told it was. He then said, "You are not going to Honolulu." He was informed that the vessel was not going to that port. He then said he would ship. Before signing the shipping articles, he asked the captain if he would be discharged in San Francisco. He was informed that he would be, and he shipped with that understanding. He shipped under the name of Lee Weller. Before the vessel arrived in San Francisco, the petitioner applied to the captain to be allowed to go ashore as soon as the vessel arrived in port. The captain told him that he would be allowed to go ashore as soon as the vessel was entered. The commissioner was then called, and testified that this and other testimony had been presented to him upon the trial of the case, and the question had been raised as to his jurisdiction over the subject-matter and of the person of the accused, and that, in view of all the facts of the case, he had determined that the accused was a fugitive from justice, and thereupon he had rendered the following decision:

"Counsel for the prisoner contend that as the testimony shows that the first warrant was founded upon an affidavit made by her Britannic majesty's consul at San Francisco while the British ship *Swanhilda*, upon which the prisoner was, was upon the high sea, and that such warrant was served upon the prisoner by arresting him while on board the British ship *Swanhilda*, in the waters of the Bay of San Francisco, that the commissioner has no jurisdiction to hear and determine the criminality of the prisoner in this matter; that the law of congress under which the commissioner acts provides only for a warrant issued 'upon a complaint made under oath charging any person found within the limits of any state, district or territory with having committed,' etc.; and as the prisoner, at the time of the service of the first warrant on him, was on a British ship, he was on British territory, and not within the territory of the United States. I do not agree with counsel in his contention. While the act of congress referred to only provides for the arrest of a party when found within the limits of any state, district, or territory, this act must be taken in conjunction with the treaty of Great Britain under which I am acting, which provides that when a person charged with the crime of murder, etc., 'shall seek an asylum or shall be found within the territories of the other.' I find from the evidence that the prisoner was seeking an asylum in the United States, as a fugitive from justice, charged with the crime of murder.

"But counsel contend that the treaty is not self-operating; that congress has intentionally left the words 'shall seek an asylum' out of its act, and provided only for the arrest of a person found within the limits of any state, etc. In this latter contention I do not agree with counsel. The treaty is self-acting, and is equally binding with the act of congress on the commissioner and on the courts that may be called on to act in these matters. In support of this, I find that Justice Catron, in the case of *In re Kaine*, an alleged fugitive from Great Britain, reported in 14 How. 103, in an opinion concurred in by Mr. Justice McLean, Mr. Justice Wayne, and Mr. Justice Greer, says: 'The treaty with Great Britain was equally binding on us as the act of con-

gress, and it likewise confers jurisdiction and authority on the judges and magistrates in the respective governments to issue warrants for the apprehension of fugitives, and for hearing and considering the evidence produced against them.' And, as I have already stated, as I find from the testimony that he was a fugitive from justice, charged with the crime of murder, from Australia to this country, and seeking an asylum herein at the time when the first warrant was served on him, that, under the language of the treaty, the commissioner had full jurisdiction. Subsequently, a second warrant was served on him, founded on an affidavit issued after the arrival of the vessel within American waters, to wit, in the harbor of San Francisco, and this warrant was served on him in the city prison, according to the testimony. Later a third warrant was served on him, on an affidavit made on the 10th day of February, for the murder of Preston, while in the city prison."

The facts constituting the jurisdiction of the commissioner over the subject-matter, and over the person of the accused, were found by him in favor of his jurisdiction; and it is contended that this is sufficient, and that this court has no authority to revise the judgment of the commissioner.

In the case of *In re Tom Yum*, 64 Fed. 485, heard in the district court, I had occasion to examine into the whole question of habeas corpus, and the law governing that subject. In that case I rendered the following decision:

"It is well settled that the writ of habeas corpus cannot be used to review, as upon a writ of error, the decision of a judicial or quasi judicial tribunal or officer lawfully constituted by law, and acting within the proper confines of his jurisdiction; and, on the other hand, it is equally certain that the writ may be resorted to—in fact, that is one of its great functions—to inquire into the jurisdiction exercised by such tribunal or officer, for the purpose of ascertaining whether such power has been kept within its legal limits, and the proceedings therein have been according to law."

In considering the question of the jurisdiction of the commissioner in this case, I find, upon the testimony that has been introduced before me, that the accused, when arrested, although upon a British vessel, was, nevertheless, within the territory of the United States. I find further, as a fact, on the testimony that has been presented, that he was seeking an asylum within the United States. These facts bring the petitioner within the provisions of the treaty of 1842 and section 5270 of the Revised Statutes.

The claim that, as the *Swanhilda* was a British vessel, her decks were British territory, cannot avail the petitioner in these proceedings. The vessel was within the territorial limits of the United States for all purposes relating to the execution of the treaties and the laws of the United States. It must be remembered that the application for extradition is made on behalf of the British government, and it certainly would be an extraordinary interpretation of the law that would determine that, under the treaties and laws relating to extradition, a warrant for the arrest of a British subject could not be made upon a British vessel within our territory. In the case of *In re Ezeta*, 62 Fed. 965, it was held that the prisoner could not set up the mode of his capture by way of defense, following the decision of the supreme court in the case of *Mahon v. Justice*, 127 U. S. 700-717, 8 Sup. Ct. 1204. In that case the accused had been brought into a port of the United States by a government vessel, and although they had applied to be allowed to leave the vessel at a foreign port, and before

coming into the port of San Francisco, it was held that this fact did not affect the question of the jurisdiction of this court over the accused, after they were found within the territory of the United States; and, in passing upon the plea of jurisdiction, I declined to enter upon any inquiry as to the conduct of the navy department in bringing the fugitives to San Francisco, holding that the fact that they were found by the marshal of this district was sufficient for the purpose of the examination. The law determined in that case is applicable to the present case. The petition is therefore dismissed, and the petitioner remanded to the custody of the marshal.

In re GRICE.

(Circuit Court, N. D. Texas. February 22, 1897.)

No. 2,062.

1. HABEAS CORPUS—CUSTODY NECESSARY TO AUTHORIZE WRIT.

Even if the writ is not authorized in behalf of a person at large on bail, yet if he surrender himself, or is surrendered by his sureties, and is in actual confinement, the writ may issue, and the court will not consider an objection that he was surrendered by collusion with his sureties.

2. SAME—POWER TO RELEASE PERSONS PROSECUTED IN STATE COURTS.

While the general rule is that persons prosecuted in state courts will not be released by the federal courts on writs of habeas corpus, but will be left to reach the supreme court of the United States by writ of error, yet a federal court has the power to do so if special circumstances should require; possessing a discretion in the matter which must be governed by the facts in each case.

3. SAME.

Where it appeared that a petitioner for a writ of habeas corpus had been indicted in a state court jointly with others, one of whom had been tried and convicted, and upon appeal to the court of last resort had been remanded because there was no testimony to sustain the verdict, and that court, without deciding the question of the constitutionality of the statute, intimated that it regarded it as constitutional; and it appeared further that the statute under which the indictment was found makes an offense under it a felony, and prevents the petitioner from giving bond after conviction, and compels him to submit to incarceration during all the time required for an appeal to the court of criminal appeals, and from there to the supreme court of the United States,—these facts, together with the rulings of the trial judge in the case which has been tried, and the delay since that trial was had, constitute circumstances under which a federal court is called on to exercise its discretion in assuming jurisdiction in a writ of habeas corpus.

4. CONSTITUTIONAL LAW — EXTRATERRITORIAL LEGISLATION — "ANTI-TRUST LAWS."

The provision in the Texas anti-trust law of 1889 that persons outside the state may commit offenses under the statute, and be liable to indictment therefor, is null and void.

5. SAME—CONTRACTS IN RESTRAINT OF TRADE.

It is not every restriction of competition or trade that is illegal or against public policy, or that will justify police regulation, but only such as are unreasonable or oppressive; and a state statute which prohibits combinations formed for the purpose of reasonably restricting competition violates the rights of contract guarantied by the federal constitution.

6. SAME.

A state statute, such as the Texas anti-trust law of 1889, which makes it criminal for two persons to combine, as partners, corporators, or other-

wise, in the ordinary business of life, to increase or reduce the price of commodities, or fix the standard thereof, or for two persons to agree to limit or reduce the production of commodities, or for two persons to combine for the purpose of limiting competition, or to make any agreement in relation to the price of an article, so as to preclude free and unrestricted competition between them or themselves and others, or for two persons to create or carry out restrictions in trade, violates the fourteenth amendment to the constitution of the United States, because it denies to citizens of the United States the right to make valid contracts with respect to their business and property.

7. "EQUAL PROTECTION OF THE LAWS" DEFINED.

By "equal protection of the laws," as used in the fourteenth amendment to the constitution of the United States, is meant equal security under them to every one under similar terms,—in his life, liberty, property, and in the pursuit of happiness.

8. SAME—CLASS LEGISLATION.

A state statute, prohibiting all combinations in restriction of competition or trade, which exempts from its provisions "agricultural products or live stock while in the hands of the producer or raiser" (the Texas anti-trust law of 1889), is class legislation, and violates that part of the fourteenth amendment to the constitution of the United States which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. And the fact that the persons thus exempted are not in a position to combine does not remove the objection to the discrimination in their favor.

This was a petition by William Grice for a writ of habeas corpus.

John D. Johnson and Clark & Bolinger, for relator.

M. M. Crane, Atty. Gen., and C. F. Thomas, for respondent.

SWAYNE, District Judge. This petition, filed by leave of the court on December 9, 1896, at Waco, in the Northern district of Texas, and subsequently transferred to Dallas for hearing, and filed there December 18, 1896, states:

That the petitioner, Wm. Grice, is a resident of the city and county of Dallas, state of Texas; that he is a citizen of the United States, and is unlawfully restrained of his liberty by John W. Baker, sheriff of McLennan county, Texas, by virtue of a capias issued out of the district court of the 54th judicial district of the state of Texas, at Waco, upon an indictment preferred in the said court against him and other citizens of the United States on the 21st day of November, 1894 (No. 871), and entitled "The State of Texas vs. John D. Rockefeller and others." Said indictment charges that John D. Rockefeller, Henry M. Flagler, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Westley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruett, E. Wells, Wm. Grice, F. A. Austin, and E. T. Hathaway, did unlawfully agree, combine, conspire, confederate, and engage with Wm. E. Hawkins and divers other persons, to the grand jurors unknown, in McLennan county, Texas, in a conspiracy against trade, with the said Wm. E. Hawkins, and said other persons, creating a trust, by the combination of their capital, skill, and acts with the said Wm. E. Hawkins and other persons, for the purpose, design, and effect to create and carry out restrictions in trade. That said indictment and prosecution has for its exclusive and only basis a certain act of the legislature of the state of Texas entitled "An act to define trusts, and to provide penalties and punishment of corporations, firms and associations of persons connected with them, and to promote free competition in the state of Texas," approved March 30, 1889, which act is a public law of the state of Texas. That petitioner was arrested upon a capias issued under said indictment, and entered into recognizance for his appearance, and subsequently appeared, on the 2d day of December, 1895, before the said court; and, said cause having been called for trial, the defendants who had been arrested announced a severance, and his co-defendant E. T. Hathaway was then placed

on trial, and by his counsel presented to said court his exceptions to the sufficiency of said indictment, and set up the following causes and exceptions to said indictment, to wit: (1) Because it did not appear from the face of the indictment that an offense against the law had been committed. (2) Because the indictment showed upon its face that the district court of the 54th judicial district had no jurisdiction. (3) Because the act hereinbefore recited was violative of the constitution of the United States, for the reason that said statute discriminated between different classes of citizens of the United States, and denied to certain citizens the equal protection of the law, and proposed to deprive certain citizens of the United States of their liberty, property, privileges, and immunities in a way other than by due course of the law of the land. (4) Because the act of March 30, 1889, was inoperative and void as to persons and citizens resident beyond the territorial limits of Texas. (5) Because said act did not prohibit a trust, or declare it illegal, nor did it declare it an offense, or propose to punish it, but merely defined a trust, without denouncing it, and was therefore not a penal law of the state of Texas, and no prosecution could be maintained under it. (6) Because said indictment showed upon its face that the parties presented were engaged in interstate commerce, within the meaning of the constitution and laws of the United States, and said court had no jurisdiction of any of such matters. Said district court overruled the above objections. The trial proceeded, and on the 12th day of December, 1895, resulted in a verdict of guilty, of the said co-defendant Hathaway, and assessed his punishment at a fine of \$50, and judgment was duly entered thereon by the court. That on the 14th day of December, 1895, said co-defendant Hathaway filed his motions for new trial and in arrest of judgment, setting up, among other things, the error of the said court in overruling the exceptions above stated, which motion was overruled on December 16, 1895; and said co-defendant did thereupon prosecute his appeal to the court of criminal appeals of the said state of Texas; said last-named court having final jurisdiction of criminal matters in Texas, and being a court of last resort in said state, to hear and determine the questions therein raised. That under the provisions of the Code of Criminal Procedure of the State of Texas, and the act aforesaid of 1889, said conviction was a felony, and the said Hathaway was subjected to confinement in the common jail of McLennan county, Texas, pending the determination of said appeal. The petition further avers that the appeal of the said co-defendant Hathaway was filed in the said court of criminal appeals at Dallas on or about the 10th day of January, 1896, and on or about the 29th day of the same month said appeal was argued by counsel, both for himself, as appellant, and counsel for the state, and was submitted to the said court for determination. That upon the 24th day of June, 1896, said court of criminal appeals handed down its decision in said cause, wherein it declined and refused to pass upon the exceptions to the sufficiency of the indictment aforesaid, which had been duly raised in the court below, and duly presented to said court by assignment of errors and by argument, and which involved the dearest rights, not only of the said co-defendant Hathaway, who was appellant therein, but of this petitioner, and which appeal called for an adjudication by said court of criminal appeals of the said state of Texas upon said rights. That the said court of criminal appeals decided said appeal upon a technical ground of the pleadings; holding, in effect, that because the indictment presented in said cause had failed to charge the appellant Hathaway with having "knowingly carried out, as agent, the stipulations, purposes, prices, rates, or orders" under said alleged conspiracy, that thereafter the admission of evidence to that effect over the objection of said Hathaway was unwarranted in law, and said conviction was invalid; and thereupon, for said cause, and without considering and determining the rights of said appellant Hathaway as a citizen of the United States under the constitution, said court reversed said judgment, and remanded said cause, for trial de novo, to said district court. 36 S. W. 465. That, since the rendition of said judgment by said court of criminal appeals, two terms of the said district court have been held, one of which is now nearing its close. That this petitioner with his co-defendants have been arrested and placed under recognizance, have stood ready and anxious for trial upon said indictment, yet said cause has not been even called by the court for trial, nor has said cause been set for trial, but same has been

permitted to remain on the docket of said court, subjecting this petitioner and his co-defendants, wantonly, to the shame and contumely of an indictment for felony, but denying him and his co-defendants the rights to be heard as a citizen of the United States; and whereby the petitioner as well as his co-defendants are without remedy in the state courts of Texas for the assertion and vindication of their rights under the constitution of the United States. And petitioner further states that on the 24th day of November, 1896, said co-defendant E. T. Hathaway procured from this court his writ of habeas corpus, commanding said John W. Baker, sheriff of McLennan county, to produce before it the body of the said Hathaway and certify to the cause of his detention, which writ was on the same day duly served on the said sheriff, who made return that he held said Hathaway by virtue of a capias issued under the indictment hereinbefore mentioned. Said cause was set for hearing on the 7th day of December, 1896, at Waco, Texas, and due notice thereof given to the state. That said writ was based exclusively upon the ground that he was a citizen of the United States, and that the law under which said indictment had been presented was violative of the constitution of the United States in the particulars stated in his exceptions thereto filed upon the trial of the said cause. That petitioner further shows that the prosecuting officer of the state of Texas in the district aforesaid, as petitioner believes, for the purpose of defeating the jurisdiction of the federal court upon the said writ, and for the purpose of preventing this court from passing upon the constitutionality of the rights of the said E. T. Hathaway as a citizen of the United States, did on the 7th day of December, 1896, in said district court, and with the consent of said court, dismiss said indictment and prosecution as to said E. T. Hathaway, co-defendant, but left same to stand unimpaired and unaffected as to this defendant and his other co-defendants; and upon the same day the said sheriff did file his amended return to said writ, wherein he submitted to this court a copy of said judgment of dismissal of the said district court of the state of Texas, and did further certify that by reason of said dismissal he claimed no further right and custody of the said Hathaway; and by reason thereof the jurisdiction of this court in the premises was practically and substantially terminated, and this court was denied the privilege of determining whether or not said act of the legislature of the state of Texas approved March 30, 1889, commonly known as the "Anti-Trust Act," was or was not violative of the constitution of the United States, and violative of the rights, privileges, and immunities of your petitioner, as well as his co-defendants. The petition further avers that said act is violative of the constitution of the United States, and is therefore null and of no effect, for the reasons stated in said exceptions to said indictment hereinbefore recited. That said act discriminates between different classes of citizens of the United States, and denies to certain citizens the equal protection of the laws. That it deprives certain citizens and classes of citizens of the United States of their liberty, property, privileges, and immunities in a way other than by due course of the law of the land. That it otherwise attempts to justify the exercise of extraterritorial jurisdiction over the citizens of the United States residing in other states of the American Union, and over acts done in other states of the American Union, and over which the state of Texas can have no possible jurisdiction. And that said act, and the indictment against your petitioner and others as aforesaid, is an attempt to regulate and interfere with interstate commerce, all in violation of the constitution of the United States. The petitioner further shows that, by reason of the premises, he is without remedy for the assertion and vindication of his rights as a citizen of the United States, under the constitution thereof; that he has stood under indictment for felony, charged with the violation of said statute, for a period of two years, without being afforded an opportunity by the state courts of Texas for the assertion of his rights as aforesaid as a citizen of the United States. Your petitioner avers and believes that it is the purpose and intent of the prosecuting authorities of the state of Texas to prevent, if possible, any appeal by this petitioner to the courts of the United States for the vindication of his rights as aforesaid as a citizen. In view of the premises herein recited, and without the interposition of this honorable court for his due protection and the due conservation of his rights as a citizen of the United States, he is practically remediless by an appeal in regular course, or other-

wise. Upon the said premises, the petitioner prays this court for its writ of habeas corpus, to the end that the cause of the detention of the petitioner may be promptly and summarily inquired into by this court according to the laws of the United States, in order to direct the discharge of this petitioner from the custody of said Baker, sheriff, as aforesaid.

The petitioner filed with his petition his exhibits as follows:

(1) Copy of indictment preferred in said cause against your petitioner and others. (2) Copy of judgment of the district court of the 54th judicial district, adjudging his co-defendant Hathaway guilty. (3) A copy of the brief and argument of your petitioner's co-defendant Hathaway in the court of criminal appeals of the state of Texas. (4) A copy of the opinion of the said court of criminal appeals of the state of Texas. (5) And petitioner refers to the record of this court in matter of the application of Ex parte E. T. Hathaway, and prays that it may be considered a part and parcel of this petition. And your petitioner prays that these papers filed herewith may be read and considered by the court upon final hearing hereof; also, as a part of this, his petition for habeas corpus. And, as in duty bound, your petitioner will ever pray.

Said petition was duly sworn to by the said petitioner, William Grice, upon the 9th day of December, 1896, in the presence of Thomas P. Stone, a notary public for McLennan county, Tex. As to the papers filed with and made a part of this petition, the indictment contains six counts, and covers every phase and feature of the said act under which it is drawn. The judgment of the district court of the Fifty-Fourth judicial district of the state of Texas follows the verdict therein. A copy of the brief and argument of petitioner Hathaway in the court of criminal appeals of the state contains the usual matters embodied in such a brief, including the rulings of the trial judge, together with the opening argument of counsel for the state, made at the trial. The copy of the opinion of the said court of criminal appeals of the state of Texas, showing that the court decided:

(1) The judgment is reversed and the cause remanded because the court charged on a phase of the case not supported by any allegation in the indictment, and because the evidence wholly fails to sustain this verdict. (2) That the decision of the constitutional questions raised by appellant Hathaway was not necessary in that case. (3) That the presumption would be indulged that the decision of the supreme court of the state of Texas sustaining the constitutionality of said act was correct.

The petition of E. T. Hathaway for habeas corpus, and the return and amended return of the sheriff thereof, shows substantially the facts as alleged above.

Upon said petition and exhibits being filed, this court on December 9, 1896, granted the writ of habeas corpus prayed for, which was duly served on the same day upon John W. Baker, sheriff of McLennan county, Tex., who upon the same day produced in open court, as directed, the said William Grice, and answered that he held him in custody by virtue of a capias issued out of the district court of the Fifty-Fourth judicial district of the state of Texas upon an indictment (No. 871) entitled "The State of Texas vs. John D. Rockefeller et al." Said indictment charged said parties with having engaged in a conspiracy against trade, in violation of the act of the legislature of the state of Texas entitled "An act to define trusts," etc. On the 11th day of January, 1897, said sheriff of McLennan

county filed his amended return herein, in which he set up, in addition to the facts contained in his former return, that the authorities of the state of Texas have at all times been vigilant and diligent in the discharge of their duties towards this relator and his co-defendants; that they have been anxious and ready to accord them a speedy trial, and that the delay in the trial came, in a great part, from their own seeking; and that the docket entries of said court would show that the cause was continued twice, at their special request, before proceeding with the trial in December, 1895. And the amended answer further charges that it was the avowed purpose of the relator and his co-defendants to delay and defeat the jurisdiction of the state courts in their case, by having their sureties surrender them in order that this writ of habeas corpus might be sued out. And said sheriff prays that the relator herein be remanded to his custody. To which amended answer, relator on the same day replied that the delay complained of in his trial was that which occurred subsequent to the 2d day of December, 1895; and denied the allegations that he and his co-defendants had conspired to defeat the jurisdiction of the courts of the state of Texas; and demurred to so much of said amended answer as referred to relator and his co-defendants having procured their sureties to surrender them to the sheriff, because such allegations, if true, are no justification of the detention of this relator, and furnish no answer to the allegations of his petition; and prays judgment therein. At the hearing, petitioner also filed in evidence the certificate of the secretary of the interior, by George S. Donald, chief of census division of the United States, showing the number of farmers, planters, overseers, and agricultural laborers, stock raisers, herders, and drovers, and other laborers not specified, within the state of Texas, according to the census returns of 1890.

Upon the said petition and exhibits, answer and amended answer, and replication thereto, hearing was had.

First, as to petitioner's demurrer to plaintiff's plea that he was in the hands of the sheriff by collusion with his sureties at the time of the suing out of the writ of habeas corpus, the court thinks the demurrer should be sustained. While it was early decided in *Respublica v. Arnold*, 3 Yeates, 263, that the law authorizing the issuance of a writ of habeas corpus did not apply to a person out on bail, and could not be directed to the bail of an offender; and in *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050, that, in order to make a case for habeas corpus, there must be actual confinement, or the present means of enforcing it, mere moral restraint not being sufficient; also, in the case in 6 Mart. (La.) 569 (*Dodge's Case*), and *Rex v. Kessel*, 1 Burrows, 638, by Lord Mansfield, to the same effect,—yet it has been held in *Taylor v. Taintor*, 16 Wall. 366, that: When bail is given the principal is regarded as delivered to the custody of his sureties, and their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him, and deliver him up in their discharge, and, if that cannot be done at once, they may imprison him until it can be done. The seizure is not made by virtue of new process; none is needed. The bail have

their principal on a string, and may pull the string whenever they please to surrender him in their discharge. In the case of *Devine v. State*, 5 Sneed, 625, the court, speaking of the principal, say:

"The sureties had the control of his person. They were bound to keep him within their jurisdiction, and have his person ready to surrender when demanded. Though beyond the jurisdiction of Connecticut, he was still in the hands of the law of that state, and held to answer there for the offense with which he was charged."

But the petitioner here was in the custody of the officer. He so answers in his return, and his answer must be taken as true. The petitioner had the perfect right, when first arrested, to refuse to give bail. His sureties had an equal right to surrender him to the state, after it was given, for any cause whatever, and it is not within the province of the respondent to question the purpose in either case. The court is of the opinion that he had the right to do either one or the other, for the purpose of testing the constitutionality of the law under a writ of habeas corpus, when all the facts of this case are considered.

Two principal questions remain: First, the right of this court to take jurisdiction of this case; second, the constitutionality of the law.

The court is not inclined to question the contention of the principles laid down by the state, as embodied in the decisions cited by its representatives on the first point, to wit, that the general rule is that parties being prosecuted in state courts will not be released on writs of habeas corpus, but will be left to reach the supreme court of the United States by writ of error. This rule is abundantly sustained by numerous decisions cited, and is scarcely questioned by the relator himself. But it is equally as well established by the same references that the federal court has the power to do so, if special circumstances should require; that it possesses a discretion in the matter which must be governed by the facts in each case. A brief review of a few of the cases cited will establish the above principle. In the leading case of *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, Justice Harlan, speaking for the court, while refusing to reverse the exercise of the discretion of the circuit court, affirms the power of the federal courts to issue writs of habeas corpus of prisoners held by the states, and on page 248, 117 U. S., and page 738, 6 Sup. Ct., in that case, says:

"The statute evidently contemplated that cases might arise when the power thus conferred should be exercised during the progress of the proceedings instituted against the petitioner in a state court, or by or under authority of a state, on account of the very matter presented for determination by the writ of habeas corpus."

And on pages 249 and 250, 117 U. S., and page 739, 6 Sup. Ct.:

"We are therefore of opinion that the circuit court has jurisdiction, upon writs of habeas corpus, to inquire into the cause of the appellant's commitment, and to discharge him, if he be held in violation of the constitution."

But adds:

"As it does not appear that the circuit court might not, in its discretion, and consistently with the law and justice, have denied the applications for the writ at the time they were made, we are of the opinion that the judgment in

each case must be affirmed, but without prejudice to the right of the petitioner to renew his application to that court at some future time, should the circumstances render it proper to do so."

In *Re Wood*, 140 U. S. 278, 11 Sup. Ct. 738, the court refuses to review the exercise of the discretion of the circuit court in refusing to grant a writ of habeas corpus, but affirms the doctrine of the authority to grant such writ. In *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40, the above doctrine is affirmed in the following language:

"We are unable to see in this case any such special circumstances as were suggested in the case of *Ex parte Royall* as rendering it proper for a federal court to interpose before the trial of the case in the state court. While the power to issue writs of habeas corpus to state courts which are proceeding in disregard of rights secured by the constitution and laws of the United States may exist, the practice of exercising such a power before the question has been raised or determined in the state courts is one which ought not to be encouraged. Should such rights be denied, his remedy in the federal court will remain unimpaired."

Mr. Justice Jackson, speaking for the court in *Re Frederick*, 149 U. S. 73, 13 Sup. Ct. 795, says:

"While the writ of habeas corpus is one of the remedies for the enforcement of the right of personal freedom, it will not issue as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense."

He affirms, however, the power of the federal court to grant such writ, in certain cases, in advance of the trial, but says that that discretion should be subordinate to any special circumstances requiring immediate action; and, when the state courts shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States.

In *New York v. Eno*, 155 U. S. 90, 15 Sup. Ct. 30, it is decided that the United States should refuse to issue writ of habeas corpus unless it also appears that the case is one of urgency. When the claim of the accused of immunity from prosecution in the state court has been passed upon by the highest court of the state of New York in which it could be determined, he may then, if the final judgment of that court be adverse to him, invoke the jurisdiction of this court for his protection in respect to any federal rights asserted by him, but this may be denied by such judgment.

In *Re Belt*, 159 U. S. 100, 15 Sup. Ct. 988, Chief Justice Fuller, speaking for the court, says:

"Ordinarily the writ will not lie where there is a remedy by writ of error or appeal, but in rare and exceptional cases it may be issued, although such remedy exists."

In *Re Swan*, 150 U. S. 648, 14 Sup. Ct. 228, the same judge, delivering the opinion for the court, says:

"We reiterate what has so often been said before, that the writ of habeas corpus cannot be used to perform the office of writ of error or appeal; but when

no writ of error or appeal will lie, if a petitioner is imprisoned, or under a judgment of the circuit court which has no jurisdiction of the person or of the subject-matter, or authority to render the judgment complained of, then relief may be accorded,"—citing *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, and *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785.

The above cases not only establish the general rule insisted upon by the state, but also the exceptions thereto, and refute the argument made by the state that the only exceptions to that rule were stated in *Whitten v. Tomlinson*, 160 U. S. 243, 16 Sup. Ct. 297.

It is insisted by the state that this is a case where the relator stands indicted in the ordinary way in the state court, and before trial, in which his rights have not been determined, and that, therefore, under the general rule referred to above in regard to the jurisdiction of the federal court and the exercise of its discretion, it will not take jurisdiction of the case. What are the facts that this court is called upon to consider on this question of jurisdiction? First, that the petitioner is indicted under this "anti-trust law" in the same indictment with more than a dozen others, some of whom are charged with the commission of crimes in other states than that of Texas. That one of the petitioner's co-defendants has been tried and convicted in the district court of the Fifty-Fourth judicial district of Texas, and appealed his case to the court of last resort in said state, raising the questions of the constitutionality of the law and the jurisdiction of the state. That said court of last resort granted a new trial, and remanded the co-defendant, for the reason that there had been no testimony offered to sustain a verdict of guilty, and, while deciding it was unnecessary to pass upon the constitutional questions raised, referred favorably to decisions of the supreme court of the state in which the anti-trust law had been sustained in this regard. Said co-defendant was held by the said district court for nearly six months before the state discovered that it had no evidence upon which to hold him longer, and said discovery was only made after the writ of habeas corpus had issued from this court, and he had been brought in for the purpose of having the question of the constitutionality of said law determined. That since the trial of co-defendant Hathaway, in December, 1895, this petitioner has never been called for trial, nor given any chance to have his rights determined by said court. That the law in question makes an offense under it a felony, and prevents the petitioner from giving bond after conviction, and compels him to submit to incarceration during all the time required for an appeal to the court of criminal appeals, and from there to the supreme court of the United States, should it become necessary. These facts, taken together with the rulings of the trial judge in the Hathaway case, as well as the argument of counsel to the jury permitted therein for the state, constitute circumstances under which this court is called upon to exercise its discretion in assuming jurisdiction in a writ of habeas corpus. While the facts that might be produced in the state court on the trial of petitioner might be entirely different from those that the state was able to offer at the trial of Hathaway, judging from the record of the evidence and the rulings of the court, and the wild harangue permitted by the state's

representative to the jury in the name of argument, and the verdict that followed, this petitioner can expect little better results than Hathaway received in that court; yet the questions of law involved in the indictment, and the rights of all his co-defendants named therein, under the constitution of the United States, must necessarily be the same. And while it is to be presumed by this court that in the first instance the state court will decide the questions properly and according to law, yet, when this court has the evidence before it of the manner in which they have been decided in the Hathaway case, it is to be presumed that the same ruling would be given on the trial of this petitioner, especially when the ruling of the court of criminal appeals in remanding the prisoner, referring favorably to the decision of the supreme court of the state affirming the constitutionality of the law, would seem to indorse that portion of the trial judge's ruling in this regard. Petitioner makes no complaint of the delay occasioned by the state court of his trial prior to December, 1895, but alleges in his petition that he has had no opportunity since that time to have his case disposed of, which fact is not denied by the state. While the court of criminal appeals expressed it as unnecessary to pass upon the question of the constitutionality raised in the Hathaway appeal, yet, in remanding Hathaway for a new trial under the circumstances, it practically and emphatically indorsed the constitutionality of said law, and, that it might not be misunderstood as to its views on the subject, referred with favor to the decisions of the supreme court of Texas indorsing said law. By this decision of the court of criminal appeals, it not only decided that there was no testimony to sustain the verdict against Hathaway, but intimated that the allegations of the indictment were not such as to admit the testimony, if it had been present. Under this suggestion, is it not strange that the state did not discover for six months that they possessed no testimony with which to convict him, and that discovery was not made until after the federal court had granted its writ of habeas corpus, and had the matter of the constitutionality of the anti-trust law set down for hearing? So far as the legal and constitutional questions are concerned, the trial of Hathaway was the trial of this petitioner, and whatever rights he has under the constitution of the United States under this indictment have already been disposed of against him by the state in a court of last resort. But, further than this, it has been disposed of in a manner which not only prevents Hathaway from coming to this court to get his constitutional rights determined, but, if the state's theory is correct, will prevent this petitioner and every other of his co-defendants so held under bond from getting any relief until they have submitted themselves to a trial and appeal to the court of criminal appeals, with the certainty of having the constitutional questions determined against them, in the way that they have already been; and, if there should appear evidence on which to hold them, then each of them must go to the supreme court of the United States pending a writ of error, and remain incarcerated in a jail of Texas during all this time while their rights are being thus determined. The court has no better

language in which to express its views of the state's contention herein than that given by Brewer, J., in *Ex parte Kieffer*, 40 Fed. 400, as follows:

"Therefore it is often the proper way to decline to allow the writ, leaving the party to enforce his rights in the state courts. So it is argued that, if it be true that these ordinances are in conflict with the federal constitution, the petitioner has his remedy. He can appeal his case from the police to the district court, from there to the supreme court of the state, and thence to the supreme court of the United States. While that is true, yet he has no adequate relief in that way. He is now under sentence, and he cannot appeal without bond. He will be subjected to trial in the district court, possibly to an inquiry in the supreme court of the state, and finally in the supreme court of the United States. He must bear the expense and suffer the delay. This is not a case prior to trial and judgment. It is a case after trial and after judgment. He has experimented with the state court, and it has decided against him. While he has, of course, the right to appeal, yet this is a burden, and personally to him it is an inadequate protection to say, 'You can appeal and go through that channel to the supreme court of the United States.' But that is not the only consideration. If these ordinances are invalid, they are invalid because of an attempt to interfere with commerce, and prevent the free exchange of commodities between citizens of another state and those of this city. Few persons can stand the expense of litigation running through that channel to the supreme court. Length of time would pass before the judgment of that court could be obtained. In the meantime, if these ordinances are enforced,—not only against this petitioner, but against whoever may see fit to engage in this business,—there is an interference with exchange of commodities between the citizens of other states and those of this city, and the result would be to stop such traffic. Now, when that would be the natural result, when that is declared to be the intended purpose of this legislation, this court may, in the exercise of its discretion, properly hold, after a case has passed to judgment in the state court, that the party has a right to a speedy inquiry and determination in the federal court as to whether such ordinances are in conflict with the constitution of the United States. The public as well as the individual are interested in a speedy settlement of this matter."

The act in question, of March 30, 1889, of the state of Texas, is as follows:

"1. A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: First, to create or carry out restrictions in trade; second, to limit or reduce the production, or increase or reduce the price of merchandise or commodities; third, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities; fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state; fifth, to make or enter into, or carry out or execute any contract, obligation, or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption, below a common, standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, or commodity, or transportation between themselves and others, to preclude a free and unrestricted competition, among themselves or others, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest that they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

"6. Any violation of either or all of the provisions of this act shall be, and is hereby declared a conspiracy against trade, and any person who may be, or may become engaged in any such conspiracy, or take part therein, or aid

or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders thereunder, or in pursuance thereof shall be punished by fine, not less than fifty dollars, nor more than five thousand dollars, and by imprisonment in the penitentiary, not less than one, nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision, shall constitute a separate offense.

"7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with, or in pursuance of it, without giving its name or description, or how, when or where it was created.

"8. In prosecutions under this act, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it or acted for, or in connection with it, without proving all the members belonged to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged, may be established by proof of its general reputation as such.

"9. Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission, necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state.

"10. Each and every firm, person, corporation or association of persons, who shall in any manner violate any of the provisions of this act, shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the state of Texas, in any county where the offense is committed, or where either of the offenders reside, or in Travis county. And it shall be the duty of the attorney general or the district or county attorney, to prosecute for and recover the same."

"12. The provisions hereof shall be held cumulative of each other, and of all other laws in any way affecting them now in force in this state.

"13. The provision of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

That portion of the fourteenth amendment of the constitution of the United States referred to in the argument is the latter part of section 1, and is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

While the objection of the petitioner to the act in question, that it is invalid and inoperative as a penal enactment, by reason of its failure to prohibit trusts and declare them illegal, and because of the further failure of said act to declare or propose any punishment, may be well taken in that strict construction required for criminal statutes, yet this objection, if good, can readily be remedied by the legislature; and the supreme court of the state have, in some of their decisions, read into it the intention of the legislature to complete its meaning. It were perhaps better to pass this objection without further comment, in view of the fact that it is not the vital, constitutional question before the court. The fifth paragraph of the said act, in which it is attempted to claim jurisdiction for offenses committed outside of the state of Texas, is so absurd that a denial thereof is scarcely necessary. It has been decided in emphatic language by Chief Justice Taney, in *U. S. v. Booth*, 21 How. 524, as follows:

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

This principle is elementary, and not only common law, but the commonest of common sense.

It has been properly suggested that, should this feature of this act be carried out and administered, it would be unnecessary for any other state or the nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated in their dealings and in the conduct of their business according to the wishes of the legislature of Texas. The state, in its criminal jurisdiction as to acts committed within its own boundaries, and within the limits prescribed by the federal constitution, is sovereign, and its process should not be interfered with where it does not contravene the said constitution; but, beyond the boundaries of the state, it has no more authority in New York, Missouri, or Ohio than it has in Great Britain or Austria, and that part of the act which proposes this extraterritorial jurisdiction is absolutely null and void. But, under some of the decisions, we think it may properly be contended that paragraph 5 of this act can be omitted as unconstitutional without affecting the remainder.

The vital question, and the most important in this case, remains: Whether or not the said act violates that portion of the fourteenth amendment to the constitution of the United States above referred to, in that it deprives its citizens of liberty and property without due process of law; and, second, it denies to a considerable number of its citizens the equal protection of the law. This is not a question of the right of taxation, nor is it a question of police power of the state to suppress or regulate nuisances or control the liquor traffic, foreign or domestic. But the two plain questions squarely raised are: First, can the state of Texas prohibit all contracts, of whatever character or nature, among its citizens, when they tend to contravene the intended prohibition of the act? And, second, if they can do so, is it class legislation to exempt 80 per cent. of the whole population from the pains and penalties of the said act, when dealing with the agricultural products or live stock in the hands of the producer or raiser? These are the two vital questions involved in this case.

In regard to the first proposition, the complainant contends that the act is violative of the fourteenth amendment to the constitution of the United States, because it denies to citizens of the United States the right to make valid contracts with respect to their business and property, and deprives them of the right of their property in that respect, as well as liberty, without due process of law. Some difficulty has been expressed by courts in finding the exact and specific definition of the expressions "due process of law," and the "law of the land." The constitution itself declares:

"This constitution, and laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The supreme court, in speaking of "due process of law" and "equality of citizens," said that the purpose of the requirement is to exclude everything that is arbitrary, affecting the rights of citizens. *Dent v. West Virginia*, 129 U. S. 124, 9 Sup. Ct. 234. Says the court in *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughterhouse Co.*, 1 Abb. (U. S.) 399, Fed. Cas. No. 8,408:

"No proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful and industrial pursuits, not injurious to the community, as he may see fit, without unreasonable regulation or molestation. There is no more sacred right to citizenship than the right to pursue any lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

The same sentiment is affirmed in the *Slaughterhouse Cases*, 16 Wall. 36, and other decisions.

It is not necessary to argue that the constitutional privileges which protect the citizen in his life, liberty, or property entitle him to raise, produce, and manufacture articles of general use; buy and sell; to fix and limit the amount of any article which he will produce or manufacture; to increase or reduce the amount so produced or manufactured at his own will, within the limits of his ability; to fix and limit the price at which he will buy and sell; to bargain and agree with others upon prices, so far as it may be necessary in the business of buying and selling; in fact, to do anything and enter into all contracts usual and necessary in the ordinary avocations of production, manufacture, and trade. Neither the state nor the national legislature possesses any right to limit these natural privileges of contracting or conducting business. Any law which undertakes to abolish these rights, the exercise of which does not involve infringement upon the rights of others, or to limit the exercise thereof beyond what is necessary to provide for the public welfare and general security, cannot be included in the police power of the government. "The right of liberty embraces the right of man to exercise his faculties and follow any lawful avocation for the support of life." *Bert-holf v. O'Reilly*, 74 N. Y. 515. "Liberty," in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. *People v. Marx*, 99 N. Y. 377, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343. "The legislature cannot, under the pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts not concerning the health, safety, or welfare of society, and the courts may examine into and annul such illegal legislation." *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37; *Hey Sing Ieck v. Anderson*, 57 Cal. 251. "Whenever the prosecution of a particular calling threatens damage to the public or to other individuals, it is a legitimate subject for police regulation, to the extent of preventing the evil, but it is strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulation." *Town of Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 192. It is also a judicial question

whether police regulation extends beyond the threatened evil, and prohibits that which involves no threatened danger to the public. One of the most sacred rights of liberty is the right of contract. All of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the constitution, and are not capable of being restrained by legislative action. Among these rights is that of forming business relations between man and man. A man may form business relations with whom he pleases, and in the conduct of such business they may fix and limit the character and amount of their business, the price they will charge for the produce which they offer to the public, or about which they contract. "It is part of the natural and civil liberty to form business relations free from the dictation of the state; that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the base of the business relation or transaction. It is therefore the general rule that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay." Tied. Lim. Police Power, p. 233. And on page 244 he says: "A man has a constitutional right to buy anything, in any quantity, provided he uses only fair means, and set his own price on it, or refuse to sell it at all. And what one man may lawfully do as an individual, two or more may also do when combined as partners. Combination for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives and aims with which they are formed. It is therefore impossible to prohibit all combinations. The prohibition must rest upon the objectionable character of the object of the combination." "If there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract." *Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946.

From the title of the act, "Conspiracies against Trade," and "Trusts," as well as from the argument for the state, it would seem to be the impression that the act was intended only to prevent oppressive and unreasonable combinations. There is no such limit, however, within its four corners. It embraces the combination of two or more persons; consequently, the partnership of two persons. Neither is there any limitation to the amount of capital combined with skill and acts. A small capital, with a minimum of skill, is as much prohibited as the largest amount. We are not permitted to read any such explanation into it, but must take it as the legislature furnished it, and with such construction as the rules of law put upon it. The courts have no more power to exclude what is embraced in it than to include what is not contained in the plain language of the act. Then it is declared that the prohibited com-

binations must be for one or more certain specified purposes, as follows: To create or carry out restrictions in trade; to limit or reduce the production of commodities; to increase the price of commodities; to reduce the price of commodities; to prevent competition in the manufacture, sale, etc.; to fix the price of any article at a standard or figure whereby its price to the public shall be in any manner controlled or established. It makes criminal the making or carrying out of any contract, obligation, or agreement by which two or more persons, firms, or corporations combine themselves not to sell any article below a standard or common figure; to keep the price of such article at a fixed or graduated price; to settle the price of any article between themselves and others; to exclude all free and unrestricted competition among themselves and others; to pool, combine, or unite any interest they may have in connection with the sale and transportation of any article when its price might in any manner be affected. An agreement between two or more persons forms a combination between them. An agreement between two or more persons is made as criminal as an agreement between a hundred. No attempt is made to condemn only acts which are oppressive by reason of their magnitude. It is evident that it is made criminal for two persons to combine, as partners, corporators, or otherwise, in the ordinary business of life, to increase or reduce the price of commodities, or fix the standard thereof. Next, it is also made criminal for two persons to agree to limit or reduce the production of commodities. It is made criminal for two persons to combine for the purpose of limiting competition, or to make any agreement in relation to the price of an article, so as to preclude free and unrestricted competition between them or themselves and others. It is made criminal for two persons to create or carry out restrictions in trade. We will assume that A. and B. agree to combine their capital, skill, and acts, or, in other words, enter into partnership, for the purpose of manufacturing and dealing in certain commodities. They must first necessarily determine the extent of their production, and the price at which they can sell their commodities. Having determined as near as possible the costs of their manufactured products, and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this common standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price up or down as the cost of production may vary. Finding, after a time, their prices too high, and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding the market against competitors. There may be, after a time, an increase in wages, and they agree to increase their prices. There comes an era of hard times. Their stock accumulates and is unsalable, and they agree to limit or reduce the production of their commodities. All this they must be able to do, or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings, or acts are made criminal by this act. It is absolutely impossible to carry on a part-

nership business without violating it. If persons combined cannot carry on business without entering into, executing, and carrying out contracts, obligations, and agreements by which they shall settle the prices of any article, as between themselves or themselves and others, and bind themselves to sell their commodities at a figure or graduated figure, and not to sell below a common standard figure, or if they cannot carry on business without raising and lowering prices and increasing and diminishing their productions at pleasure, then certainly all these things are purposes of their combination. Whether these are the main purposes, or purposes essential to the main purposes, is not of the slightest consequence. The right to combine, to form partnerships and joint-stock associations; the right to agree as to prices and productions; the right to fix prices, to raise and lower them as business men may require,—is not oppressive to the public, nor unjust to the individual, nor contrary to public policy. It is an essential right, as part of the liberty of the citizen, of which no legislature can deprive him. If an ordinary business partnership is rendered criminal by the act, no further argument is necessary. That it is so most clearly appears from the concluding portion of section 1, by which two or more persons are forbidden to unite any interest that they may have in connection with the sale or transportation of any article or commodity that its price might in any manner be affected. Two village grocers doing business at a loss to both could not form a partnership in order to save both from bankruptcy. Neither could they form a partnership in order that they might lessen their expenses, and thus reduce the price of their commodities to the public. Still more, if A. and B., each owning half a car load of potatoes, should agree to ship together, in order to obtain car-load rates, thus enabling them to sell lower in the markets, they would violate this act. Not only, under this act, is it impossible for citizens to enter into the simplest partnership without violating it, but they cannot enter into a joint-stock association or corporation, for that precludes competition between those combined. And this forms so necessary a part of the daily business affairs of men that its prohibition would interfere with and prevent business as now conducted, and consequently to make that criminal is to interfere with the liberty of the citizen. The statute books contain laws authorizing and legalizing associations and corporations. Can it be that the same statute book which contains such laws can contain also a valid law inflicting severe penalties on those who do only that which the laws have authorized? The act also prohibits combinations which create or carry out restrictions in trade. It has never been held that all restrictions in trade were illegal or contrary to public policy. The rule is well settled that when a contract is publicly oppressive, and the restrictions broader than necessary for the legitimate protection of the other party to be benefited by the contract, then the contract is void; otherwise it is legal. The fault of the act in regard to restraint of trade is the same as in regard to competition. It makes no distinction between legal and illegal combinations and agreements which prevent competition. Those which have always been held legal, and

which have always been an essential part of the liberty of the citizen, are made criminal, equally with those which the law has always condemned.

A few citations showing the law as established by the federal courts, as compared with the Texas act, may be instructive in this connection. The case of *U. S. v. Trans-Missouri Freight Ass'n* will bear careful perusal in this connection. The opinion of Riner, district judge, is reported in 53 Fed. 441, and of Sanborn, circuit judge, in 7 C. C. A. 15, 58 Fed. 63. The argument in these opinions is to demonstrate that contracts which restrict competition are not necessarily in restraint of trade, and therefore not embraced in the federal act. The same arguments conclusively demonstrate that any laws preventing all contracts which prevent competition are infringements of the liberty of the citizen. After reviewing the cases which apparently condemn restrictions of competition, Judge Sanborn says (page 74, 7 C. C. A., and page 70, 58 Fed.):

"But in none of these cases were they required to hold, and in none of them did they hold, as we understand the opinions, when read in relation to the facts of the cases, respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal."

The learned judge then cites a score of cases in which contracts in restriction of competition are held to be illegal, and sustaining his opinion:

"That it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of the contracts that are claimed to be in restraint of trade."

This case is followed in *Dueber Watch-Case Manuf'g Co. v. E. Howard Watch & Clock Co.*, 14 C. C. A. 14, 66 Fed. 637:

"Excessive competition may sometimes result in actual injury to the public, and competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable, and are condemned as against public policy."

Also, *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, in which the court says:

"It does not think competition invariably a public benefaction, for it may be carried on to such a degree as to be an evil. It is perfectly legitimate to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade."

If this right to combine exists, the right to do ordinary business, such as fixing prices, changing prices, agreeing on productions, etc., must follow, and all these things constitute the liberty of the citizen. The vice of the act in question is that it attempts to prevent too much. It does not stop at reasonable limits. It is not content with making criminal general restraint of trade, but it makes criminal all restrictions of trade. It is not content with affixing penalties to acts or contracts which unreasonably restrict competition; it condemns any agreement or arrangement which prevents competition between two or more persons entering into it. It not only prevents competitors from oppressing the public by unreasonable agreements as to production and prices; it also prevents persons associated in interest, joint own-

ers and co-partners, from making any agreement about their production and prices. It not only prevents persons from using their capital, skill, and acts for the purpose of increasing prices; it reaches the very acme of absurdity, in preventing persons from uniting their capital, skill, and acts for the purpose of reducing prices. The legislature perhaps had in mind that which might possibly be a means of public oppression, to wit, the forced reduction of prices of articles which the combination or partnership purchased, but the act does not discriminate between articles purchased and articles sold. And it is because it does not so discriminate, because of the want of ordinary care in studying the meaning of words, that we have on the statute books of Texas at this close of the nineteenth century, during which combinations of capital and skill have cheapened the price of products to an extent unparalleled in the world's history, an act making it a highly penal offense for two or more persons to unite their capital and skill for the purpose of reducing the price of the products which they undertake to manufacture and sell.

The next question is, does this act of March 30, 1889, deprive any citizen or class of citizens of the equal protection of the law? The fourteenth amendment of the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the law, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws, and by "equal protection of the laws" is meant equal security under them to every one, under similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances. This subject of equality before the law is a fundamental principle of English and American liberty, which not only has been held sacred in all latter-day constitutions, state and federal, but the principle has been guarded by the courts with jealous watchfulness, to see that the citizen may have guaranteed to him this inestimable privilege and condition. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231; *Ex parte Virginia*, 100 U. S. 339; *Duncan v. Missouri*, 152 U. S. 382, 14 Sup. Ct. 570. The supreme court of the United States, in an unanimous opinion on the equality of the citizens, in *Dent v. West Virginia*, above, says:

"The great purpose of the requirement is to exclude everything arbitrary or capricious in legislation affecting the rights of the citizen."

The same court, speaking through Justice Matthews, in *Yick Wo v. Hopkins*, *supra*, says:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not

mean to leave room for the play and action of purely personal and arbitrary power."

And the same court in *Barbier v. Connolly* put the same thought in the following language:

"These provisions are undoubtedly intended that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

We do not mean to say by this that the state of Texas does not have the power to prescribe regulations to promote the health, peace, morals, education, and good order of its people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation, sometimes of a special character, having these objects in view, must obtain in certain districts; and special burdens are sometimes necessary for general benefits, such as for supplying water, preventing fires, lighting districts, clearing streets, opening parks, and many other objects. As said by the courts, occasions for these purposes may press with more or less weight on one than upon another; but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, these, in proper limitations, do not furnish just grounds of complaint, if they operate alike upon all persons and property under the same circumstances and conditions. This statute under discussion is clearly class legislation, discriminating against some and favoring others. It is not that character of legislation which, in carrying out a public purpose, is limited in its application, and, within the sphere of its operation, affects alike all persons similarly situated. It may affect, and does affect, individuals of the same class in an opposite way. It favors some individuals of a certain class, and denounces other individuals of the same class. This statute exempts no class. On the contrary, it seeks to exempt certain classes of property, which is carrying the doctrine beyond any case to which we have had access. All property in the state is entitled to equal protection, and no special property is entitled to, or ought to receive, any special favors. Discrimination may be as potent against the citizen, in the direction of his property, as if aimed directly against himself personally. The right to hold or sell property, and to make agreements and contracts concerning it, which may be believed by the owner to be for his betterment, is the most essential right of

property. With some citizens, this right is taken away; with others, it is encouraged.

But it is contended upon the part of the state that the act is valid in restraint of trade on the ground of public policy; that combinations in restraint of trade are public acts. An additional reason against the law in this particular, is that, if that be true, all of the acts in restraint of trade are not public, but many of them are private; and, when we look closely to the object of the act, it will be seen that the business of the farmer, in growing vegetables, grain, cotton, wool, or meat, is no more a private occupation than that of the shoemaker, the blacksmith, or the bricklayer. If the anti-trust act of 1889, under discussion, applied only to those occupations where the business implies a trust or public duty, such as railways, telegraphs, telephones, etc., then the argument might be plausible that it is not class legislation, but such is not the case. The penalties are visited not only upon those exercising a public trust or duty, but upon the body of private citizenship, composed of artisans, mechanics, professional men, traders, and the like, giving advantage to certain persons that it refuses to others. Judge Simpkins, in the case of *Railway Co. v. Wilson* (Tex. App.) 19 S. W. 913, in discussing this question, said:

"In those occupations where the business implies a trust or public duty, the government has the power to see that the trust is not abused and the duty is properly performed. On this principle, statutes have been upheld that regulate the charges of railway companies, elevator, telephone, telegraph, and other companies, hackmen, warehousemen, mills, etc.; but we are aware of no well-considered case on which a statute has been upheld that undertook to regulate the dealings between employer and employé."

The exemption of agricultural products in the hands of the original producer and raiser exempts, upon a rough estimate, four-fifths of the people of Texas from the operation of this act, because four-fifths of the people of Texas are engaged in the business of producing and raising agricultural products and live stock. The penalties are visited upon the remaining one-fifth of the people, without regard to any particular class. This one-fifth comprises all classes and conditions not heretofore exempted. And this in the face of the constitutional guaranties, state and federal, of perfect equality of the citizen before the law. Even in the matter of labor the iniquitous character of the enactment under discussion is apparent. This statute makes no exemption of labor, or of the products of labor. Under its terms and provisions, the laborer is subjected to punishment for doing the very act that the landowner or farmer is authorized to do. The original producer, if a farmer, has authority to combine to fix prices, restrict trade, build up monopolies, while the original producers in other lines of labor are denounced for combining. The agricultural products of the farmer are the fruits of his labor, but no more so than the manufactured articles of the workingman are the fruits of his labor. The blacksmith, the carpenter, and all other artisans purchase their raw material, and the manufactured products constitute the fruits of their

labor, and upon which they must rely for the sustenance of themselves and families, just as the agricultural products of the farmer constitute the fruits of his labor, and upon which he relies for similar purposes; yet the statute prescribes total inequality between these classes, and encourages the one to build up monopolies, while denouncing the others if they make any attempt in the same direction; or, to apply the provisions of the statute to the matter of live stock, from which application this inequality becomes still more apparent, the cattle king may raise his thousands of head of live stock each year, and, so long as this stock remains in his hands, he can combine, not only with his neighbors, but with all other similar original producers throughout the state of Texas, or even throughout the United States, for the purpose of fixing the prices and monopolizing markets. Not so, however, with the hands which he employs, and which constitute the ordinary labor of the ranch. The fruits of the labor of the latter class are his day's work. This may be paid him either in money, which he invests in stock, or it may be paid him in stock, on shares, or otherwise; and yet, not being the original producer, he is forbidden to make any combination of any character whereby the price of the fruits of his labor can be promoted or regulated in any manner whatsoever. These common laborers on the ranch can form no agreement among themselves whereby they can maintain the prices of their labor, and yet the ranch owner can combine with other ranch owners with reference to the prices of their products which constitute the fruits of their labor. The demonstration can be carried to a further absurdity by simply calling attention to the fact that under the terms of the statute the farmer or stock raiser may combine with any person, firm, or corporation whatsoever, or any number of them, in respect to agricultural products he has produced or the live stock he has raised, without fear of punishment under the law, and yet the party or parties with whom he makes such a combination may be held liable to all the penalties denounced against such combinations. Two citizens may combine, therefore, for the purpose of fixing prices; one, by doing so, committing a crime, and the other, by doing so, performing a laudable act. If this is equality before the law, within the meaning of the constitution, we had better revise the constitution. All of the decisions hold that where a distinction is necessary in classes of citizens, under the law, in every instance the classification must be reasonable. What ground can there be for setting aside, as this act has done, four-fifths of the citizens of Texas as an exempt class from the punishment for felony, because they are producing farmers? It is not because of their poverty, for they are not poor; and, if some of them are, they do not constitute all of the poor. It is not because of the character and location of their occupations. Neither can it be said to be on account of the lack of intelligence or ability to take care of themselves. It cannot be on account of the character of the products they produce, for one of the avowed purposes of the act was to prevent combinations and injury to the people of the state, and to protect them in

their acquirements of the commodities necessary for the enjoyment and sustenance of life; and yet the act puts it within the power of the men who produce nearly all of these articles to combine and raise the price and control it in any way they please. But it is argued that, on account of the large district of the country over which they are distributed, they cannot combine, and therefore it would have been useless to include them within the prohibition of the act. While there was no evidence before the court on this subject, we were asked to take judicial notice of the fact. We hardly find the allegation correct. The Swine Breeders' Association of the State of Texas, the proceedings of whose meetings are published in the public press of the country; the enormous wealth of the cattle raiser; the efforts, most energetic, of the cotton growers to limit the acreage by a combination with his fellows for the purpose of decreasing the quantity, and thus raise the price to the consumer,—are well known everywhere. But, if it should be true that the producing agriculturalists do not have the power to combine, what reason is that that they should be excluded from the penalty prescribed for combining? This is a strange proposition indeed; yet it is gravely argued in this tribunal by the representative of the state that the principal reason for granting to so large a body of citizens absolute immunity from punishment for felony for combining in restraint of trade is the fact that they are utterly unable to avail themselves of the great privilege thus granted. The court apprehends that this would not be accepted as a valid reason anywhere. Nor can it be successfully contended that the proposition is correct that the producing agriculturalist is unable to combine, nor that he has any privilege or rights on account of his location or occupation. We are familiar with the duties of the farmer and the cares and trials of his business life, and appreciate highly the customary compliments paid by mankind to the rural yeomanry of the land. He has been justly lauded for his integrity, and for the independence and importance of his calling. Without the products of his toil, people cannot live, nor society endure. Yet what is there about it all to entitle him to the privilege of combining in restraint of trade as to these articles he produces, while his neighbors, the storekeeper and mechanic, are precluded therefrom, and he himself is debarred from engaging with the same exemption from bartering in the products of his neighbor. If there is any one thing evident from a careful study of the act, it is that it is aimed to favor the agricultural class, and is against the merchant and mechanic, and all the others, without either reason or justice. I apprehend that it will not be questioned that the business of merchandising is not only legitimate, but laudable. Millions of people of this and other lands have made and are making their honest living, and millions more are being accommodated and served, thereby. Great empires, both ancient and modern, have built their strength and glory on their trade, and to-day we have great arteries of steel transportation pulsating across the continent, and white-winged fleets of commerce traverse the seas. They not only carry the

fruits of the labor of the agriculturalist, but what would he and the fruits of his labor be worth without them? The merchant, the manufacturer, the agriculturalist, three great classes of the world, each dependent upon the other, each entitled to the same protection before the law, each justly claims alike, under the constitution, the right of life, liberty, and property. They constitute one mighty people, citizens of one republic, all deserving of our care, all governed by the same laws, whose rights shall be weighed in the same balance, that shall not swerve a hair's breadth in favor of either while being held by the blind Goddess of Justice. Although the reasons alleged in support of the act by the state are inapplicable and invalid, and do not properly state the purpose for which the act was really passed, of course there was a purpose behind so important a piece of legislation,—one that formulated the thing and procured its passage. Such a purpose is patent upon its face, and is apparent from the history of the act. It is a purpose thoroughly appreciated by the court and recognized by the public, but it is such a purpose that the constitution of the United States will not support, nor the courts thereof favor. The court can find no better language in this connection—almost prophetic in some respects—than that used by Judge Catron, of Tennessee, in two early cases, viz. *Wally v. Kennedy*, 2 Yerg. 555, and *Vanzant v. Waddel*, Id. 270:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law; the most of the community, and those who made the law, by another; whereas a like and general law, affecting the whole community equally, could not have been passed." "The idea of people, through their representatives, making laws whereby are swept away the life, liberty, and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of the Magna Charta in England, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as a part of our constitution."

This law that deprives the citizen of many of his rights of contract, and that seeks to divide citizens, not exactly by the calling they follow, but by the source of the property they hold, and exempts 80 per cent. of them from the penalties it visits upon the remainder, is not sustained by any good reason or excuse; is not just; is utterly without support in law, and can have no just purpose; is vicious class legislation, depriving the citizen of his constitutional right of life, liberty, and property without due process of law, contrary to the law of the land; and is therefore declared to be null and void. The relator is discharged.

DURYEA et al. v. NATIONAL STARCH-MANUF'G CO.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

TRADE-NAMES—UNFAIR COMPETITION.

One Duryea and his brothers were the controlling members of the Glen Cove Manufacturing Company, which for a long time made and sold starch in packages having thereon, in prominent letters, "Duryea's Starch." A picture of the manufacturing buildings, together with the name of the corporation, also appeared on the packages, and the starch and the corporation became identified with each other. Thereafter the business was sold to another corporation, which continued the use of the words and pictures with its own name. Duryea, having subsequently withdrawn from the company, furnished capital to his sons, who thereafter procured other starch to be made for them, and sold it as "Starch Prepared by Duryea & Co.," etc., without any imitation of labels or packages. *Held*, that this was a proper use by Duryea and his sons of their own name, and could not be enjoined.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by the National Starch-Manufacturing Company against Harry H. Duryea and others to enjoin the use of the word "Duryea & Co." in connection with starch sold by defendants. The circuit court granted an injunction pendente lite, and defendants appealed.

Elihu Root and Francis Forbes, for complainant.

Esek Cowen, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges, and BROWN, District Judge.

SHIPMAN, Circuit Judge. In 1855 Hiram Duryea and his brothers became the controlling officers and members of a corporation located at Glen Cove, Long Island, for the manufacture of edible and laundry starch, which continued in active business, under the control of the Duryeas, until 1890, and was known during the latter part of its history as the Glen Cove Manufacturing Company. The products of its extensive factories acquired a high and well-known reputation. Upon its packages the name "Duryea's Starch" was always prominently printed, generally in connection with adjectives denoting its quality, as "Duryea's Superior Starch," or "Duryea's Improved Corn Starch"; and thus "Duryea's Starch" became the name by which its products were universally known in the wholesale and retail trade, and by which they were described in price lists and by consumers. A picture of the buildings of the corporation at Glen Cove, and the name of the Glen Cove Manufacturing Company, as the manufacturer of the starch, also appeared upon the package, so that "Duryea's Starch" and the corporation became identified with each other. Hiram Duryea had charge of the general management of the sale of the company's products from about 1857 to 1890, when its entire property, trade-marks, and good will were sold to the complainant, the National Starch Manufacturing Company, of which he became the first president. He also

entered into an agreement with the new company that during the term of five years from April 12, 1890, he would not permit or suffer his name to be used or employed in carrying on or in connection with the business of manufacturing or selling starch in any one of the states which were specified in the contract, and which were, in the main, the Northern states of this country. The complainant continued to manufacture at Glen Cove, and its packages from that factory have been and are presented to the public in the same dress, and with the same nomenclature and description, except the announcement that they are manufactured by the complainant, and the product continues to be popularly known as "Duryea's Starch." On November 1, 1895, two sons of Hiram Duryea formed a co-partnership with two former prominent salesmen of the Glen Cove Company and also of the complainant, under the name of Duryea & Co., for the sale of starch. Hiram Duryea furnished the capital of the firm, which made a contract with the Sioux City Starch Company, of Iowa, to furnish it, for three years, starch, according to the samples agreed upon by the contracting parties. This starch the firm of Duryea & Co. has placed upon the market in packages which prominently display the words "Laundry Starch Prepared by Duryea & Co.," and "Pure Corn Flour Prepared by Duryea & Co.," and have no other symbols of the Glen Cove starch, while its labels are strikingly different. These articles have been vigorously pressed upon the market in New York City and elsewhere at a price below that of the complainant's starch, and have gained a place in retail stores, in some of which they have been sold as "Duryea's Starch." Before the formation of the firm, its members were not manufacturers, but they are said to have successfully devoted time in Sioux City to improvements upon the Sioux City Company's former product. Upon the complainant's motion, an injunction pendente lite against the use of the words "Prepared by Duryea & Co." or "Duryea & Co." was granted, and was suspended during the appeal therefrom. The circuit judge was of opinion that the case was a close one, but thought that the affidavits apparently made out a case of an intentional and unnecessary use of a defendant's name to deprive the complainant of a portion of its trade.

It cannot be denied that, by continuous and rightful use for 40 years, the name of "Duryea's Starch" had become identified with its "source of manufacture," and that an attempt by persons of the name of "Duryea," or of any other name, to put upon the market their own product, under the name of "Duryea's Starch," could be suppressed. Inasmuch as the defendants have not called their starch by this well-known name, and have not assimilated the labels upon their packages to those long used by the manufacturers at Glen Cove, the question is whether the defendants have made such an unnecessary and unfair use of the name of "Duryea" as to deserve the unfavorable criticism of a court of equity. In the recent case of *Singer Manuf'g Co. v. June Manuf'g Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, it is declared by the supreme court to be a well-settled doctrine that:

"Every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But, although he may thus use his name, he cannot resort to any artifice or to any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications."

If the new firm could properly adopt the name of "Duryea & Co.," and if sufficient precautions were taken to show the public that the manufacture is not that of the successor of the Glen Cove Manufacturing Company, the complainant is not entitled to an injunction. The firm consisted of four persons, two of whom were named "Duryea," and all of whom were without capital, which was furnished by the father of the two Duryeas, and who had now a right to permit his name to be used honestly in the starch business. Under this state of facts, the firm was not dealing unfairly with the complainant in calling itself "Duryea & Co.," and in omitting to add the name of the former salesmen of the complainant. Upon the second point, whereas the complainant uses the name "Duryea Starch" and the picture of the Glen Cove factories, and said that it was the manufacturer, the defendants' packages simply assert that the starch which they contain is prepared by Duryea & Co. We think that this is a sufficient declaration of the source of the manufacture, as distinguished from the well-known source at Glen Cove, and that the labels are not objectionable, because, by reason of their marked dissimilarity from the complainant's labels, the public could not be misled. Upon the whole case, as disclosed by the affidavits, the order of injunction should be reversed, with costs.

MARDEN et al. v. CAMPBELL PRINTING-PRESS & MANUF'G CO.

CAMPBELL PRINTING-PRESS & MANUF'G CO. v. MARDEN et al.

(Circuit Court of Appeals, First Circuit. November 10, 1896.)

Nos. 169, 170.

PATENTS—INFRINGEMENT SUIT—SETTLEMENT AFTER INTERLOCUTORY DECREE—
FINAL DECREE.

An interlocutory decree for injunction and an accounting was granted under a bill relating to the use of a single machine by defendants, who were not manufacturers, and who indicated no disposition to use any other infringing machine. Thereafter, and before final decree, a settlement was effected, whereby all damages, profits, and costs were released, and defendant was licensed to use and sell that machine. This settlement having been brought to the attention of the court under such circumstances that a formal pleading of it was waived, it rendered a final decree for a perpetual injunction, with a provision that it should not apply to the machine in question. *Held*, that this was erroneous, and that the bill should have been dismissed without costs.

Appeals from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Campbell Printing-Press & Manufacturing Company against George A. Marden and others for alleged infringement of certain patents for web printing machines. In December, 1894, an interlocutory decree for an injunction and account was ordered, the court holding that certain claims of the patents were valid and infringed, that others were not infringed, and that one claim of the Stonemetz patent was void for want of novelty. 64 Fed. 782. From this decree both parties appealed, and thereafter, upon a hearing in this court, the appeal of the defendants was dismissed without prejudice to subsequent proceedings in the circuit court or to a subsequent appeal, and the appeal of the complainant was dismissed, with costs. Thereafter the defendants moved to reopen the decree to amend their answer and introduce further evidence, which motion was granted, the court at the same time vacating the order for supersedeas, and authorizing the issuance of an injunction. 70 Fed. 339. After some further proceedings below, a settlement was effected between the parties by the payment of a sum in cash in satisfaction of all profits, damages, and costs, and the granting of a license to defendant to use and sell the infringing machine, which was the sole subject of the suit. This settlement having been brought to the attention of the court, a final decree was entered, December 16, 1895, granting a perpetual injunction against the infringement of claims 1, 2, and 7 of patent No. 291,521, and the twelfth claim of patent No. 376,053. The decree concluded with the following paragraph:

"And it appearing to the court that the respondents, since the filing of this bill, to wit, on the 22d day of November, 1895, in consideration of the payment by them to the complainant of the sum of twenty-five hundred dollars, have received from the complainant a contract in writing, whereby the complainant licenses the respondents to use and sell a certain printing machine, which machine is the same by the use of which the respondents herein are adjudged to have infringed certain claims of said patents, and also releases any right to any money recovery of damages, profits, or costs in this cause,—it is further ordered, adjudged, and decreed that the respondents shall not be held to violate the injunction heretofore in this decree ordered by any use or sale by them in the future of the said machine as to which the respondents are so licensed as aforesaid, and that the complainant recover no damages or profits from the respondents, and that the complainant recover no costs of the respondents."

From this decree both parties have appealed.

Frederic H. Betts, T. H. Alexander, and Arthur E. Dowell, for Geo. A. Marden.

Louis W. Southgate and Frederick P. Fish, for Campbell Printing-Press & Manuf'g Co.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

COLT, Circuit Judge. These are cross appeals from the decision of the circuit court. The defendants below move to dismiss the complainant's appeal upon the ground that the cause of action therein has been extinguished by settlement thereof. In the court below the defendants were adjudged to have infringed the first, second, and seventh claims of the Kidder patent, No. 291,521, issued January 8, 1884, and the twelfth claim of the Stonemetz patent, No. 376,053, issued January 3, 1888. These patents were for improvements in printing machines. The bill alleges that the defendants, without license or right, use, and threaten to continue to use, a single printing and folding machine which contains each and all of the patented improvements. The bill was filed July 11, 1892. On November 22, 1895,

the complainant granted a license to the defendants. This license contains the following provisions:

"And whereas, the said Marden & Rowell are desirous of taking a license from the said Campbell Printing-Press and Manufacturing Company under both of said patents, and are desirous of being discharged from all costs of the suit brought by the Campbell Printing-Press and Manufacturing Company in the circuit court of the United States for the district of Massachusetts against them, and are desirous of being discharged from all claims for damages, profits, or recoveries whatsoever which the said Campbell Printing-Press and Manufacturing Company have under said patents against the said Marden & Rowell: Now, therefore, to all whom it may concern, be it known that for and in consideration of the sum of twenty-five hundred dollars (\$2,500) well and truly paid by said Marden & Rowell to said Campbell Printing-Press and Manufacturing Company, it does hereby license and empower the said Marden & Rowell, or their assigns, to use and sell said printing machine, and no other, to the full end of the terms for which said letters patent are or may be granted, the said sum of twenty-five hundred dollars being accepted by the said Campbell Printing-Press and Manufacturing Company to cover all claims whatsoever for the past use of the machine by any party or parties whatsoever, and for all future use thereof. And the said Campbell Printing-Press and Manufacturing Company hereby releases all claims for costs of said suit that they have against said Marden & Rowell in the case of the Campbell Printing-Press and Manufacturing Company against Marden & Rowell, and all claims for liabilities that said Campbell Printing-Press and Manufacturing Company may have against said Marden & Rowell, or their assigns, for the use and sale of said machine. This discharge, however, is not to be understood as extending to relieve the Duplex Printing-Press Company, in any manner, from any liability for its manufacture and sale of the said machine."

As this suit was brought against the user of a single machine which embodied the patented improvements, and as the complainant, for a consideration of \$2,500, has licensed the defendants to use this machine, and has waived damages for past use, and as there is no proof that the defendants have any intent to purchase any other of the alleged infringing machines, we think that the controversy between the parties to this suit has been substantially settled, and that, so far as this particular controversy is concerned, there is nothing left for the court to determine.

Appeals dismissed, without costs to either party in this court.

On Petition for Rehearing.

(March 9, 1897.)

PER CURIAM. These cases involve an appeal and a cross appeal, or they may be described as cross appeals. The appellees in one appeal, who were also the appellants in the other, moved to dismiss the appeal in which they were the appellees on the ground that the cause of action therein had been extinguished by a settlement thereof. On opening the record, we found that the cause of action had been so far disposed of by an adjustment between the parties that there was no substantial question left for this court. This fact, of course, as the parties are the same in each, affected one appeal as much as it did the other. Consequently we granted the motion in the very terms in which it was expressed; and this, if correctly done, necessarily carried both appeals. The opinion directing the dismissal of the appeals was passed down November 10, 1896. The principles underlying it have since been reinforced by us in *Gamewell Fire-Alarm Tel. Co. v.*

Municipal Signal Co., 23 C. C. A. 250, 77 Fed. 490. The appellants seasonably filed a petition for a rehearing, claiming that, so far, at least, as the appeal taken by them was concerned, the decree below should have been reversed, and the appeal should not have been dismissed. This position involved a clear inconsistency, as the two appeals, so far as this matter is concerned, necessarily went hand in hand. However, in order to protect ourselves from entering judgments which may be improper on their face, we were disposed to look into their propriety under the actual circumstances of the case, and therefore we ordered that all the parties might be heard by briefs on the petition for a rehearing. These briefs have been filed and duly considered. The adjustment was made after an interlocutory decree for an injunction, and for an accounting, on a bill in equity which related to the unauthorized use of a patented device in a single machine by the respondents below, who were not manufacturers, and who had indicated no disposition to make any use of the device except in that machine. It included a license covering the machine, and a release of all damages, profits, and costs in the suit. Consequently, all controversy between the parties had ceased; and, if the adjustment had been properly pleaded, it is clear that the court below would have had no occasion to consider the case further, and a final decree against the respondents below, whether for an injunction or otherwise, would have been erroneous. In this respect the case would have been essentially different from those in which it has been held that infringers cannot deprive a patentee of the just fruits of his litigation, including an injunction, by ceasing to infringe of their own motion alone. As the adjustment was made after an interlocutory decree for an injunction and an accounting, it should, in strictness, have been brought formally to the attention of the court by supplemental proceedings, if relied on as a matter of right to bar a final decree. This was not done. The record, however, shows that it was incorporated into the final decree by the complainant itself, through the draft decree which it filed under the rules; and it is plain that its effect was a matter of controversy, and, as such, was brought to the attention of the court. All questions as to the proper method of setting it up were evidently waived, and no judgment should have been rendered against the respondents below. The adjustment satisfied all costs in the circuit court, and, under the circumstances we have stated, neither party is equitably entitled to any costs on appeal. The judgment on each appeal must be the same, as we have already said. The petition for a rehearing is granted, and, having been fully heard, the judgment heretofore entered is vacated, the decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill because of accord and satisfaction, and without costs to either party in either court.

LANNING v. OSBORNE et al.

RIPPEY v. SAN DIEGO LAND & TOWN CO. et al.

(Circuit Court, S. D. California. March 22, 1897.)

Nos. 671 and 716.

1. FEDERAL COURTS—JURISDICTIONAL AMOUNT.

In a suit brought by the receiver of a water company to establish his alleged right to fix the rates at which he should furnish to consumers water for irrigation, it is the value of that right which constitutes the amount in controversy, and not the mere difference between the annual rate contended for by the defendants and that to which the complainant asserts a right.

2. SAME—SUITS BY RECEIVERS.

A suit by or against a receiver of a federal court in the course of the winding up of a corporation is ancillary to the main suit, and is cognizable in the same court, regardless of the amount in controversy.

3. SAME—STAY OF PROCEEDINGS IN STATE COURT.

The provision of Rev. St. § 720, that no writ of injunction shall be granted by any court of the United States to stay proceedings in any state court, with a certain exception, relates only to the stay of proceedings begun in a state court before any resort to the federal court, and does not apply to proceedings begun in the state court after the jurisdiction of the federal court has attached.

4. SAME.

Where a federal court has taken possession of the property of an insolvent water company by the appointment of a receiver, and the receiver has brought suit in that court to test the alleged right of the company to fix water rates, the jurisdiction thus acquired cannot be taken away by a subsequent suit brought by a consumer of water in a state court to test the same question; and such a suit, having been removed to the federal court, will not be remanded.

Works & Works, for complainant Lanning.

Withington & Carter and C. H. Rippey, for complainant Rippey.

C. H. Rippey, Haines & Ward, and J. S. Chapman, for defendants Osborne and others.

Works & Works and Works & Lee, for defendant San Diego Land & Town Co.

ROSS, Circuit Judge. The bill in this case, to which there are a large number of defendants, was filed January 6, 1896. It alleges, among other things: That on the 4th day of September, 1895, the complainant was, by an order and decree of the circuit court of the United States for the district of Massachusetts, duly made and entered, appointed receiver of all of the property of the San Diego Land & Town Company, with full power to take possession of and manage, operate, and control the same, including the plant and water system in the bill mentioned; and that by an order of this court, duly made and entered September 30, 1895, the said first-mentioned order was duly confirmed as to all property of the said company situated within the jurisdiction of this court, including the said water plant and system, and that the complainant was by the said last-mentioned order duly appointed receiver of the said mentioned property, with full power and authority to manage and control the same,—by virtue

of which orders and decrees the complainant took possession of and entered upon and continued the management thereof as such receiver. That the San Diego Land & Town Company, of which the complainant is thus the duly appointed and qualified receiver, is a corporation duly organized and existing under and by virtue of the laws of the state of Kansas, and at the times mentioned in the bill was doing business in the state of California. That during all the times mentioned the company was, and still is, the owner of valuable water, water rights, reservoirs, and of a pipe system for furnishing water to consumers for domestic, irrigation, and other purposes, and of a franchise for the impounding, sale, distribution, and disposition of such waters to the defendants and other consumers, and to the city of National City, in this state, and its inhabitants. That its main reservoir and supply of water is, and was at the times mentioned, situated in a small stream called the "Sweetwater River," in San Diego county, distant about five miles from National City; and that its system of reservoirs, mains, flumes, aqueducts, and pipes covers and can supply a limited amount of territory, consisting of certain farming lands within and outside of National City, and in part of the residence portion of that city. That the company, in procuring the water and water rights, reservoirs, and distributing system owned by it, and in preparing itself to supply consumers with water, expended, up to January 1, 1896, \$1,022,473.54, which was reasonably necessary for those purposes. That by the expenditure of that sum of money the company procured and owns, subject to public use, and the regulation thereof by law, the property mentioned. That the capacity of its reservoir is 6,000,000,000 gallons of water. That the defendants are the owners, respectively, of tracts of land under the company's water system, most of the defendants owning and holding small tracts of only a few acres each. That each of the defendants has, by purchase or otherwise, become the owner of a right to a part of the water appropriated and stored by the company necessary to irrigate his tract of land, and is liable to pay for the use thereof such rental as the company is entitled to charge and collect. That the annual expense of operating and keeping in repair the reservoir and water system of the company, and of furnishing the consumers with water, is, including interest on its bonds, and excluding the natural and necessary depreciation of its system, \$33,034.99. That in order to pay the company the amount of its annual expenses and an income of 6 per cent. on the amount actually invested in its water, water rights, and water system up to the 1st day of January, 1896, it is necessary that rates for the water sold and consumed be so fixed as to realize to the company the sum of \$119,791.66. That the total amount that was realized by the company from sales of water and water rights and from all other sources on account of its business of supplying water to consumers outside of the city of National City for the year ending January 1, 1896, was about \$13,000, and that no more than that sum can probably be realized for the year ending January 1, 1897, at the rates now prevailing. That all of the mains and pipes of the company and other parts of its property used in furnishing water to consumers are perishable prop-

erty, and require to be replaced at least once in 16 years, and require frequent repairs. That in order to acquire the water and water rights and to construct its system of waterworks, the company was compelled to and did borrow \$300,000, and that it is compelled to pay, as interest thereon, \$21,000 annually, which sum must be realized from the sale of its water, and is a part of its operating expenses. That the proportionate share of the revenues of the company that should be raised by water rates within the limits of National City, as compared with the revenues that should be raised and paid as rates by consumers outside of that city, is about one-third. That the amount that can be realized from that city and its inhabitants per annum from the rates now prevailing under the ordinance established by that municipality is about \$10,715, and no more. That the value of the water, water rights, reservoirs, franchises, and property necessary for the proper operation of the business of the company and now held by it is \$1,100,000, and that the same is necessary for the use of the company in furnishing water to the defendants and other consumers. That the city of National City is a municipal corporation of the sixth class, organized under the general laws of the state of California; and that the rates to be charged for water within the city are fixed by its board of trustees, as provided by law. That the company commenced to furnish water to consumers in the year 1887. That it was then informed by its engineer that its system and the supply of water that could be stored thereby would furnish water to consumers sufficient to irrigate 20,000 acres of land, and would supply such water, in addition thereto, as would be necessary for domestic use inside and outside of the city of National City. That the company was then unfamiliar with the operation of a plant and system of the kind constructed by it, and did not know what the cost of operating and maintaining the same would be. That, relying upon the report and estimate of its engineer, and believing that by fixing and charging an annual rate of \$3.50 per acre for irrigation it could meet its operating expenses, and pay it some interest on its investment, it fixed and established, and has since charged, the rate of \$3.50 per annum, and no more, until January 1, 1896. That, instead of being able to supply from its system water sufficient to irrigate 20,000 acres, it has been demonstrated by actual experience that the system will not supply water sufficient to irrigate to exceed 7,000 acres, together with the water demanded for domestic use, and probably not to exceed 6,000 acres, although there are about 10,000 acres under the system susceptible of irrigation. That at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in National City equally high for domestic use and irrigation, the company would not be able to pay its operating expenses and maintain its plant and system; and that the company has been, and still is, under the rates mentioned, losing money every year, and its plant and system has been and is gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water, without any revenue or means being provided for replacing the same, whereby the system and the money invested by

the company therein will be wholly lost to it, and it will, if the rate of \$3.50 per acre be maintained, be compelled to furnish water to consumers at an actual and continual loss. That, in order to pay the costs of operating the plant and maintaining the same, and pay the company a reasonable interest on its investment, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than \$7 for irrigation purposes, which sum is a reasonable rate for consumers to pay, and the smallest amount for which the company can furnish the water without loss to it. That by the laws of the state of California the board of supervisors may, upon the petition of 25 inhabitants who are taxpayers of the county, fix the rate of yearly rental to be collected by the company, but no such petition has ever been presented, or rates fixed, in the case of the company. That, for the reasons stated, the company gave notice to the defendants that on January 1, 1896, it would establish a rental of \$7 per acre per annum for water supplied to their, and each of their, lands for irrigation, and that from and after that date they, and each of them, would be required to pay that sum for the irrigation of their, and each of their, lands, and that the receiver, after his appointment, and before the date mentioned, gave a similar notice. That the defendants, and each of them, refused to pay the rate of \$7 per acre, and maintained that neither the company nor the receiver has any legal right to increase the amount of rental to be paid by them, or any of them, and that the rate of \$3.50, established and collected by the company, must be and remain the established rate of rental until a rate is established by the board of supervisors of the county in which the plant is situated. That an increase of the rate is absolutely necessary to enable the receiver to maintain and operate the plant and pay the expenses of its maintenance and operation, as he is required by law to do. That, in order to enforce the payment of the rate so fixed, the receiver caused the water to be shut off from the premises of the defendants, and each of them, until such rates are paid, and that the defendants threatened to, and will, unless restrained from so doing by this court, commence suits in the superior court of the county of San Diego, state of California, to compel the receiver to turn on and furnish water to their lands without the payment of \$7 per acre rental, on the ground that they are entitled to the use of the water for \$3.50 per acre, and for damages for cutting off the said supply of water. That the rights of the defendants are the same, and the determination of the question of the right of the company and of the receiver to increase the rate of rental to be charged and collected affects all of the defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different. That the bringing of such suits by the defendants separately will involve the company, the receiver, and the defendants in a multiplicity of suits, and put them, and each of them, to great and unnecessary cost and expense, and seriously hinder the receiver in the proper operation and management of the property of the company and the settlement of its outstanding debts, liabilities, and obligations, while all of the questions

involved in such litigation, and the rights of all of the parties in interest, can be better settled and determined in one suit, and vexatious litigation and unnecessary expense and consequent unnecessary interference with the receiver's management and control of the property and business of the company be thereby avoided. That the proposed increase in rates will add to the revenue and earnings of the company from the sale and distribution of the water from its system, with the amount of land now under irrigation, not less than \$14,000 per annum, and upon the whole of the lands that can be irrigated under the system of the company not less than \$21,000 per annum.

The prayer of the bill is that the defendants, and each of them, be enjoined from prosecuting, in the state courts or elsewhere, separate actions against the receiver or the company growing out of the matters alleged; that the defendants, and each of them, be required to appear in this suit, and set up any claims they may have against the right of the receiver or the company to increase the rate for water so furnished; and that it be finally decreed by the court that the receiver and the company have the right to increase the rate to any reasonable sum, and that the sum of \$7 per acre per annum is a reasonable rental to be charged for irrigation; and that the defendants, and each of them, be required to pay that rate as a condition upon which water shall be furnished them; and for such other and further relief as the nature of the case may demand.

In due time the defendants filed an answer to the bill, in which they set up various grounds upon which they claimed that the San Diego Land & Town Company and its receiver became legally and equitably bound to supply them, respectively, for all time, with water for irrigation at the rate of \$3.50 per acre per annum, exceptions to which answer, filed by the complainant, were sustained by the court for reasons given in an opinion filed at the time, and reported in *Lanning v. Osborne*, 76 Fed. 319. Subsequently the defendants filed an amended answer, to which exceptions for insufficiency and impertinence were also filed by the complainant. Upon the hearing of these exceptions the counsel for the defendants strenuously objected to the jurisdiction of the court; but, after careful consideration, I am unable to see the least ground for their contention. But for the high character of the counsel, and for the earnestness with which they press the point, I should be disposed to think it little less than absurd to say that the subject-matter of the controversy between the complainant and the respective defendants is the sum of \$3.50,—the mere difference between the annual rate contended for by the defendants and that to which the complainant asserts a right. The real subject of the controversy is the asserted right on the part of the land and town company to establish the rates at which it will furnish water to the defendants for the purpose of irrigation, in the absence of any action on the part of the board of supervisors of the county. The establishment of that right, denied by the defendants, is the principal object of the bill, and it is the value of that right which constitutes the amount in controversy. *Railway Co. v. Kuteiman*, 4 C. C. A. 503, 54 Fed. 547; *Fost. Fed. Prac.* § 16; *Stinson v. Dousman*, 20 How. 461; *Railroad*

Co. v. Ward, 2 Black, 485. The bill shows the value of that right to be more than \$2,000. But, independently of this consideration, when a court of equity appoints a receiver to take possession of and hold the property of a corporation, that court "assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it." Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008. In such a case, said the supreme court in *White v. Ewing*, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 1019, "any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy." See, also, *Price v. Abbott*, 17 Fed. 506; *Armstrong v. Trautman*, 36 Fed. 275. Moreover, it would not be difficult, I think, to maintain the jurisdiction of this court upon the ground that one of the objects of the bill is to prevent a multiplicity of suits alleged to be threatened by the defendants against the receiver in respect to the property in his hands as the officer of this court. The provisions of section 720 of the Revised Statutes, which are the same as section 5 of the act of congress of March 2, 1793, to the effect that no writ of injunction shall be granted by any court of the United States to stay proceedings in any court of a state, with a certain exception, not necessary to be mentioned, relate only to the stay of proceedings begun in the courts of a state before any resort to the United States court. In *Fisk v. Railway Co.*, 10 Blatchf. 520, Fed. Cas. No. 4,830, Judge Blatchford said:

"The provision of section 5 of the act of March 2, 1793, that a writ of injunction shall not be granted to stay proceedings in any court of a state, has never been held to have, and cannot properly be construed to have, any application except to proceedings commenced in a state court before the proceedings are commenced in the federal court; otherwise, after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court after it had obtained full jurisdiction of person and subject-matter. Moreover, the provision of the act of 1793 (now section 720, Rev. St.) must be construed in connection with the provision of section 14 of the act of September 24, 1789, that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. 1 Stat. 81, 82." Rev. St. U. S. § 716.

See, also, *Dietzsch v. Huidekoper*, 103 U. S. 494; *French v. Hay*, 22 Wall. 250; *Sharon v. Terry*, 36 Fed. 365.

As said by the circuit court of appeals in *Railway Co. v. Kute-man*, *supra*:

"When the United States courts acquire jurisdiction of the parties and of the subject-matter, so far as acquired, the jurisdiction is complete. 'There is not, in our system, anything so unseemly as rivalry and contention between the courts of the state and the courts of the United States' (*Sharon v. Terry*, *supra*); and in a case where the circuit court would have jurisdiction to enjoin a party from bringing a multiplicity of suits which he was threatening to bring in the United States courts, and should exercise that jurisdiction, it is manifest how inadequate the relief would be if the party

enjoined was left free to institute proceedings on the same cause of action in a state court having concurrent jurisdiction. It seems clear to us that no such element of weakness affects the jurisdiction of the United States courts; that in a proper case for injunction, of which, by reason of the subject-matter or of the citizenship of the parties, the United States courts have jurisdiction, the injunction may issue, and will be effectual to prevent the institution of a multiplicity of suits, or of any suit, in any other court; and that there is drawn to the court, otherwise properly issuing the injunction, the consideration of and jurisdiction over the whole subject-matter on account of which or out of which said suits are apprehended."

Upon the merits, it is sufficient to say that the views expressed by this court when considering the exceptions to the original answer (of the correctness of which I have no doubt), applied to the amended answer, show its insufficiency also as a defense to the bill, unless it be that an act passed at the present session of the legislature of California, and which has been called to the attention of this court in another case pending herein, works a change in the law as already declared. That statute is said to have been signed by the governor on the 3d day of March, 1897, and to be in these words:

"An act to amend an act entitled 'An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March 12, 1885, by inserting a new section therein, relating to contracts for the sale, rental, and distribution of water, and the sale or rental of easements and servitudes of the right to the flow and use of water.

"The people of the state of California, represented in the senate and assembly, do enact as follows:

"Section 1. The act entitled 'An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March twelfth, eighteen hundred and eighty-five, is hereby amended by inserting therein a new section, to be numbered section eleven and one half thereof, as follows:

"Section 11½. Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations described in section two of this act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract.

"Sec. 2. This act shall take effect immediately, and be in force from and after its passage."

Upon the question as to what extent, if at all, this late statute affects the rights of the parties to this suit, they should be heard, and upon that question the respective parties will be further heard on the merits of the case.

In the amended answer, all of the defendants, except C. H. Rippey and M. L. Ward, having made admissions similar to those contained in the original answer in regard to their respective ownership of the lands for which the land and town company and its receiver had furnished them with water, as alleged in the bill, and the defendants Rippey and Ward having in the original answer admitted their respective ownership of the tracts of land now claimed to belong to their respective wives, the counsel for the complainant,

upon notice given, at the time the exceptions to the amended answer came on for hearing, asked leave to make Mrs. Rippey and Mrs. Ward parties defendant, which leave I am of opinion should be granted.

In *White v. Ewing*, supra, the court said:

"Indeed, it was conceded that where an insolvent corporation is placed in the hands of a receiver of the circuit court, such appointment draws to the jurisdiction of that court the control of its assets so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into that court in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and, having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed. This position is entirely correct, so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits. * * * The court proceeds upon its own authority to collect the assets of an estate with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation over which it has by an original bill obtained jurisdiction. In this particular the jurisdiction of the circuit court does not materially differ from that of the district court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted. There is just as much reason for questioning the jurisdiction of the court in this case upon the ground of the want of diverse citizenship as upon the ground that the requisite amount is not involved."

What has been said above, applied to the motion made at the time of the hearings above considered to remand the suit brought in the superior court of San Diego county by Mrs. Rippey against the receiver and others, after the commencement of the present suit, to test the same questions, and by that court transferred to this court, makes it proper to deny the motion. The taking possession by this court of the property of the insolvent corporation, and the subsequent suit by its officer to enforce the alleged rights of that corporation, draws to the jurisdiction of this court the entire subject-matter, which cannot be taken away or interfered with by any subsequent suit in any other court.

Orders will be entered: (1) Granting the complainant's motion for leave to make Virginia Rippey and Ella B. Ward parties defendant; (2) denying the motion to remand to the state court the suit entitled "*Virginia Rippey vs. San Diego Land and Town Company et al.*"; and (3) restoring the case to the calendar for further hearing in respect to the effect upon the merits of the case of the act above referred to, passed at the present session of the legislature of California.

WARD v. SAN DIEGO LAND & TOWN CO. et al.

(Circuit Court, S. D. California. March 22, 1897.)

1. PARTIES—SUIT BY RECEIVER.

Where the receiver of the property of a water company appointed by a federal court brought suit in the same court to establish his alleged right to fix the rates at which he should furnish water for irrigation to takers of the water from the system, all of such consumers were proper and necessary parties.

2. REMOVAL OF CAUSES.

The petition of the defendant for removal of a cause from a state court being denied, he loses none of his rights by contesting in that court the suit on its merits.

3. FEDERAL COURTS—RESTRAINING PROSECUTION OF SUIT IN STATE COURT.

A federal court having acquired jurisdiction of the property of a water company by the appointment of a receiver, who has brought suit in the same court to establish his alleged right to fix the rates at which he shall furnish water for irrigation to takers of the water from the system, that court will not permit any party or counsel to proceed in a state court to test the receiver's right to fix rates, as such a suit may result in a judgment directing the receiver to administer the property contrary to the orders and decrees of the court whose receiver he is.

Ella B. Ward brought a suit in equity in the superior court of San Diego county, Cal., against the San Diego Land & Town Company and others, and the defendants made a motion to transfer to the United States circuit court for the Southern district of California, which was denied. Thereupon a certified copy of the record was entered in the United States circuit court, and a motion was then made by the complainant to remand to the state court, and by defendants to restrain the complainant and each of her attorneys from the further prosecution of the suit in the state court.

Haines & Ward, for complainant.

Works & Works and Works & Lee, for defendants.

ROSS, Circuit Judge. A suit precisely similar to that above entitled, brought by Virginia Rippey against the same defendants in the superior court of San Diego county, Cal., was by that court transferred to this court on the motion of the receiver of the property of the San Diego Land & Town Company, appointed by this court September 30, 1895. The suit by Mrs. Rippey was brought in the state court to test the same questions involved in a suit first instituted in this court by its receiver, to which C. H. Rippey, the husband of Virginia Rippey, was made a party defendant as the owner and irrigator of the land to which Mrs. Rippey now asserts title. The suit by the receiver was commenced in this court on the 6th day of January, 1896. The precise nature of that suit is fully stated in the opinion just filed therein, granting, among other things, the complainant's motion to make Virginia Rippey, wife of C. H. Rippey, and Ella B. Ward, wife of M. L. Ward, defendants thereto, and also denying the motion made on behalf of Mrs. Rippey to remand her suit to the state court from which it was brought. 79 Fed. 657. In the subsequent suit brought by

Mrs. Ward in the same state court against the same defendants that were made defendants by Mrs. Rippey, to test the identical questions originally presented by the suit first brought in this court by its receiver, and afterwards by the suit brought in the superior court of San Diego county by Mrs. Rippey against him and others, the state court changed its opinion, and denied a motion for the transfer of the suit to this court, made by its receiver, in all respects similar to the motion made by him for the transfer to this court of the suit of Mrs. Rippey, which motion had been by the same state court granted.

As will be seen from the opinions heretofore filed by this court, the real subject of controversy between the parties to all of these suits is the asserted right on the part of the San Diego Land & Town Company, a Kansas corporation, to establish the rates at which it will furnish water to consumers for the purpose of irrigation, in the absence of any action on the part of the board of supervisors of the county in which the property is situated. Prior to the bringing in the state court of either the suit of Mrs. Rippey or of Mrs. Ward, to wit, on the 14th of September, 1896, this court, in an opinion filed at the time, and reported in 76 Fed. 319 (*Lanning v. Osborne*), sustained that asserted right by the receiver of the property of the land and town company. In the subsequent suit brought by Mrs. Ward in the superior court of San Diego county against the land and town company, the receiver, and one of his employes in the distribution of the water, that court, on demurrer filed by the defendants to the bill, held directly contrary to the prior ruling of this court upon the same question, and to the effect that the receiver of this court, in the management and control of the property of the land and town company, which passed into the hands and administration of this court long prior to the institution of Mrs. Ward's suit, is legally and equitably bound to furnish Mrs. Ward with water from the land and town company's water system, for irrigation, at the annual rate of \$3.50 per acre. It may be that the superior court of San Diego county is entirely right in its views in respect to the legal and equitable rights of the respective parties to the controversy, and that this court, in its previous ruling in respect to the same questions, was entirely wrong. If so, there is an easy and an appropriate way, by appeal, for the correction of any error into which this court may have fallen, or may fall, in the administration of the property with which it is charged, and in respect to the rights of any and all persons thereto or therein. While it always has been, and always will be, the purpose and desire of this court not to assume or draw to itself jurisdiction over any subject-matter or party not clearly within its jurisdiction, it can never hesitate to assert and maintain its rightful and proper jurisdiction over either subject-matter or parties. Conflicts between courts of co-ordinate jurisdiction, under our mixed system of government, may easily occur by a failure on the part of either court to carefully observe the line of demarkation; but care on the part of each will always avoid such conflicts, which are so unseemly, and always so much to be regretted. The

moving papers in the present case show that in a suit regularly instituted in this court against the San Diego Land & Town Company, a Kansas corporation, this court, in the exercise of its equity powers, appointed a receiver of the property of the land and town company, who thereafter qualified, and took the property into his possession. This court thereupon became charged, through its receiver, with the administration of the property for the benefit of whomsoever might be ultimately adjudged to be the owner or owners thereof, and in accordance, of course, with the rights of any and all third parties. Subsequently, to wit, on the 6th day of January, 1896, and in the due course of the administration of the property, the receiver commenced suit in this court against a large number of persons as takers and consumers of water from the water system of the insolvent corporation, constituting the property in his hands, primarily to establish the asserted right on the part of the land and town company to fix the rates at which such water should be furnished the consumers, in the absence of any action on the part of the board of supervisors of the county in which the property is situated. Among the defendants to that suit was M. L. Ward, the husband of Ella B. Ward; and the affidavit upon which one of the present motions is in part based states that he was made a party defendant thereto, instead of his wife, Ella B. Ward, upon the supposition that he was the owner of the land to which his wife now alleges title, such supposition being based upon the alleged fact that the land and town company first, and afterwards the receiver of its property, always furnished water for the irrigation of that land upon applications therefor made by and in the name of M. L. Ward. And the pleadings in the suit brought in this court by the receiver, to which M. L. Ward was made a party defendant, show that he appeared by one, at least, of the same attorneys who represented the other defendants to the suit, and who afterwards brought the suit for Mrs. Ward in the state court, and who appears for her on the pending motions; and in his original answer to the bill in that suit admitted his ownership of the land to which Mrs. Ward now asserts title, for the irrigation of which he, in the original answer to that bill, and she in her subsequent suit, claimed that the land and town company and its receiver are legally and equitably bound to furnish water at the annual rate of \$3.50 per acre. A bare statement of the facts is enough to show that Mrs. Ward was, after the assertion of her claim, properly made a party defendant to the suit brought by the receiver; for, the court being engaged in administering the property through a receiver duly appointed, and that receiver having brought suit in the same court to establish his alleged right to fix the rates at which he should furnish water for irrigation to takers and consumers of the water from the system, all of such consumers were manifestly proper, and, in order to prevent a multiplicity of suits, necessary, parties. It is not necessary to refer to the numerous cases cited by counsel in which it has been held by the supreme court that where a state court wrongfully refuses to give up its jurisdiction on a proper petition for removal, sup-

plemented by the filing of a proper bond, and forces the petitioning party to trial, the error, if not corrected on appeal to the supreme court of the state, may be ultimately corrected by writ of error from the supreme court of the United States. Such cases have no application to a case where property has first lawfully come into the possession of a court of competent jurisdiction, the proper administration of which requires that court to exercise its powers of protection. In cases of the latter character, of which the present is one, the court first acquiring jurisdiction will protect its possession and control, not only against parties, but against any and all other courts. This doctrine is firmly established. *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, and cases there cited. The fact brought to the attention of this court by counsel for Mrs. Ward that, after the denial by the state court of the receiver's petition for the removal of that suit to this court, and after the overruling by the state court of the demurrer to the bill in that suit, the receiver filed in the state court a cross bill, making defendants thereto all of the parties whom he had made defendants to his bill in this court, and in which cross bill he alleged the same rights asserted by him in the bill in this court, is unimportant. His petition for removal being denied, he loses none of his rights by contesting in the state court the suit on its merits. *Railway Co. v. Koontz*, 104 U. S. 5, 14, and cases there cited. But such a contest is necessarily at the cost of the property being administered by this court through its receiver, and of which this court acquired jurisdiction long before Mrs. Ward commenced her suit in the superior court of San Diego county. And, unless the motion here made for an order restraining Mrs. Ward and her attorneys from proceeding with that suit in the superior court of San Diego county is granted, not only will the property in the possession and control of this court be called on to pay those costs, but that court, if it should, upon the trial of the merits of the case, adhere to its ruling when considering the demurrer to the bill, will enter a decree requiring the receiver of this court to furnish, of the property in the custody and under the management of this court, certain water to Mrs. Ward for the irrigation of her land at the rate of \$3.50 per acre per annum; whereas, prior to the bringing of Mrs. Ward's suit, in a suit regularly instituted by the receiver of this court to test the question, in which suit the question was by one, at least, of the same counsel who appear in the state court, as well as in this court, for Mrs. Ward, elaborately argued and carefully and fully considered, this court decided that the receiver, in the absence of action by the board of supervisors of the county in which the property in question is situated, is entitled to fix the rates at which he shall furnish water for irrigation to all consumers under the system. The logical result of such conflicting decisions is too obvious to be dwelt upon. No argument is necessary to support the position that the court first acquiring jurisdiction of the property in question, and engaged in administering it through a receiver duly appointed and qualified, will not permit any party or counsel to proceed in any other court for the purpose of obtain-

ing a judgment directing such receiver to administer the property contrary to the orders and decrees of the court whose receiver he is.

I see nothing of merit in the suggestion of counsel for Mrs. Ward that this court, in the administration of the property in question through its receiver, is undertaking to exercise a part of the public powers of the state of California. That the property in question, in the hands of the receiver, as well as when operated by the San Diego Land & Town Company, is, and was then, charged with a public use, is, I think, made sufficiently plain in the opinion of the court rendered in the case entitled Lanning v. Osborne, 76 Fed. 319. The court administering the property administers it subject to that use, and in accordance with the laws of the state regulating it, just as it administers, through a receiver, the property of a railroad or other public or quasi public corporation whose property is subject to such a use, and to regulation by the state. For errors, if any, committed by the court in the administration of such property, aggrieved parties have appropriate remedies by resort to superior courts.

The motion made on behalf of Ella B. Ward to this court, where a certified copy of the record of her suit in the state court to and including the proceedings on the petition for removal was entered December 18, 1896, to remand it to the state court, is denied, and an order will be entered restraining her and each of her attorneys from the further prosecution of that suit in the superior court of San Diego county, Cal., until the further order of this court.

YOUNGSTOWN COKE CO., Limited, v. ANDREWS BROS. CO.

(Circuit Court, N. D. Ohio, E. D. April 14, 1897.)

No. 5,284.

FEDERAL COURTS—DIVERSE CITIZENSHIP—QUASI CORPORATIONS.

Limited partnership associations, under the laws of Pennsylvania, which are governed by managers or directors, and may sue and be sued by their association names, have all the essential characteristics of corporations, and may sue in a federal court of another state, irrespective of the citizenship of their individual members.

This was an action at law brought by the Youngstown Coke Company, Limited, against the Andrews Bros. Company. On motion for a new trial.

White, Johnson, McCreslin & Cannon, for plaintiff.
Thos. W. Sanderson and L. A. Russell, for defendant.

SAGE, District Judge. Upon the trial, the intervention of a jury having been waived, and the action submitted to the court, a judgment was directed in favor of the plaintiff for the sum of \$9,519.16. The defendant now moves for a new trial.

The plaintiff is a limited partnership association, under the laws of Pennsylvania. By article 16, § 13, of the constitution of that state, the term "corporation," as used in the article, is to be con-

strued as including all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships. The status of such associations has been repeatedly passed upon by the supreme court of Pennsylvania.

In *Coal Co. v. Rogers*, 108 Pa. St. 150, the plaintiff being a partnership association, limited, Chief Justice Mercur, delivering the opinion of the court, declared that, although such an association had many of the characteristics of a corporation, it was not technically a corporation: It could sue and be sued in its association name only. Its capital was alone liable for its debts. The omission of the word "Limited" might make each person participating in the association personally liable for any indebtedness arising in the transaction of its business. There is a provision of the act under which such an association is organized for winding up its business and for the distribution of its property. He says:

"It may not be improper to call such an association a quasi corporation. If not a corporation, it is a person. It is either a natural or artificial person. There is no intermediate place for it to occupy, no other name for it to bear. It cannot claim an existence which exempts it from all liabilities imposed on either class of persons."

The question in that case was whether the association was liable upon an action of trespass, and the holding affirmed the liability.

The same court, in *Hill v. Stetler*, 127 Pa. St. 145, 13 Atl. 306, and 17 Atl. 887, held that a limited partnership organized under the act of 1874 was a joint-stock association, "having some of the characteristics of a partnership, and some of a corporation." In Pennsylvania the law provides for limited partnerships, and for limited partnership associations. The plaintiff in that case was a limited partnership. In this case the plaintiff is a limited partnership association.

In *MacGeorge v. Manufacturing Co.*, 141 Pa. St. 575, 21 Atl. 671, the judge below held that:

"The points of similarity between partnership associations, limited, and corporations, are that both are permitted to have, and attest some of their acts by, a seal; are governed by managers or directors; may sue and be sued by their association or corporation name; and the members or stockholders are not liable individually for the debts of the concern, as general partners are. The chief point of difference between them is that, while a corporation cannot refuse to permit a transfer on its books of shares of its stock to any purchaser thereof, a partnership association, limited, can, except according to its rules."

The judgment below was affirmed by a *per curiam* opinion, in which the point above stated was not discussed.

In *Stevens v. Ball Club*, 142 Pa. St. 52, 21 Atl. 797, said defendant being an association organized under the act of 1874 providing for the creation of limited partnerships, it was held that the club was a quasi corporation.

The court, in *Laflin & Rand Co. v. Steytler*, 146 Pa. St. 439, 23 Atl. 215, reviewed the course of legislation with reference to limited partnership associations, and arrived at the conclusion that

the act of 1874 with reference to the formation of such associations, under which the defendants in that case were organized, created a new kind of artificial persons, "standing between a limited partnership, as previously known, and a corporation, and partaking of the attributes of each."

In *Whitney v. Backus*, 149 Pa. St. 29, 24 Atl. 51, the action was in trespass quare clausum fregit against the members of the Penn Lumber Company, Limited. The summons was served personally upon each of the members. They all pleaded not guilty, and *liberum tenementum*. The court held that the company was liable for the tortious acts which it expressly or impliedly authorized, but that its members and officers were not personally responsible for such acts, unless they participated in them. The court said that such an association had many of the qualities of a corporation:

"It has an association name, in which it must sue and be sued, and take, hold, and convey the real estate purchased and sold by it. Its operations are carried on through officers or agents, and it is responsible for their torts committed within the scope of their employment, and in the prosecution of its business. The liabilities of its members for its acts and engagements are limited to their contributions or subscriptions to its capital, and their interests in it are personal estate. Unlike an ordinary partnership, and unlike a corporation, it is an artificial person, and survives the death of a member, or a sale of his interests. Such an association is answerable for the tortious acts which it expressly or impliedly authorizes, but its members are not personally responsible for them, as a consequence of their contributions to its capital."

The court held that it was not enough, in such a case, to show that the person sued was an officer or agent of the association, but that it should appear that he was a participant in the tortious act complained of.

The supreme court of the United States, in *Secombe v. Railroad Co.*, 23 Wall. 108, was called upon to decide whether the defendant company was a corporation. The territorial legislature of Minnesota had incorporated the railroad company under the name then given to it. In 1858 the territory became a state, and made a constitution which prohibited the formation of corporations by special act. About the same time, by constitutional amendment, the state authorized the company above referred to, as incorporated by the territorial legislature in 1856, to mortgage its roads, franchises, etc., to the state, as security for the payment of certain bonds. The railroad company made the mortgage, but defaulted on the bonds; and in 1860 the governor, under a special act of the legislature, foreclosed the mortgage, and purchased the roads and franchises in the name of the state. In 1861 the legislature, by special act, granted the roads, franchises, etc., to certain persons who had organized themselves into a company. That grant, in turn, was forfeited, according to its conditions, and in 1862 the roads were regranted to a third set of persons, organized into a new company, and called "The Minnesota Central Railroad Company." The question was whether that company was a corporation. The supreme court said that whether it was a corporation having the right to condemn land depended, of necessity, on the

laws of the state, and, if those laws had been construed by the highest court in the state in a case similar in character to the one before the supreme court, the question was relieved of all difficulty. The court held, in reference to the question whether the company had a corporate existence, that it was enough to say that the point was settled in favor of the company by the decision and reasoning of the supreme court of Minnesota.

The motion for new trial in this case is based solely upon the proposition that the court is without jurisdiction, for the reason that the plaintiff is not a corporation, and that it does not appear that the members of the plaintiff company are all citizens of the state of Pennsylvania. It is urged by counsel for the defendant that the decision in *Secombe v. Railroad Co.* does not apply to the case of a quasi corporation, but only to the case of a corporation pure and simple. If so, why the supreme court should have any occasion to consult, for the solution of the question, the decisions by the highest court of the state, is not clear. The very fact that those decisions are referred to as authoritative would seem to imply that the supreme court did not intend to limit its recognition of corporations as suitors to those associations which are in all respects technically within that designation. The real question in *Secombe v. Railroad Co.* was whether the company, which, if organized, was undoubtedly a corporation, had been legally formed under the laws of the state of Minnesota. The court said that whether the company had the rights claimed depended, of necessity, on the laws of the state which gave it existence, if it had any existence. And so here; whether the company has corporate existence must depend upon the constitution and laws of the state under which it was organized.

Yet, upon the authority of a case which will be hereinafter cited, it is at least doubtful whether the supreme court would recognize as authoritative and decisive, upon the question whether a party to an action or suit in a federal court is to be regarded as a corporation, an adjudication of the highest court of the state under whose laws it was organized. In *Secombe v. Railroad Co.* the question was whether the company had been legally formed, not what was its status if legally formed. Here it is conceded that the association was legally formed, and the question is, solely, what is its status, or true designation?—a question of a general nature, not necessarily depending, as we shall see, upon adjudication by the state courts.

Counsel for the defendants cite *Refining Co. v. Wyman*, 38 Fed. 574, decided in this district April 8, 1889. In that case, proof was offered tending to show that the plaintiff was only a limited partnership under the laws of Pennsylvania, composed of persons unknown, who held some 3,000 certificates of shares of interest in the capital of the concern, wherefore it was contended that the court had no jurisdiction. It will be noticed that that company was only a limited partnership, and not a limited partnership association, as is the plaintiff in this case. Neither the clause of the constitution of Pennsylvania, hereinbefore adverted to, nor

any of the decisions by the supreme court of that state, were cited in that decision, nor was *Secombe v. Railroad Co.* The objection to jurisdiction being made, the plaintiff asked leave to amend its petition, if the opinion of the court should be that it was not a corporation of Pennsylvania, and not entitled to sue as a citizen of that state, by suing in the names of the persons who constituted the organization, some half-dozen citizens of New York, New Jersey, and Pennsylvania. The court said:

"Surely, they would be entitled to this amendment, and it would rid us of all further trouble as to the jurisdiction. The court is therefore willing to rule, pro forma,—and I say that because, while I believe it to be the correct ruling, I have not had time or opportunity to give that critical study to the point which its importance deserves,—that the plaintiff, on the facts shown, is not a corporation of Pennsylvania, and therefore is not entitled to sue as such in respect to the rule of the federal courts governing their jurisdiction of controversies between citizens of different states."

The amendment was accordingly so made, and the question of jurisdiction dropped out of the case. That case, therefore, cannot be regarded as anything more than a formal adjudication, made avowedly without full examination, and based upon none of the authorities which have been cited pro and con in this case.

They cite also *Carnegie, Phipps & Co. v. Hulbert* (decided by the court of appeals of the Eighth circuit Oct. 31, 1892) 3 C. C. A. 391, 53 Fed. 10. There a demurrer to the complaint was sustained, and judgment rendered for the defendants, by the court below. The case was then taken by writ of error to the court of appeals, where it was argued upon its merits. But the court of appeals, through Caldwell, circuit judge, said that, upon looking into the record, it appeared that the only jurisdictional averment in the complaint relating to the citizenship of the complainant was that it was a "co-partnership organized and created by the laws of the state of Pennsylvania, and by the laws of said state of Pennsylvania authorized and empowered to sue and be sued in its co-partnership name." The court of appeals rightly decided that that averment did not show a case of which the circuit court could take jurisdiction. The allegation was that the plaintiff was a co-partnership, and not a corporation. The court said that a co-partnership was not a corporation, and could not be a citizen of a state, within the meaning of the statutes regulating the jurisdiction of the circuit court; also, that, when a co-partnership sues, the citizenship of the parties composing it must be averred, and must be such as to confer the jurisdiction. Thus, it appears that the question of jurisdiction was not argued, and that it was considered by the court solely upon the averments in the pleadings. So considered, it was rightly decided. That case is not authoritative on the question here presented.

On the other hand, the plaintiff cites *Bushnell v. Park Bros. & Co.* (decided by Judge Lacombe on a motion to remand) 46 Fed. 209. Upon the authority of *Secombe v. Railroad Co.*, 23 Wall. 108, and *Hill v. Stetler*, above cited, he held that, for the purposes of the suit, the defendant, which was a joint-stock associa-

tion, limited, created under the Pennsylvania act of June 2, 1874, must be considered to be a Pennsylvania corporation, and as such had the right to remove. That decision is directly in point.

There is also in proof in this case a certified copy of the record in the case of Andrews Bros. Co. (the defendant in this case) against the Youngstown Coke Co., Limited (the plaintiff in this case), in the circuit court of the United States for the Western district of Pennsylvania, in which the jurisdiction of the federal court was not questioned by Judge Acheson, who decided the case, and whose opinion is part of the record. 39 Fed. 353.

It is necessary, or at least proper, in passing upon the question involved, to refer to the essential differences between a corporation and a partnership. They are very well stated by Judge Thompson in the first volume of his Commentaries on Corporations, at section 13. Among them, he cites the following particulars:

(1) Members of a corporation "may, in general, without restraint, by transferring their shares, introduce other persons in their stead; but the members of a general partnership contribute to the common enterprise not only their respective shares in the partnership capital, but also their personal skill and individual credit, and cannot, hence, retire from the partnership, and introduce other persons in their stead, without the consent of their co-partners.

"(2) The members of a general partnership are, by virtue of their status as such, agents of the partnership firm, and of each other, in all matters within the scope of the partnership business. [In a footnote it is stated that this is not a necessary incident of a partnership.] Not so the members of a corporation. They can only act about the business of the corporation in their aggregate capacity, through the agency of a committee, commonly called a 'board of directors' or 'board of trustees,' whom they have chosen to represent them, and through such other officers as this committee may appoint.

"(3) The members of a general partnership are jointly and severally liable to pay, out of their private estates, all the debts of the partnership firm. But in the United States the members of a corporation are not, in general, liable to pay any of the corporate debts, unless they have received or withheld some of the assets of the corporation, or unless they are otherwise made liable by the terms of the charter of the corporation, or by statute."

In section 14 he sets forth the differences between corporations and joint-stock companies, referring chiefly to English joint-stock companies, where the members are, in general, liable as partners:

"In the United States, however, an unincorporated joint-stock company, although it may possess a capital stock divided into shares, and transferable at the will of the holders, do business under a name indicating that it is a corporation, act through a common agency and not by its individual members, and hold its property in the name of a trustee, is deemed to be an ordinary partnership, with respect of its relations with the public, such as the manner in which it may sue and be sued, its liability to taxation, and the liability of its members to its creditors. Nonliability of members to creditors will not, of itself, however, determine whether an association is a corporation or not; since, as we shall see hereafter, the members of some American corporations are liable, as partners, to its creditors. Thus, an English joint-stock company, possessing the general incidents of an American corporation, except the nonliability of its members, and organized under acts of parliament expressly declaring that it is not a corporation, will nevertheless be deemed a corporation in this country, for the purposes of taxation."

In support of this last proposition, *Oliver v. Liverpool & L. Life & Fire Ins. Co.*, 100 Mass. 531, is cited. That case was affirmed (10 Wall. 566) under the name of *Liverpool Ins. Co. v. Massachusetts*.

There the supreme court held (Justice Miller delivering the opinion of the court) that the association possessed—

"Many, if not all, the attributes generally found in corporations for pecuniary profit, which are deemed essential to their corporate character.

"(1) It has a distinctive and artificial name, by which it can make contracts.

"(2) It has a statutory provision by which it can sue and be sued in the name of one of its officers, as the representative of the whole body, which is bound by the judgment rendered in such suit.

"(3) It has provision for perpetual succession, by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

"(4) Its existence as an entity apart from the shareholders is recognized by the act of parliament, which enables it to sue its shareholders, and be sued by them."

Justice Miller proceeded to dispose of the objection that the association was nothing but a partnership because its members were liable individually for the debts of the company, by remarking that the principle of the personal liability of the shareholders attaches to a very large proportion of the corporations of this country. So, also, he said that the fact that there was no provision, either in the deed of settlement or the act of parliament, for the company suing or being sued in its artificial name, did not forbid the corporate idea; that the court could see no real distinction in that respect between an act of parliament which authorized suits in the name of the Liverpool & London Fire & Life Insurance Company and that which authorized suit against that company in the name of its principal officer.

"If it can contract in the artificial name, and sue and be sued in the name of its officers on those contracts, it is, in effect, the same; for the process would have to be served on some such officer, even if the suit were in the artificial name."

With reference to the objection that the several acts of parliament cited expressly declared that such organizations should not be held to be corporations, he said that the question before the court was whether an association such as the one under consideration—

"In attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of interests. We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate functions in that state on the condition of payment of a specific tax, is no violation of the federal constitution, or of any treaty protected by said constitution."

Judge Bronson, in *People v. Assessors of Watertown*, 1 Hill, 620, defined a "corporation" as follows:

"A corporation aggregate is a collection of interests united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members, for the time being, an artificial person, or legal being, capable of transacting some kind of business like a natural person."

Mr. Kyd, in the first volume of his work on Corporations, at page 70, gives a definition which has been widely quoted:

"Though many things be incident to a corporation, yet, to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: (1) To have perpetual succession under a special denomination, and under an artificial form; (2) to take and grant property, to contract obligations, and to sue and be sued in its corporate name, in the same manner as an individual; (3) to receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation."

Quasi corporations, according to Mor. Priv. Corp. § 6, are "associations and government institutions possessing only a portion of the attributes which distinguish ordinary private or public corporations." He cites, in illustration, towns and other political divisions, school districts, boards of commissioners, overseers or trustees of the poor, etc., having authority to act and bring suit as united bodies, without regard to their membership for the time being; also, individual public officers having authority to sue in their official capacities upon contracts made with their predecessors in office. These are referred to as examples of quasi corporations sole. To the same effect, see Thomp. Corp. § 20.

Judge McIlvaine, in *State v. Powers*, 38 Ohio St. 54, announcing the opinion of the supreme court of Ohio, declared that common-school districts and boards of education are not corporations, within the meaning of section 1 of article 13 of the constitution of Ohio, although they are quasi corporations, and although declared by statute to be bodies politic and corporate.

Under the authorities cited, and the definitions quoted, it is clear that the plaintiff company is endowed with all the essential characteristics of a corporation, and that, for the purposes of jurisdiction, it must be regarded as such.

The motion for new trial is overruled, and judgment will be entered on the verdict for the amount claimed.

RONDOT v. TOWNSHIP OF ROGERS.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1897.)

No. 432.

FEDERAL JURISDICTION—AVERMENT OF ALIENAGE.

In an action in the circuit court against a citizen of the United States, a description of the plaintiff as a "resident of Ontario, Canada, and a citizen of the dominion of Canada and of the empire of Great Britain," is not a sufficient averment that such plaintiff is an alien, and a subject of the queen of England, to show jurisdiction in the circuit court. *Stuart v. City of Easton*. 15 Sup. Ct. 268, 156 U. S. 46, followed.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

C. A. Lightner, for plaintiff in error.

Henry M. Duffield, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

TAFT, Circuit Judge. This action was begun in the court below, the circuit court of the United States for the Eastern district of Michigan. The jurisdiction of the court rests upon the sufficiency of the first paragraph of the declaration to show it. That paragraph is as follows:

"Augustus E. Rondot, a resident of Ontario, Canada, and a citizen of the dominion of Canada and of the empire of Great Britain, plaintiff, by Keena & Lightner, his attorneys, comes and complains of the township of Rogers, a corporation organized and existing under the laws of the state of Michigan, and a citizen of said state, and a resident of the Eastern district of Michigan thereof, defendant therein, filing this declaration entering the rule to plead, etc., as commencement of suit of a plea of breach of covenant."

By the first section of the act of March 3, 1875, as amended March 3, 1887, and August 13, 1888, the circuit courts of the United States are given cognizance of controversies between citizens of a state and foreign states, citizens, or subjects in which the matter of dispute exceeds, exclusive of interest and costs, \$2,000. The dominion of Canada is a colony of the kingdom of Great Britain and Ireland, and those who enjoy political protection and privileges under the governments of the dominion of Canada and the province of Ontario, and owe allegiance thereto, are subjects of the queen of England; as much so as if they, owing the same allegiance, were residents of London. Hence the right of a Canadian to sue in the courts of the United States must be based on the jurisdiction of those courts to hear and decide controversies between citizens of a state of the United States and foreign subjects, and the correct averment would have been that the plaintiff was a subject of the queen of England, and an alien. This seems a very technical ruling, and it is so; but it is in accordance with a recent decision of the supreme court of the United States upon a similar case. In *Stuart v. City of Easton*, 156 U. S. 46, 15 Sup. Ct. 268, the chief justice, speaking for the court, said:

"Plaintiff in error is described throughout the record as 'a citizen of London, England,' and the defendants as 'corporations of the state of Pennsylvania.' As the jurisdiction of the circuit court confessedly depended on the alienage of plaintiff in error, and the fact was not made affirmatively to appear, the judgment must be reversed, at the costs of plaintiff in error, and the cause be remanded to the circuit court, with leave to apply for amendment, and for further proceedings."

If the description of a party as a citizen of London, England, does not make his alienage affirmatively to appear, we are unable to see that the description of a party as a citizen of the dominion of Canada and the empire of Great Britain makes such alienage any more clear. It is doubtless true that the plaintiff in error can amend his declaration so as affirmatively to show his alienage, and thus that the same questions will probably be presented on a new trial as now arise upon the record. It would shorten the litigation, therefore, were we now to pass upon the questions raised, but the supreme court has not deemed it proper to take such a course in a case like this. *Robertson v. Cease*, 97 U. S. 646. The judgment of the circuit court is reversed, at the costs of the plaintiff in error, and the cause is remanded to the circuit court, with leave to apply for amendment, and further proceedings.

ROBINSON v. HONSTAIN et al.

(Circuit Court, D. Minnesota, Fourth Division, April 8, 1897.)

No. 363.

SECURITY FOR COSTS.

Rule No. 77 of the circuit court for the district of Minnesota, providing that in every case "the plaintiff shall give security for costs," requires merely the giving of security for the clerk's costs, and not security for the benefit of defendants.

This is a suit in equity brought by Dighton A. Robinson against George T. Honstain and Arthur E. Honstain. Upon motion to require complainant to give security for costs for the benefit of defendants.

A. C. Paul, for plaintiff.

P. H. Gunckel, for defendants.

LOCHREN, District Judge. The defendants in this case move for an order requiring the plaintiff to give security for costs for the benefit of the defendants, and base their motion upon rule No. 77 of this court, recently formulated, as follows:

"Ordered: That rules numbered 72 and 77 be and the same hereby are repealed and abrogated, and that the following be and the same hereby is adopted as a rule of the United States circuit court for the district of Minnesota, numbered 77, to wit:

"Ordered: That before any case, either at law or equity, is commenced in this court, or before any papers in any case removed by the plaintiff or defendant from a state court are filed by the clerk, the plaintiff shall give security for costs. That besides the security for costs now required to be given at the commencement of an action at law or a suit in equity by the plaintiff therein, the clerk may require the party commencing such action or suit, or removing a cause into this court from a state court, and before docketing the same or issuing process therein, to deposit with the clerk \$10.00 to cover the clerk's costs which may be paid by him in the prosecution of the cause; and if said deposit shall at any time be exhausted by the party making the same, the clerk may from time to time require such party to deposit a further sum of \$5.00. When the defendant in any action or suit in this court, or the party against whom such suit or action had been removed into the same, or any other party who is or seeks to become a party to any such action or suit enters his appearance or files any paper therein, the clerk may require of him to deposit \$5.00 to cover the costs of clerk which may be made by him, and whenever the said sum is exhausted the clerk may require the same to be renewed. Upon the determination of a cause, any sums deposited as aforesaid, and remaining in the hands of the clerk not applicable to the clerk's costs, of the party making the deposit, shall be returned by him to the party who made such deposit. The terms plaintiff, defendant and party as above used shall be taken as meaning all of the parties plaintiff when there are several, and all of the parties defendant when there are several; but if the interests of several parties on one side are separate and diverse a special order regulating the deposit to be made by them shall be made by the court.

"Dated St. Paul, March 3rd, 1897.

"Walter H. Sanborn, Circuit Judge."

The contention of the defendants is that under the terms of the first clause of this new rule, requiring that before a case is commenced, or any papers filed, "the plaintiff shall give security for costs," the plaintiff must give such security for the benefit and protection of

the defendant. Notwithstanding the generality of the language last quoted, which gives color to such contention, the difficulty is that, if such interpretation be allowed, the rule would be nugatory or defective in that respect, in that it does not indicate what security shall be given to the defendant, either as to the amount or form. It clearly does not contemplate that it is a matter to be settled by the court on motion in every case, as it is required to be given before the case is begun or a paper filed. The only allowable construction is that these general words are limited, in their interpretation and scope, to the special provisions which follow in respect to the giving of security, by deposits of money, for the clerk's costs. The former rules 72 and 77, which were abrogated and replaced by this new rule, related entirely to the payment and security of costs and fees of the clerk; and the subject-matter of such new rule is evidently the same, and not other. The motion is therefore denied.

COTTING v. KANSAS CITY STOCK-YARDS CO. et al.

HIGGINSON v. SAME.

(Circuit Court, D. Kansas, First Division. April 12, 1897.)

1. **JURISDICTION OF FEDERAL COURTS—ENJOINING STATE OFFICERS.**
A federal court has jurisdiction to enjoin a state officer from enforcing a law which is in violation of the constitution of the United States.
2. **CONSTITUTIONAL LAW—CLASS LEGISLATION.**
A state statute regulating stock yards is not objectionable, as class legislation, because it applies only to stock yards doing a certain volume of business; it being uniform in its operation on all yards coming within the designated class.
3. **SAME—REGULATION OF STOCK YARDS.**
The business of stock yards is of such a public nature as to justify a state legislature in imposing rules and regulations for its government.
4. **SAME—INTERSTATE COMMERCE.**
The business of a stock-yards company does not come under the designation of "interstate commerce," and is not exempt from state regulation merely because the yards of the company are located in two states, and it does business in both, though it is possible that, as to stock billed from one state to another, its business is interstate commerce, and to that extent exempt from state regulation.
5. **SAME.**
A state statute regulating public stock yards, which limits the charge for yardage to one charge, and permits the owner of dead stock to dispose of it as he may please, is not in substantial conflict with the provisions of the act of congress of May 29, 1884, entitled "An act for the establishment of a bureau of animal industry, and to prevent the exportation of diseased cattle," as that act and the regulations thereunder, which are applicable only to cattle shipped from certain areas of country and at certain times, merely prescribe certain sanitary measures to be observed in such cases.
6. **SAME—DEPRIVING CORPORATION OF FAIR COMPENSATION.**
Legislation which prevents a fair and reasonable return, the rights of the public considered, for capital engaged in legitimate business, is obnoxious to the constitution of the United States. But, to enable a court to determine what is a fair and reasonable compensation, it must have before it all the facts, such as the cost, the present value of the property, receipts and expenditures, the manner of its operation, etc.; and the

court will hear proof as to these matters, for the purpose of determining whether 2 and a fraction per cent. on the capital stock of a corporation is a fair and reasonable return on the investment.

These were suits in equity, brought, the one by Charles U. Cotting, and the other by Francis Lee Higginson, against the Kansas City Stock-Yards Company, a corporation, and others, and Louis C. Boyle, as attorney general of the state of Kansas, to enjoin defendants from enforcing a certain act of the legislature. Heard upon objection by the attorney general to any proofs under the bills; his contention being that they present no cause of action, and that he is improperly made a party.

Complainant Cotting is a citizen of Massachusetts, and a stockholder in the defendant corporation to the amount of about \$30,000. He presents this bill to enjoin the attorney general and other defendants from enforcing the act of the legislature hereinafter set forth. The defendant is a corporation organized under the laws of the state of Kansas, and is engaged in the business of operating public stock yards at Kansas City, situated on both sides of the state line; about 120 acres of its land being in Kansas, and about 40 acres in Missouri. About 65 per cent. of its earnings are derived from its business in Kansas, and about 35 per cent. from its business in Missouri. Its corporate stock is \$7,500,000. It appears from the bill of complaint that a total number of 5,471,444 head of live stock were received during the year 1896. The gross earnings were \$1,023,870.20, and the total expenditures \$549,351.80; leaving net earnings of \$474,518.40, being about 6¹¹/₂₅ per cent. on its capital stock. On March 12th last, an act of the legislature entitled "An act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, and regulating all charges thereof, and removing restrictions in the trade of dead animals, and prescribing penalties for violations of this act," became a law. This act defines what shall be a public stock yard. Section 1 reads as follows:

"Section 1. Any stock yards within this state into which live stock is received for the purpose of exposing or having the same exposed for sale or feeding, and doing business for a compensation, and which, for the preceding twelve months, shall have had an average daily receipt of not less than one hundred head of cattle or three hundred head of hogs or three hundred head of sheep, are hereby declared to be public stock yards."

Section 2 provides that any person or corporation owning or operating any such stock yard in this state is declared to be a public stock yard operator, whether living within this state or not. Section 3 requires such operator of a public stock yard to file annually on the 31st day of December, with the secretary of state, an itemized statement of the number of head of cattle, calves, sheep, hogs, horses, and mules received during the preceding year. Sections 4 and 5 read as follows:

"Sec. 4. It shall be unlawful for the owners, proprietors or the employes of the owners or proprietors of any such public stock yards within this state, to charge for driving, yarding, watering and weighing of stock, greater prices than the following: For driving, yarding, watering and weighing of cattle, 15 cents per head; calves, 8 cents per head; hogs, 6 cents per head; sheep, 4 cents per head; and there shall be but one yardage charged.

"Sec. 5. It shall be unlawful for the owner, owners, or proprietors or their employes of any such stock yards within this state, to sell and deliver at the rate of less than two thousand pounds for a ton of hay, or any part thereof, the same to be of good quality, or to charge for or to sell the same at more than one hundred per cent. above the average market price or value of such hay upon the markets of the towns or cities wherein such stock yards are located, upon the day preceding such sale and delivery; and it shall also be unlawful for any such owners or proprietors or employes, to sell and deliver less than seventy pounds of corn in the ear for a bushel, or less than fifty-six pounds of shelled corn for a bushel, or to charge for or sell the same at more than one hundred per cent. above the average market price

or value of such ear corn or shelled corn on the markets of the towns or cities wherein said stock yards are located, on the day next preceding such sale and delivery. All feed not above named shall be sold for no greater per cent. of profit than hereinbefore provided."

Section 6 makes it unlawful for the owners of stock yards to prohibit the owner of any dead stock from selling such stock to any person or persons. Sections 7 and 8 read as follows:

"Sec. 7. That any person or persons violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined for the first offense not more than one hundred dollars; for the second offense not less than one hundred dollars, nor more than two hundred dollars; and for the third offense not less than two hundred dollars, nor more than five hundred dollars, and by imprisonment in the county jail not exceeding six months for each offense; and for each subsequent offense he or they shall be fined in any sum not less than one thousand dollars, and by imprisonment in the county jail not less than six months.

"Sec. 8. It is hereby made the duty of the attorney general to prosecute all violations of the provisions of this act."

The bill charges that said law is unconstitutional and void, because it violates the third clause of section 8 of article 1, and article 8, and the fifth and fourteenth amendments of the constitution of the United States, in this, to wit: It violates the exclusive power granted to congress to regulate commerce among the several states. It violates section 1 of the fourteenth amendment, which provides as follows: "Nor shall any state deprive any person of * * * liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." It also charges that said law is void under the constitution of the state of Kansas. There are several other objections made to the law, which will be mentioned hereafter. The attorney general objects to any proofs under the bill, and contends that it presents no cause of action, and that he is improperly made a party.

Waggener, Horton & Orr, for complainant.

L. C. Boyle, Atty. Gen., and David Martin, for defendant Louis C. Boyle.

FOSTER, District Judge (after stating the facts). There has been some discussion about the jurisdiction of this court, but it is not seriously challenged; and the objection by the attorney general that he is improperly made a party defendant is not well taken, as the court has jurisdiction to enjoin a state officer from enforcing an unconstitutional law. *Reagan v. Trust Co.*, 154 U. S. 388, 14 Sup. Ct. 1047.

The complainant insists that the act is objectionable as class legislation, and is not of uniform operation; that it is really special legislation under the disguise of general terms, etc. These objections are not apparent. The act first defines what shall be a public stock yard. It is a stock yard which, for the preceding 12 months, shall have had an average daily receipt of a certain number of live stock. The word "preceding" does not mean anterior to the passage of the act, but that a stock yard, to come under the law, must have maintained for a period of 12 months a stated volume of business, and the annual report of its business required by the law indicates this intention. The act is general in its terms and the classification is not strained or unnatural. It is uniform in its operation on all yards coming within the designated class. The laws of Kansas divide the cities of the state into

three classes, based exclusively on population, and the cities, by force of this alone, pass from one class to another by merely increase or decrease of population. Such laws have been sustained by the supreme court of Kansas, and other courts. *Leavenworth Co. v. Miller*, 7 Kan. 491; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 163; *McAunich v. Railroad Co.*, 20 Iowa, 343; *Dow v. Beidelman*, 125 U. S. 691, 8 Sup. Ct. 1028.

It is contended that this is not such a public corporation or business as justifies the legislature in imposing rules and regulations for its government, but a brief reference to decided cases dispels this contention. *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, Id. 155; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702; *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468.

It is further contended by the complainant that this act of the legislature is not applicable to, and should not be enforced against, defendant stock-yards company, because its business comes under the designation of "interstate commerce." This law, by its terms, applies to stock yards in Kansas, and not in Missouri. Three-fourths of the land of the defendant company lies in Kansas, and two-thirds of its business is transacted there. Its business is to receive live stock for the purpose of yarding, feeding, and watering it until it can be sold or reshipped. The company has railroad switches and viaducts located in its yards, partly in both states, over which stock is carried to and from one state to the other. The company receives shipments of stock from many different states, and reships the same to other states for sale. In handling the stock, some of it is driven across the state line, and perhaps returned again, as it may be most convenient for yarding or feeding, and removing from the pens. Can it be that because it is located in two states, and does business in both, it is answerable to the legislative power of neither state? I think not. It cannot be maintained that its business is interstate, to the exclusion of all state business. It is alleged that about one-fourth of the stock received is billed through from one state to another. It is possible that that class of business is interstate commerce, but that can be reserved for future consideration. This subject concerning the legislative power of the state in such cases is discussed and considered in *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, Id. 163; *Peik v. Railway Co.*, Id. 164-178.

It is charged by the complainant that the said act of the legislature is contrary to, and in conflict with, the provisions of the act of congress approved May 29, 1884, entitled "An act for the establishment of a bureau of animal industry, and to prevent the exportation of diseased cattle," in this: that it permits the owner of dead stock to sell and dispose of the same to any person he chooses, and provides that there can be but one charge for yardage. Therefore the so-called act is a regulation of the quarantine grounds and yards, and the charges thereon, and is in conflict with

said act of congress. The said act of congress, and the regulations of the department of agriculture thereunder, seem to be applicable only to cattle shipped from certain areas of country south of a designated line, and to other states and territories, between certain months in the year; and the regulations prescribe certain sanitary measures to be observed in such cases, such as separate yards and cars for the cattle, and the disinfecting of cars, pens, feed troughs, etc. I fail to find any important conflict with these measures in this act of the legislature. It simply limits the charge for yardage to one charge, and permits the owner of dead stock to dispose of it as he may choose.

There are other and minor objections made to the law, which I shall not now discuss. The contention most forcibly urged and relied upon by complainant is that the law is in violation of the first section of the fourteenth amendment of the constitution of the United States, in that it deprives him of his property without due process of law, and denies to him the equal protection of the laws, because it deprives him of a fair and reasonable compensation on his capital invested in the stock of the company. The rule is well settled that any legislation fixing rates which deprive a person or corporation of all compensation on capital invested is obnoxious to the constitution, and the enforcement of such legislation will be enjoined by the courts. In the case of *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, which is the latest decision of the supreme court upon this subject, the court uses this language:

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair, and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged, and as the demurrer admitted) could not earn more than four per cent. on its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable, and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public." *Reagan v. Trust Co.*, 154 U. S. 399, 14 Sup. Ct. 1047; *Railroad Commission Cases*, 116 U. S. 331, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191.

In several instances the courts have been called upon to consider state legislation not so extreme in its character, but which deprived corporations of a fair and reasonable compensation. *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028; *Southern Pac. Co. v. Board of Railroad Com'rs*, 78 Fed. 261. In this case Judge McKenna says:

"For the natural persons the protection of the constitution is intended, and would any one say that justice is done them if their investment be allowed only an infinitesimal fraction of 1 per cent., while all other investments are expected to return at least legal interest, with freedom, besides, of unlimited advantage?"

In the case of Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 458, 10 Sup. Ct. 467, 702, the court says:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." *Ames v. Railway Co.*, 64 Fed. 165; *New Memphis Gas & Light Co. v. City of Memphis*, 72 Fed. 952.

So it seems to be clearly established by most recent interpretations of the constitution that legislation which prevents a fair and reasonable return—the rights of the public considered—for capital engaged in legitimate business is obnoxious to the constitution; but how shall it be determined what is reasonable compensation? It is not every public enterprise or investment, however unwisely undertaken or extravagantly managed, that can claim a fair return on its property. The public have rights to be considered. If a company should build a railroad across the Great Desert of Sahara, and carry but one passenger or one car of freight a day, it would be absurd to say that its rates should be fixed so as to make a fair return on the investment. Has the income been dissipated by extravagant or bad management? or has the property depreciated by a general decline in values? would seem to be questions entering into the problem. And, after all, what shall be the rule in determining if the compensation is reasonable? Is it to be left to the unguided judgment or whim of the chancellor? Doubtless the rate fixed by law for interest on money furnishes a test of which the investor cannot complain, although in many cases it might be oppressive to the general public. It is apparent that if the court is to form an intelligent judgment on the subject, and not rely on mere conjecture, all the facts should be before it, such as the cost, the present value of the property, receipts and expenditures, the manner of its operation, etc. As this case now stands, it presents this question: Is 2 and a fraction per cent. on the capital stock of this corporation a fair and reasonable return on the investment? On that question I prefer to withhold answer until further evidence is presented, and the objection of the attorney general to the introduction of evidence must be overruled. A master should be appointed to speedily take evidence, and report the material facts without delay. In the meantime the restraining order will be continued in force. The facts being substantially the same in the Higginson case, same order will be made therein.

COWELL v. CRAIG.

(Circuit Court, N. D. California. March 26, 1897.)

No. 11,953.

MORTGAGES—CONDITIONAL SALES—EVIDENCE.

On an application for a loan to redeem property from a foreclosure sale, a deed absolute on its face was executed by the applicant, reciting a consideration of \$5,000; and an instrument dated the next day was executed by the grantee, agreeing to reconvey on payment of \$5,000 within three years, with interest at 1 per cent. per month. A lease of the premises, of the same date, was executed by the grantee to the grantor for the term of three years, at a rental of \$50 per month. The consideration recited was but little, if any, less than the actual value of the property. It was entirely optional with the grantor to purchase or not, and he was not bound to repay the purchase price. In an insolvency proceeding commenced by him, and on other occasions, he emphatically declared that he was not the owner of the property, but held it merely as lessee. Soon after the expiration of the three years, he made a tender to the grantee in accordance with the terms of the deed. *Held*, that the transaction must be construed as a conditional sale, and not as a mortgage.

E. S. Pillsbury and R. Y. Hayne, for plaintiff.
D. M. Delmas and W. H. Beatty, for defendant.

MORROW, District Judge (orally). This is an action in ejectment. The plaintiff alleges ownership in fee of the land in controversy, and the possession of the defendant. In support of his claim, plaintiff has introduced testimony showing that he derives title from the defendant by a deed to Henry Cowell, plaintiff's grantor. The deed is absolute on its face, is dated November 17, 1879, and the consideration is \$5,000. The defendant admits possession of the land and the execution of the deed of conveyance, but claims that the deed was intended as a mortgage, and, as part of the transaction, produces an agreement signed by Henry Cowell, dated November 18, 1879, wherein the latter agreed to reconvey upon the payment of \$5,000 within three years, with interest at 1 per cent. per month; also, a lease of the premises from Cowell to Craig, dated November 18, 1879, for the term of three years, at a rental of \$50 per month. The question is, was this transaction intended as a mortgage on the premises to secure the payment of \$5,000 in three years? The law relating to the construction of instruments of conveyance of this character has been much discussed in the courts, and I think the principles have been very clearly established. Where there is but a single instrument, and that is a deed of conveyance, the courts have determined that parol testimony introduced for the purpose of converting such an instrument into a mortgage must be very clear and convincing; that it must appear to the court, beyond reasonable controversy, that it was the intention of the parties that the deed should be a mortgage, and not an absolute conveyance. *Howland v. Blake*, 97 U. S. 624; *Henley v. Hotaling*, 41 Cal. 22. This must necessarily be so; otherwise there would be no security whatever in deeds of conveyance, because it would always be open for persons to come in, where prop-

erty had increased in value after such a transaction, and contend that the conveyance was a mortgage, and not a deed. But, where there is more than one instrument (that is to say, where there is an instrument to reconvey and a lease executed simultaneously with the execution of the deed of conveyance), these instruments must be carefully considered, and their purpose ascertained; and while they do not, as documents, change the rule of evidence with respect to the construction to be given to the facts connected with the transaction, nevertheless the terms of such instruments are to be considered as a circumstance in the case, to be given such weight by the court as they appear to deserve in view of all the other circumstances of the case; so that where there is an absolute deed of conveyance, and in connection with that instrument, and about the same date, there is executed an agreement to sell, and a lease to the grantor, it is the duty of the court to give careful consideration to such instruments, in connection with whatever circumstances there may be in the case, to determine whether or not the presumptions of the deed have not been overcome, and a presumption obtained in favor of a mortgage; and if it should appear to the court, in this aspect of the case, that there is a question of doubt as to whether the conveyance is a conditional sale or a mortgage, some of the cases undoubtedly establish the doctrine that the doubt should be given in favor of the construction of such a conveyance as being a mortgage, rather than a conditional sale, and in that view I concur. We have here in this case a deed absolute on its face, dated November 17, 1879; an agreement for a reconveyance, dated November 18, 1879; and a lease of the premises of the latter date for the term for which the contract was to exist; and all filed for record at about the same time. It is contended on behalf of the defendant that the presumption and the circumstances in connection with these various instruments show that these instruments constituted a mortgage. In support of this contention, he refers to a number of circumstances; among others, first, that the defendant had been living on the premises for some time prior to the transaction. The presumptions of a sale would, however, apply with equal force to this circumstance. If the grantor were selling the land absolutely, intending to leave it and go elsewhere, the fact that he was residing on the premises, or had been living there for a number of years, would not necessarily give any different construction to the instrument of conveyance. Whether it should be considered a mortgage or a deed because a person abandons his premises, leaves his home, and sells his property, is manifestly a question to be determined—in this country, at least—by other circumstances.

Again, it is said that the conveyance was made on an application for a loan. It is the fact that this conveyance was made upon an application made by Mr. Craig to Mr. Cowell for a loan of the amount of money required to redeem the property from a foreclosure sale, but that circumstance alone is not sufficient to give character to the transaction. We must look to all the surrounding circumstances connected with the case. If, for instance, a person

desired to improve his place, or to enlarge it, or if, living in the San Joaquin valley, he desired to bring water from a distance for the purpose of irrigation, and to enable him to incur the expense he should seek a loan, and should make a conveyance of his property, taking a lease and an agreement for a reconveyance, the transaction, in view of all the circumstances, would have the appearance of a mortgage, even though the consideration was nearly the value of the place. Under such circumstances, the fact that the loan was obtained for the purpose of improving the place, in the way of new buildings, or for bringing in water, or enlarging its capacity or capabilities as a farm, would tend to show that the transaction was a mortgage, and that the loan of the money was on the premises, to be repaid and to be secured as a mortgage. But in this case the application for the loan was for the purpose of redeeming the place from foreclosure proceedings. The place had been mortgaged, and the mortgage debt had not been paid; and proceedings for foreclosure had been carried to a judgment and sale, and the time for redemption had about expired. This is a circumstance for the court to consider. The mortgage value of the premises appears to have been nearly exhausted for a loan of six or seven thousand dollars. It is to be presumed that Craig would have paid this mortgage when it became due, if he could have borrowed the money, and paid it rather than to have incurred the expense attending on foreclosure proceedings. Therefore the circumstance that there was an application for a loan, considered with the other circumstances in the case, would rather tend to show, it seems to me, that it was a sale, and not a mortgage, because, as I have just remarked, the place had been mortgaged, the foreclosure proceedings were being carried to a conclusion; and, while the application for the money was as a loan, it may be said that Craig obtained it only by a conditional sale of the property.

It is said, furthermore, that the defendant valued the premises at a larger sum of money than the consideration of the deed, to wit, \$10,000. This circumstance would be of some significance if it appeared that the property was in fact of that value, because, in cases of this kind, where the money loaned is in no proportion to the value of the premises,—as, for instance, the premises being of great value, and the amount of money loaned is small,—that is a significant circumstance tending to show that the transaction was a mortgage and not a sale. A man is not presumed to sell his property for very much less than what it would be valued at in the market. Now, while it is true that the defendant may possibly have valued the place at \$10,000, it does not appear that any one else so valued it, or that the valuation was above the amount involved in the foreclosure proceedings. The foreclosure proceedings were to satisfy a debt which did not originally much exceed \$6,000, or about that amount, and the consideration of the deed was therefore very nearly the value of the premises. This circumstance, instead of being one tending to show that the conveyance was a mortgage, rather tends, in my judgment, to show that it was a deed of conveyance.

There is a circumstance urged on the attention of the court, that the Craigs advanced about \$2,000 in the redemption proceedings in addition to the \$5,000 paid by Cowell. This is a circumstance, unquestionably, in favor of the claim that the transaction was a mortgage, and a circumstance which, if connected with other circumstances of a like import, would be very significant. The question is as to whether that fact, standing alone, is sufficient. I think it has some value, and should be considered; but whether it is sufficient to give character to the transaction can only be determined in the light of all the other facts in the case.

It is urged, also, that the reconveyance was to be made for the precise amount shown to be the consideration for the deed. I am unable to understand what significance there is in that fact, standing alone. The consideration of the deed was \$5,000. The amount that was to be paid on the repurchase was therefore, necessarily, the same sum of \$5,000. That was the amount of the transaction. That is all that can be said, unless we should assume that Mr. Cowell had gone into this transaction for the purpose of making money by the purchase of the property, by its resale three years after. But I do not understand Mr. Cowell had in view any profit on the advance of the real estate. It was a purchase by him for \$5,000. He appears to have believed that that amount was about the value of the property, and that it would be sold probably for that amount at any time within three years, and he gave Mr. Craig the option of buying it back at that price. Meantime, Craig would have to pay the rent of \$50 a month, which would be the equivalent of 1 per cent. interest on \$5,000.

It is said another circumstance to be considered is that the premises continued in the possession of the mortgagor. But it was so continued under a lease. The mortgagor had leased the premises for the term of three years. If I determine that this was a conveyance absolute, then the fact that the grantor continued in possession was simply the fact that he continued in possession as the lessee. The significance of the occupation is the significance of the original transaction, whatever that may be, and I do not see that the fact that the grantor continued in possession had any other relation to the subject of inquiry. If the transaction was a mortgage, then Craig continued in possession under the agreement. If it was a deed, he was in possession under his lease.

The rent was made equivalent to the interest on the consideration of the deed. That fact has some significance. The interest was to be 1 per cent. per month on \$5,000, or \$50 a month, and that was the rent of the premises. This last circumstance, and the one that Craig advanced \$2,000, appear to be the two circumstances in this case which to my mind have some tendency to establish the conveyance as a mortgage, and these two circumstances appear to be about all there is in the case to support that view of the transaction. Are these two circumstances sufficient? What are the facts that tend to show that the transaction was a sale of the property?

Commencing again, and reviewing the facts in the case from the other standpoint, what do we find? Mr. Cowell was a man of

means, and had a large experience in the transaction of business involving the buying and selling of land. We find, when applied to by Craig for a loan, that Cowell went upon the premises and examined their value. He knew that the place had gone to sale on the foreclosure proceedings for an amount of about \$6,000, or a little more. It must have appeared to him that the mortgage value of the place had been exhausted for any sum about that amount, and that its only value to him would be as a purchaser; that there was not enough margin for him to take a mortgage on it; that the only way in which he could be secured would be to take a deed for the place, own it, and give Craig the right to repurchase it within a given time. In that connection is the circumstance which I referred to a while ago, that the consideration of the deed was about the value of the premises. In the case of *Coyle v. Davis*, 116 U. S. 108, 112, 6 Sup. Ct. 314, 316, the court said:

"Great stress is laid, in cases of this kind, on inadequacy of consideration, where there is a considerable disproportion between the price paid and the real value of the property. There is testimony on both sides on the question of disproportion in this case. But the preponderance is very large on the part of Davis that the share of Coyle in the property was sold for about its sale value, in view of its conditions."

This circumstance was considered in that case as tending to establish a sale, and the same interpretation may be given to the like circumstance in the present case.

There is another significant fact which must be considered, and that is, there was no agreement on the part of Craig to pay the amount of the loan, if we are to treat this transaction as a mortgage. He made no agreement whatever with Cowell to pay in any event upon a reconveyance. In *Henley v. Hotaling*, 41 Cal. 22, 28, Mr. Justice Rhodes said:

"A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money."

To the same effect is *Slowey v. McMurray*, 27 Mo. 113. And see, also, the observations of Lord Chancellor Manners in *Goodman v. Grierson*, 2 Ball. & B. 274, as to the mutual and reciprocal remedies in a mortgage agreement.

In this case, as I understand the transaction, Craig was not, in terms, required to pay the purchase price in any event. If he wanted the property, he was privileged to pay the \$5,000 and interest, or rent, but he did not obligate himself to purchase the property from Cowell. The latter agreed to sell to Craig for \$5,000 and interest from November 18, 1879, but it was a matter wholly optional with Craig whether he would purchase or not. Suppose Craig had been a man of means, and this property had depreciated in value; what recourse had Cowell for this loss? The risk appears to have been all on the side of Cowell.

The other circumstances in the case to be considered are the terms

of the crop mortgage given to Cowell by Craig. The first crop mortgage, dated May 15, 1880, recites that the property is under lease from Cowell to Craig. The second crop mortgage, dated May 18, 1881, executed by Craig, but not by Cowell, on account of erroneous consideration, recites the conveyance to Cowell and the lease to Craig. The second crop mortgage, executed by both parties, is dated August 1, 1881, and recites that the property is owned by Mr. Cowell and leased to Craig. The latter recital is an express declaration on the part of Craig that Cowell owned the property, and that Craig was the lessee,—an admission that the conveyance to Cowell was an absolute deed, and not a mortgage. There is also the declaration to Sheriff Franks, under circumstances that would indicate Craig's understanding of the transaction. It appears that Craig declared to Mr. Franks, then sheriff of Monterey county, that this property was owned by Cowell. The declaration was made when it was necessary for the sheriff to know who was the real owner of the premises. In the cases I have had occasion to examine, I find that declarations of this character have been considered by the court as a very strong circumstance—almost a controlling circumstance—in the case. But perhaps the most significant circumstance in this case is the insolvency proceeding commenced by Craig in the superior court August 7, 1880. In the petition he enters into some considerable detail with respect to this land, its ownership by Cowell, the lease to Craig, the terms of the lease, the conditions under which he held the property, and the interest that he had in the premises. Not only that, but, when a contest was presented by a creditor against Craig's discharge, he comes into court and answers the contest, and further declares, still more emphatically, if possible, that this property is owned by Cowell; showing that the deed that he gave was an absolute deed, and that it was not a mortgage. It is said in explanation of these declarations that Craig is an ignorant man, illiterate, and cannot read or write; that these declarations were in fact only the declarations of his attorney. This is a circumstance to be considered, but I am in doubt as to what weight should be given to the fact. I think the experience of most people is that persons who are unable to read or write are quite as particular and careful about their business transactions as people who do read and write. Where persons are able to read and write, they are often disposed to pass over written documents without critical examination, but a person who cannot read or write is usually very careful to have documents read over and explained. I did not discover anything in the appearance or conduct of Mr. Craig on the stand to indicate that he was unable to look after his own interests. In some respects he seemed to behave himself with as much shrewdness, judgment, and caution as some of the witnesses on the other side of the case. I thought he showed a fair ability in comprehending the intricacies of this case, and his relations to the facts as they were developed. So, indeed, did Mrs. Craig. While they were both illiterate, it appeared to me they had all the natural shrewdness usually associated with people in their condition. I cannot, therefore, conclude that the fact that these defendants could neither read nor write should be taken as evidence that they did not know the legal sig-

nificance of all these proceedings relating to this property. I think the insolvency proceedings must necessarily have been explained to Craig. The petition appears to have been presented to the superior judge, John K. Alexander, who was the attorney that prepared and was familiar with the original conveyance and the other instruments connected with that transaction. The certificate attached to the petition indicates that it must have been brought to the attention of the judge, who, knowing the character of the original transaction, would hardly have permitted Craig to go on record with a document that was untrue, and particularly where it contained declarations against his interest. If, therefore, Craig's declarations in the insolvency proceedings are true, there is no question but that he understood that the deed was an absolute sale, and that this property was owned by Cowell after November 17, 1879.

The next circumstance to be considered is that of the tender. This document was prepared by Mr. Rodgers as attorney for Craig, and is dated December 30, 1882. It seems to be as strongly in favor of the claim that the conveyance was an absolute deed as the proceedings in insolvency. It seems to me that in these latter proceedings Craig and his attorney, Rodgers, looked upon the conveyance as a deed, and treated it as a deed absolute, and that Craig's rights under it were such that they could only be secured by acting in accordance with its express terms, as a sale, and not as a mortgage.

Upon all these facts, and others which might be referred to, but which I will not now recite, I have arrived at the conclusion that the evidence in this case establishes the fact that this conveyance, a deed absolute on its face, was in fact a deed of conveyance, and that the transaction was a conditional sale of the property, and was not a mortgage. I will therefore direct judgment to be entered in favor of the plaintiff.

UNITED STATES v. SIERRA NEVADA WOOD & LUMBER CO. SAME
v. HIGGINS et al. SAME v. BOYINTON et al. SAME v.
KIELY et al. SAME v. RICE.

Nos. 609-613.

(Circuit Court, D. Nevada. April 5, 1897.)

CANCELLATION OF LAND PATENTS—FRAUD—BONA FIDE PURCHASERS.

To a bill in equity by the United States to cancel a patent, upon the ground that it was obtained by fraud, the fact that the defendants are bona fide purchasers for value, without notice of the fraud, constitutes a complete defense.

These were bills in equity brought by the United States against the Sierra Nevada Wood & Lumber Company and others to cancel a patent for certain lands.

The facts stipulated, omitting the names of the defendants and the description of the lands in each suit, are as follows:

"It is hereby stipulated and agreed by and between the United States of America, plaintiff, and * * *, defendants, through their respective attorneys, that the following statement is and shall be considered the facts at

Issue in the above-entitled case, and the whole thereof, and that upon this statement of facts the same shall be presented to the above-entitled court for consideration, determination, and decree: That * * * defendants, and each of them, are citizens of the district and state of Nevada, and are resident therein, and that the land and real property hereinafter more particularly described is situated within said district and state of Nevada. That one Charles Musso is a Sioux half-breed Indian, and on, to wit, July 17, 1854, was a resident and occupant of the Sioux half-breed Indian reservation, in the state of Minnesota. That under and by virtue of an act of congress approved July 17, 1854, the said and identical Charles Musso, Sioux half-breed Indian, as aforesaid, was entitled to have scrip, known as 'Sioux Half-Breed Indian Scrip,' to wit, for 480 acres of land, which said scrip was, by the terms thereof, locatable by the said Charles Musso upon any unoccupied lands subject to pre-emption and private sale, or upon any other unsurveyed lands not reserved by government, upon which he has made improvements; and, under and in pursuance of the provisions of said act, there was issued to the said Charles Musso, and in his name and for his use and benefit, five piece of said Sioux half-breed Indian scrip, to wit, number 301, A, B, C, D, and E, for 480 acres of land in the aggregate; and the said Charles Musso then and there became, and was, and ever since has been, the legal owner of said five pieces of scrip, number 301, A, B, C, D, and E, for said 480 acres of land in the aggregate. That said five pieces of scrip, number 301, A, B, C, D, and E, were never delivered to said Charles Musso, or to any one, with authority to act for him, or to receive or to have the same; and the said Charles Musso never did receive or have the same, or any part thereof, nor did he assign, transfer, or dispose of the same, or authorize any one to do so for him.

"That, after said scrip was issued, it was taken possession of by the special commissioner of the United States, appointed under the act of July 17, 1854, whose duty it was to secure a deed of relinquishment from the said Charles Musso, and to deliver to him, upon the execution of said deed, the said scrip. That the said Charles Musso was not found by the said commissioner, and did not apply for said scrip, but was at the time, about July 17, 1854, upon the said reservation in the state of Minnesota, and was not advised of the issuance of said scrip to him, or of his right to have the same, otherwise than by the said act of congress and the proceedings had thereunder, and did not execute to the said commissioner his deed of relinquishment; and the said commissioner did not deliver said or any part of said pieces of scrip before mentioned to the said Charles Musso, or to any one for him having authority to receive the same. On the contrary, the said commissioner returned said pieces of scrip to the Indian office. That afterwards, and on or about December 10, 1860, the said five pieces of scrip number 301, A, B, C, D, and E were sent to the superintendent of Indian affairs at St. Paul, Minnesota, with instructions to give public notice that the same were in his possession, and held by him for delivery. That the said superintendent of Indian affairs, at St. Paul, Minnesota, did give notice that he held said scrip for delivery. That one person, falsely pretending to be Charles Musso, a Sioux half-breed Indian, a resident of the state of Minnesota, represented himself to one W. S. Chapman as the genuine Charles Musso, and as being entitled to said pieces of scrip, and made claim to the same, and, so pretending, made, executed, and delivered in due form of law a power of attorney, creating and appointing one W. S. Chapman his attorney in fact to receive, receipt for, and have the said scrip. That afterwards, on or about January 1, 1864, the said superintendent of Indian affairs at St. Paul, Minnesota, reported said scrip as delivered; and the same was delivered to said W. S. Chapman, who claimed then to be the attorney in fact of said Charles Musso, and who then presented to the said superintendent of Indian affairs a paper in writing, purporting to be the power of attorney, and purporting to be executed by said Charles Musso, on, to wit, January 9, 1863, in the county of Hennepin, Minnesota. That the said W. S. Chapman presented said paper, purporting to be a power of attorney, claiming to be acting as the attorney in fact for the said Charles Musso; and the said W. S. Chapman, under and by virtue of the said paper, purporting to be a power of at-

torney of the said Charles Musso, executed a pretended relinquishment of said Charles Musso's interest in the said Indian reservation to the United States of America, and under and by virtue of said paper, purporting to be a power of attorney of said Charles Musso, demanded and received the said pieces of scrip, number 301, A, B, C, D, and E. That W. S. Chapman was not the attorney in fact for said Charles Musso, nor had he any authority to act for or bind the said Charles Musso of and concerning the said five pieces of scrip, or any thereof; on the contrary, that said paper, purporting to be the power of attorney of said Charles Musso, and purporting to nominate and appoint the said W. S. Chapman as the attorney in fact of and for said Charles Musso, was not the power of attorney of said Charles Musso, and was not executed by him, but was in fact the said other person falsely pretending to be Charles Musso, who was in no manner entitled to said scrip, nor was he interested therein. That the said Charles Musso never having made or executed the same, and never having authorized the same to be made or executed in his name, or for any purpose whatsoever. That the said Charles Musso had no knowledge of the existence of said false, fraudulent, and pretended power of attorney, and was in no wise a party to the same. That afterwards, and on or about the 1st of March, 1864, the said W. S. Chapman, as the pretended agent and attorney in fact of the said Charles Musso, and claiming to act as the attorney in fact for said Charles Musso, and without the knowledge, authorization, or consent of the said Charles Musso, located one of the said pieces of scrip, to wit, number 301, * * * at the United States land office at Carson City, Nevada, upon lands in the said district of Nevada, to wit, * * *; and afterwards, and on the 15th day of September, 1864, upon the aforesaid location, and without the knowledge, authorization, or consent of the said Charles Musso, a United States patent was issued upon said piece of scrip for said above-described lands, in the name of said Charles Musso, which said patent was afterwards, and on the 15th day of September, 1864, delivered, upon said Chapman's demand, to said W. S. Chapman, claiming to be the agent and attorney in fact of said Charles Musso, and upon his receipt as such attorney in fact. That each and every of said acts were without the knowledge, authorization, or consent of said Charles Musso, and were false, fraudulent, and void as to said Charles Musso, and as to plaintiff, the United States of America.

"That as to plaintiff, the United States of America, the said paper, purporting to be the power of attorney of said Charles Musso, and the said deed of relinquishment made, executed, and delivered by the said W. S. Chapman under the pretended authority of said pretended power of attorney, and the said delivery of the said pieces of Sioux half-breed Indian scrip to the said W. S. Chapman, and the location of the same by the said W. S. Chapman, under said false and pretended power of attorney, and the issuance and delivery of said patent, were, and each and every of said acts were and are, fraudulent and void. That the said defendants * * * are in the possession, use, and occupancy of the aforesaid and above-described land, claiming under the patent of the United States granted and issued upon and in satisfaction of said piece of scrip, and deraign their title from the United States, under and in virtue of said patent, and have no other claim or title to the said land. That at the time the said pretended power of attorney to the said W. S. Chapman, purporting to make the said W. S. Chapman the attorney in fact of said Charles Musso, and at the time said deed of relinquishment was made by the said W. S. Chapman, pretending to act as the attorney in fact of the said Charles Musso, under said false and fraudulent power of attorney, and at the time said scrip was located as aforesaid, and a patent to the said land was issued and delivered as aforesaid, said Charles Musso was absent from the state of Minnesota, and from the state of Nevada, and had no knowledge of said acts or either of them; and that the said Charles Musso left the state of Minnesota in June, 1855, and did not return to said state until the year 1885, and when informed touching his rights in the premises, and of and concerning the said pieces of scrip, and the said pretended power of attorney, and the delivery of said scrip to the said W. S. Chapman, under the said pretended power of attorney, and of the location of the scrip, the said Charles Musso did, on, to wit, the — day of

April, 1892, make, execute, and tender to the United States, and to the proper officers of the United States, a formal deed of relinquishment of his interest in said Sioux Indian reservation, and did then demand of the United States, and of the proper officers thereof, the issuance and delivery to him of certificates of Sioux half-breed Indian scrip, under the provisions of the aforesaid act of July 17, 1854, for 480 acres of land, in exchange for and in satisfaction of his interest as a Sioux half-breed Indian in said Sioux Indian reservation, in the said state of Minnesota. That not until on or about the said day of April, 1892, did said Charles Musso or plaintiff have knowledge that said power of attorney was false and fraudulent. That after said patent was issued by the United States, and after the same was delivered and recorded to the said W. S. Chapman, alleged attorney in fact as aforesaid, and long prior to the commencement of this suit, said defendants, * * * and each of them, or their grantors, became and were bona fide purchasers of a portion of said land described in said patent, and paid a valuable consideration in money therefor, and afterwards entered into and took possession of the same, and made valuable and expensive improvements thereon; and ever since then, and for more than twenty-five years, defendants and their grantors have been in the actual and exclusive possession and use of the said lands, and are now in such possession and use. That defendants had no knowledge nor information, nor had their grantors any knowledge or information, nor had they or their grantors any means of acquiring any knowledge or information, of the alleged wrongful or fraudulent acts heretofore set forth; nor did they, or either of them, know, or have reason to know, that said power of attorney was false or fraudulent, or was not the power of attorney of said Charles Musso named in the complaint. That neither the defendants nor their grantors in any manner participated in said alleged unlawful or wrongful acts, or any of them."

Charles A. Jones, U. S. Atty.

T. V. Julien and Robert M. Clarke, for defendants.

HAWLEY, District Judge. These are bills in equity to cancel a patent issued September 15, 1864, by the United States to W. S. Chapman, as the agent and attorney in fact for one Charles Musso, upon the ground of fraud. The five cases were tried together. The principles of equity applicable thereto are the same in each case.

Has the government, upon the facts stated, shown such a superior equitable right to that of the defendants to the lands in question as to entitle it to recover? From the stipulated facts it is apparent that the controlling question in each case is whether the defendants, being bona fide purchasers of, and having the legal title to, the lands herein involved, without knowledge of the fraud committed upon the government in obtaining the patent through which they derived their title, are entitled to a decree. This question, in the light of the adjudicated cases, is too well settled in favor of the defendants to require any extended discussion. The undisputed facts affirmatively show that a fraud was committed upon the United States, sufficient in equity, as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patent. But it is manifest that the fraud that was committed was not such as prevented the passing of the legal title by the patent. This being true, it necessarily follows that, to a bill in equity to cancel the patent upon this ground, the defense of a bona fide purchaser, for value, without notice, is perfect. *Boone v. Chiles*, 10 Pet. 177, 209; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131; *U. S. v. California & O. Land Co.*, 1 C. C. A. 330, 49 Fed.

496; *Id.*, 148 U. S. 31, 41, 13 Sup. Ct. 458; *U. S. v. Dalles Military Road Co.*, 2 C. C. A. 419, 51 Fed. 629, 638; *Id.*, 148 U. S. 49, 13 Sup. Ct. 465; *U. S. v. Winona & St. P. R. Co.*, 15 C. C. A. 96, 67 Fed. 948, 960; *U. S. v. Southern Pac. R. Co.*, 76 Fed. 134, 137.

The reason for protecting innocent purchasers holding the legal title is that a court of equity only acts upon the conscience of the party, and, if he has done nothing which taints it, no demand can attach upon it, so as to give jurisdiction in equity. Clear and strong as the equity of the United States in these cases must be admitted be, it is self-evident that it is no clearer or stronger than that of the innocent purchasers of the legal title to the lands, who paid a valuable consideration therefor, and have made many valuable improvements thereon in good faith, without any notice of the illegal acts committed by the person or persons who wrongfully and fraudulently obtained the patent from the United States. Justice and equity demand that they should have protection and relief. They committed no fraud. They have acted with a clear conscience, and are not guilty of any wrong. They relied, and had the right to rely, upon the patent issued by the government in a case where it had the unquestioned jurisdiction and right to issue the patent. The fact that the government was imposed upon is not their fault. They cannot be held responsible for the fraud of others, of which they had no notice. The United States has no equitable title to the lands which is superior to the rights of the defendants and bona fide purchasers thereof. A decree in each case will be entered in favor of the defendants.

ALLEN v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 317.

MORTGAGES—AFFIDAVIT OF GOOD FAITH—RECORDING—RIGHTS OF CREDITORS.

A statute of Washington provides that "a mortgage of personal property is void as against creditors * * * unless it is accompanied by the affidavit of the mortgagor that it is made in good faith * * * and it is acknowledged and recorded." *Held*, that under this statute a mortgage of real and personal property, which, when executed and recorded as a mortgage of realty, is not accompanied by the affidavit required by the statute, is not for that reason absolutely void as against creditors, but upon the affidavit being subsequently attached to it, and its being recorded as a mortgage of personal property, it acquires validity as such, except as against intervening rights and liens, or creditors who may have become such on the faith of the property's being unincumbered.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

Hudson & Holt and T. N. Allen, for appellant.

George Donworth, James B. Howe, and John P. Judson, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. On December 31, 1891, the Olympia Light & Power Company executed a mortgage of all its property, both real and personal, to the American Loan & Trust Company, to secure an issue of bonds amounting to \$150,000. This mortgage was duly acknowledged as required by law, but did not have attached to it at the time of its original execution the affidavit required by the statute of Washington in order to constitute it, as to creditors, a valid chattel mortgage. It was recorded January 20, 1892, in the records of mortgages of real estate, but not in the book of chattel mortgages. On June 1, 1893, the intervener became an unsecured creditor of the mortgagor in the sum of \$8,000. On November 16, 1893, the mortgagor, while perfectly solvent, caused to be attached to the mortgage the affidavit requisite to constitute it a perfect chattel mortgage, and on November 17, 1893, it was duly recorded as such in the chattel mortgage records. Thereafter the American Loan & Trust Company instituted suit in the circuit court of the United States for the district of Washington to foreclose said mortgage, and in said foreclosure suit a receiver was appointed, who qualified and took possession of all the property of the mortgagor. Subsequently the intervener recovered judgment against the Olympia Light & Power Company, the mortgagor therein, upon his debt contracted as above stated. He intervened in this suit, and now claims the right to have his judgment satisfied out of the proceeds arising from the sale of the personalty covered by the mortgage before said proceeds are applied to the satisfaction of the mortgage indebtedness. A demurrer to the petition for intervention was interposed upon the ground that it did not state facts sufficient to entitle the intervener to the relief prayed for therein. The demurrer was sustained, and petition for intervention dismissed, and judgment entered against him for costs. From that judgment this appeal is taken.

Did the court err in sustaining the demurrer? The answer to this question depends upon the construction to be given to the statute of Washington which reads as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property." 1 Hill's Code Wash. § 1648.

This statute, it will be observed, makes a distinction between creditors and subsequent purchasers and incumbrances; but, while it protects only purchasers and incumbrances "for value and in good faith" against the operation of a mortgage not properly executed and recorded, all classes of creditors come within its provisions. *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190, 194, 40 Pac. 729. The contention of appellant is that the mortgage was void as to him when his debt was contracted, and that no subsequent action in supplying the defect of the absence of the affidavit required by law could in any manner impair or affect his rights. Can this contention be maintained? It is true that at the time the debt to the intervener accrued the mortgage was void as to all creditors. Why?

Because it did not have attached to it the affidavit of the mortgagor that it was "made in good faith, and without any design to hinder, delay or defraud creditors." For the want of this affidavit, the mortgage could not be recorded as a chattel mortgage. It imparted no notice to any one. It was not of any binding force. It created no lien upon the property. To all intents and purposes, as a chattel mortgage, it was invalid as to creditors. Being invalid and void in its then condition, could it be made valid by the subsequent act of the mortgagor in supplying the affidavit which the law required, and the act of the mortgagee, of having it, in its corrected form, recorded in the book of chattel mortgages?

Under the facts in this case, the question of appellant having been induced to give credit on the faith of the mortgagor having unincumbered personal property is eliminated from this case. If we correctly understand appellant's position, it is that if a new mortgage had on November 16, 1893, been drawn up in the language contained in the original, duly acknowledged, with the proper affidavit attached, and regularly recorded, it would have been valid as security for the debt for which the original mortgage was given; but he contends that inasmuch as the original mortgage was void at the time of its execution, as against creditors, no subsequent act could make it valid. This argument states a difference in fact, without any distinction in principle. The original mortgage, as acknowledged and recorded, was a valid real-estate mortgage. It was simply void as to the personal property. When the mortgagor attached the proper affidavit to it, and the mortgagee caused it to be recorded, it had the same force, vitality, and effect as if the instrument had then been again written, signed, and acknowledged. If any intervening rights or liens had been secured before the defect was cured, such rights would, of course, have priority over the mortgage; but the intervener is not in a position to urge this point. The legal principle here involved was presented and elaborately discussed by the supreme court of Kansas in *Cameron v. Marvin*, 26 Kan. 612, 627, as will be seen by the following statement of the court:

"Counsel for defendant in error seem to contend that where a chattel mortgage is not recorded immediately after it is executed, and the property is not immediately delivered to the mortgagees, it is absolutely void as to all creditors whose debts have been created subsequent to the execution of the mortgage, and prior to its being recorded, and prior to the delivery of the property, without reference to any lien procured upon the property by virtue of an attachment or an execution, or otherwise; that is, they claim that such a mortgage is so absolutely void as to general creditors whose debts have been created after the execution of the mortgage, and before the recording of the same, or before the delivery of the property, that they may obtain a lien upon the property after the mortgage is recorded, and after the property is delivered, by virtue of an attachment or other legal process."

The court, in answering this contention, after stating that an unrecorded mortgage of property not delivered to a mortgagee is void as against creditors without notice, and referring to other questions not specially important here, expressed its opinion upon this subject as follows:

"If the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mort-

gagor, or takes possession of the property with the consent of the mortgagor, his mortgage then has the force and effect of the mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both the parties, and hence must be held to be valid from that time on as against all persons."

This conclusion is based upon the principle that a mortgagor who is indebted to several parties has the unquestioned right to mortgage his property to secure any of his debts, and to give preference to one creditor over others, so long as he acts in good faith, without any intention to hinder, delay, or defraud other creditors. Mr. Jones, in his work on Chattel Mortgages, says that:

"If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. The subsequent delivery cures all such defects, and it also cures any defects there may be through an insufficient description of the property. * * * Delivery of possession under a mortgage before rights have been acquired by others will cure any invalidity there may be in the instrument, whether arising from an insufficient execution of it, the omission to record it, or from its containing a provision which makes it void except as between the parties." Jones, Chat. Mortg. § 178.

In *Reed v. Bank of Commerce*, 8 Wash. 539, 36 Pac. 484, the court held that where possession is taken under the mortgage the rights of the mortgagee do not depend upon the affidavit as to its execution having been in good faith. In *Willamette Casket Co. v. Cross Undertaking Co.*, supra, it does not appear that the mortgagor did anything after contracting the new indebtedness to make the mortgage operative in favor of the mortgagee as against debts contracted after the delivery of the mortgage. The court was not called upon to discuss, and did not express any opinion upon, the question which is directly involved in this case. There is no decision of the supreme court of Washington, to which our attention has been called, which, upon similar facts, announces any principle in opposition to the views we have expressed. The judgment of the circuit court is affirmed.

ALLEN et al. v. JONES et al.

(Circuit Court, E. D. Arkansas, W. D. April 10, 1897.)

1. INJUNCTION BOND—LIABILITY OF SURETIES.

The sureties in an injunction bond, where the prosecution of an action is restrained, are liable for the whole penalty, without credit for what has been paid on the judgment finally rendered in such action, it appearing that the unpaid balance of the judgment exceeds the penalty of the bond, and that the whole judgment could have been collected but for the delay caused by the injunction.

2. SAME.

Where the plaintiff in an action, which was delayed by temporary injunction, pressed the action to judgment with reasonable diligence on the termination of an appeal from a judgment dissolving the injunction, and he was unable, by reason of the insolvency of the defendants, to collect his judgment, the sureties in the injunction bond are liable, though the de-

fendants were solvent when the injunction was dissolved. The court having, in its discretion, announced that it would take no steps in the action at law pending the appeal in the injunction suit, plaintiff was not chargeable with want of diligence in failing to press his action to judgment pending that appeal.

This was an action at law brought by Allen, West & Bush against Wyley Jones and others upon an injunction bond. Heard on motion to credit judgment entered on verdict of jury.

Rose, Hemingway & Rose, for plaintiffs.

J. M. & J. G. Taylor, N. T. White, and A. B. Grace, for defendants.

WILLIAMS, District Judge. At a former day of this term, judgment was entered in this cause, in accordance with the verdict of the jury, in favor of the plaintiffs, and against the defendants. The defendants have presented a motion to enter a credit upon the judgment, and, in order that the question which the motion presents may be understood, it becomes necessary to make a statement of facts either conceded by the parties or established by the verdict of the jury, as follows:

On the 10th of September, 1886, the plaintiffs in this cause instituted an action at law in the United States court at Helena, against R. G. Atkinson and E. B. Houston, to recover an amount claimed against them upon a note and written contract for \$6,927.34. Before the defendants in that cause filed an answer, they instituted a suit in equity in the same court to enjoin the prosecution of the action at law, and to cancel the note and contract on which the action was based. The application for a temporary injunction was heard, and the court ordered that upon the execution by complainants of a bond in the sum of \$7,000, conditioned according to law, that plaintiffs in the action at law be enjoined and restricted from prosecuting the same until the further orders of the court. Thereupon the plaintiffs in the suit in equity executed a bond, which was signed by the defendants Jones and Triplett, as well as by the intestate of the defendant Talbott, which is in the following language:

"We undertake that the plaintiffs, R. G. Atkinson and E. B. Houston, partners as R. G. Atkinson & Co., shall pay to the defendants, James H. Allen, Thomas H. West, and J. E. Bush, as Allen, West & Bush, the damages, not exceeding seven thousand dollars, which may be sustained by reason of the injunction in this case, if it is finally decided that said injunction ought not to have been granted."

And thereupon all proceedings upon the action at law were suspended until the final determination of the suit in chancery. Both cases were by consent transferred to this court, and the suit in equity came on for final hearing in October, 1894, when a decree was entered dismissing the bill for want of equity. Atkinson and Houston took an appeal to the circuit court of appeals, and the decree of this court was affirmed by it on the 2d of December, 1895, 17 C. C. A. 570, 71 Fed. 58. Pending determination of the cause upon appeal, this court declined to take steps in the action at law; but, immediately after the cause was determined, the plaintiffs in the action at law began to press for a trial, and after considerable delay, caused by de-

murrers, answers, and amendments to the same, it was tried, and a verdict was rendered in favor of the plaintiffs for the sum of about \$12,000. As soon as an execution could issue under the statute of Arkansas, one was sued out upon the judgment, and levied upon such property of the defendants Atkinson and Houston as the marshal was able to find. That property was afterwards sold for the aggregate sum of forty-nine hundred and ——— dollars, leaving a balance due upon the judgment in excess of the penalty in the injunction bond. At the time that the bond was executed, Atkinson and Houston were both solvent, and both continued so for a number of years. About 1893, Houston became insolvent. Atkinson became insolvent shortly before or shortly after the final determination of the suit in chancery. After the issuance of the execution above referred to, the plaintiffs brought this action upon the injunction bond, upon the ground that, by reason of the injunction, they had been prevented from making their debt, which they would have made but for the injunction. The verdict of the jury establishes the fact that plaintiffs could have made their full debt out of Atkinson and Houston if the injunction had not issued, and that, by reason of the injunction, they are unable to make upon their debt and interest an amount in excess of the penalty of the bond. The verdict and judgment were for the latter amount, and the defendants now move that a credit be entered thereon of the amount realized from the sale under execution of lands belonging to Atkinson and Houston. The only question presented by the motion is, are they entitled to the credit?

By the provisions of the bond, the defendants obligated themselves that Atkinson & Co. would pay to plaintiffs all damages, not exceeding \$7,000, which they might sustain by reason of the injunction; and the contention made on part of the defendants is that this is, in effect, a guaranty of the payment of \$7,000; that \$4,900, having been paid, is to that extent a compliance with the guaranty; and that the only default is as to the balance. The court would have been glad to reach this conclusion, but is constrained to hold that the obligation is one of indemnity, and not of guaranty. The obligors undertook to indemnify the obligees against all damages by reason of the improper issuance of the injunction, limiting, however, the amount that they could be called upon to pay to the sum of \$7,000. To entitle the defendants to the credit sought, they should show either that they made the payment, or that the damage had been reduced by reason of the payment to a sum less than the penalty of the bond. This case presents neither condition. The amount for which they seek credit was realized from a sale of property belonging to the defendants in the original action, and in it the defendants in this case had no interest. When it had been applied upon the original judgment, it left a balance unpaid and uncollectible of more than the penalty of the bond. As this balance would have been collected if the bond had not been executed, it is a damage resulting from the execution of the bond and the issuance of the injunction, for which, by the terms of the bond, the defendants herein became liable.

A case in which there was a question much similar is *Sessions v. Pintard*, 18 How. 106. In that case, the court, speaking of the con-

tention made by the sureties as to the distribution of money resulting from a sale of the property of the principal, say:

"On what ground could the appellants [the sureties] claim a pro rata distribution of this fund [arising from sale of the land of the principal]? They were bound to the extent of the penalty of their bond, on which a judgment was entered. They had a direct interest in the application of the proceeds of the land to the payment of the original decree, including the interest and costs; and, so much as such payments reduced the original decree below the amount of the judgment against them, they were entitled to a credit on the judgment. The judgment has been so made, and the credit entered, and beyond this they have no claim, either equitable or legal."

It follows that the motion must be denied.

In the brief filed by counsel, it is argued that the entire judgment should be set aside, because the court erred in admitting upon the trial evidence to the effect that, pending the appeal in the equity cause, the court announced to counsel that it would take no steps in the action at law; and, in support of this contention, authorities are cited, to the effect that the dissolution of the injunction was not affected nor the injunction reinstated by the taking of an appeal. Upon this proposition of law there can be no controversy, and the court's action in admitting the evidence was in full recognition of the doctrine contended for. But courts have much discretion in directing the conduct of causes before them, and it seems to me, after full consideration of the position taken by counsel, that my action in this matter was justified by the soundest principles of justice, and exacted in the exercise of proper discretion. In the suit in chancery the court had disposed of the issues upon which the action at law proceeded, by final decree. If the action at law had been brought to trial, the appellants in the chancery case (defendants in the law case) would have been bound upon these issues by the decree entered, and the fruits of the appeal, if successfully prosecuted, would have been lost. In order that the defendant in the action at law might enjoy the full benefit of the appeal in case they succeeded, the court deemed it proper to defer trial upon the action at law. If the decree had been reversed, it would have resulted to the benefit of the sureties upon the injunction bond, as well as to the benefit of the principals. During the time that the court, in the exercise of its discretion, declined to proceed with the trial of the cause, the plaintiffs were not in a position to press their action to judgment, and having proceeded immediately after the case was decided on appeal, and having failed to realize upon a judgment obtained with all reasonable diligence, the fact, if it be a fact, that R. G. Atkinson became insolvent between the date when the injunction was dissolved and the judgment against him in the law case rendered, would not exonerate the sureties.

The fact remains that, if the prosecution of the action had not been stopped by the injunction, the plaintiffs could have obtained judgment and execution, allowing for all reasonable delays in the administration of the law, before either Atkinson or Houston became insolvent. If there was not sufficient time for them to get judgment and satisfaction after the injunction was dissolved, taking into consideration the same reasonable delays in the admin-

istration of justice, it results that the failure to make the money was brought about by the injunction. If the parties had continued solvent for eight years, and the injunction had then been dissolved, but they had both failed the next day, before it was possible to obtain judgment according to the ordinary course of causes in court, there could be no doubt that the sureties would still be liable. The fact, if it be a fact, that one of the parties was solvent for more than a day after the injunction was dissolved, would not change the result, unless the condition of solvency continued so long as that the plaintiffs, by exercising reasonable diligence in the prosecution of their suit, could have obtained judgment. In this case the delay was reasonable so long as the equity suit was pending on appeal, and after that time the evidence all shows that the plaintiffs prosecuted their appeal with the utmost diligence. So much of plaintiffs' judgment against Atkinson & Co. as they could not make at the date of its recovery is a part of the damage growing out of the wrongful issuance of the injunction; and the evidence to explain the delay was proper, and I am of the opinion that judgment should stand.

Although counsel have not made a motion to set aside the judgment, they have argued with much earnestness the question last considered, and I have deemed it proper to state my views thereon.

MERCANTILE TRUST CO. v. MOBILE & S. H. RY. CO.

(Circuit Court, S. D. Alabama. June 20, 1896.)

MORTGAGES—FORECLOSURE—RIGHTS OF CREDITOR OF THE MORTGAGOR'S VENDEE.

After a decree of foreclosure and expiration of the time allowed for redemption, a judgment creditor of a vendee of the mortgagor had the land sold under an execution on his judgment, and became the purchaser. Held, that he had no interest in the land entitling him to claim a part of the proceeds of the foreclosure sale.

Bestor & Gray, for complainant.

Fred. G. Bromberg, for petitioner.

TOULMIN, District Judge. As I understand the case made by the petition, amendments thereto, and exhibits, it is substantially this: On April 15, 1895, the petitioner recovered a judgment in the state court against the Mobile & Spring Hill Railway Company for \$6,500. On May 6, 1895, it caused an execution to be issued on the judgment, and to be placed in the hands of the sheriff, which was by him levied on certain lands belonging to the defendant. The sheriff sold the lands under the execution, and at the sale the petitioner became the purchaser for the sum of \$300. On September 11, 1895, the sheriff executed a deed for the lands to the petitioner. Prior to said judgment, execution, levy, and sale, the defendant, the Mobile & Spring Hill Railway Company, acquired by purchase the said lands and the railroad franchises, rights, etc., of the Mobile & Spring Hill Railroad Company. At the time the Mobile &

Spring Hill Railway Company acquired said property, there was a mortgage on it, executed on June 1, 1886, by the Mobile & Spring Hill Railroad Company to M. P. Levy and F. Ingate, which was in full force and effect. On April 1, 1893, the Mobile & Spring Hill Railway Company executed a deed of trust on the railroad, franchises, and rights aforesaid to the complainant, the Mercantile Trust Company, as trustee, to secure certain bonds therein mentioned, which deed of trust, however, did not cover the lands in question. Subsequently the Mercantile Trust Company was subrogated to and acquired all the rights and remedies of said Levy and Ingate under the mortgage of June 1, 1886, which mortgage, it will be observed, included said lands. On June 11, 1895, a decree was rendered in this court foreclosing said mortgage, and ordering the property described therein to be sold to pay the debt secured by it. The amount of the debt then due was \$9,666.55. The Mercantile Trust Company was ordered to sell the property, and it was sold at public outcry on April 20, 1896. The deed of trust executed by the Mobile & Spring Hill Railway Company on April 1, 1893, was foreclosed by a decree of this court of February 29, 1896, and the property covered by said deed of trust ordered to be sold by Richard Jones, special commissioner, appointed for that purpose. The sale under this decree was also on April 20, 1896. The sale under the two decrees took place at the same time and place. They were made by one T. M. Le Baron, acting as crier for the Mercantile Trust Company, and for said Richard Jones, and all the property covered by the Levy and Ingate mortgage and by the said deed of trust was purchased by Lewis H. Rust for the sum of \$85,000, of which \$73,950 were paid to said Jones as commissioner, and by him paid into the registry of the court, and the balance of the purchase money, to wit, \$11,050, was paid to the Mercantile Trust Company, and by it applied to the satisfaction of the debt due to it under the Levy and Ingate mortgage, and by the company reported to the court. The court took no action with this division of the purchase money, and was not requested to take any action in the matter. On the reports of Commissioner Jones and of the Mercantile Trust Company, proper deeds were ordered by the court to be executed to the purchaser. At the time and place of sale, the petitioner, claiming to be the owner of the equity of redemption of the Mobile & Spring Hill Railway Company in and to the lands in question, tendered to the solicitors of the Mercantile Trust Company \$10,000 in cash in payment of "all the rights, privileges, franchises, and land granted to the Mobile & Spring Hill Railway Company, and described in the advertisement of sale," exclusive of the particular lands purchased by the petitioner at the sheriff's sale aforesaid, and demanded that said Mercantile Trust Company sell the property included in the Levy and Ingate mortgage, exclusive of the lands in question, and before selling said lands, and that said lands be sold separately, which demand was refused or disregarded. The petitioner now prays the court to decree that so much of the said \$73,950 be paid to it as equitably belongs to it as the owner of the Mobile & Spring Hill Railway Company's interest in said lands up-

on its making a conveyance of the same to the purchaser at the sale under the aforesaid decrees, and prays that it may be ascertained what sum petitioner is so equitably entitled to. The question is, what is the Mobile & Spring Hill Railway Company's interest in said lands? It was once the owner of the lands by purchase, but held them subject to a mortgage. In other words, it acquired by purchase the interest of the Mobile & Spring Hill Railroad Company. At most, that interest was but the equity of redemption, the grantor (Mobile & Spring Hill Railroad Company) having already executed the mortgage to Levy and Ingate. That mortgage has been foreclosed, and the property sold. The Mobile & Spring Hill Railway Company could have paid off the debt secured by the mortgage, and obtained a clear title to the lands. But it did not do so. It was not the mortgagor of the lands; and if it ever had the right, as a vendee of the mortgagor, to redeem, it had no such right on September 11, 1895, the day the petitioner purchased the lands at sheriff's sale. The mortgage had been foreclosed by the decree of this court three months prior to that time, and by the terms of the decree the equity of redemption was forever barred 30 days after the date of the decree. The Mobile & Spring Hill Railroad Company was barred by this decree, and the Mobile & Spring Hill Railway Company had no greater rights than the former company, and certainly the petitioner had no rights superior to the latter company. *Childress v. Monette*, 54 Ala. 317. So it seems to me clear that the Mobile & Spring Hill Railway Company has no interest in said lands, nor in the proceeds of their sale, even if they were now in the custody or under the control of the court, to which the petitioner is or can be equitably entitled, and there was no such interest at the time of the alleged tender and demand. If the Mobile & Spring Hill Railway Company had a right, as vendee, to redeem from the mortgagee of the Mobile & Spring Hill Railroad Company, where does the judgment creditor of such vendee get that right? The mortgagor or his judgment creditor can redeem, but I know of no authority for the judgment creditor of a vendee to redeem from the mortgagee of the vendor. *Kelly v. Longshore*, 78 Ala. 203. But if the petitioner, as the judgment creditor of the Mobile & Spring Hill Railway Company, had the right to redeem from the mortgagee of the Mobile & Spring Hill Railroad Company, it did not comply with the law of the tender. The amount alleged to have been tendered was \$10,000. The amount of the principal and interest due on the mortgage, without costs, was some \$10,300. So there was no legal tender. However, this is not a bill to redeem. It is a petition that the petitioner be paid such an amount as equitably belongs to it as the owner of the Mobile & Spring Hill Railway Company's interest in said lands. As I have said, I think it is clear that that company has no interest in said lands. In no aspect of the case, as now presented, can the court grant the relief prayed for. The demurrers to the petition are therefore overruled.

UNION STOCK YARDS NAT. BANK v. MOORE et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

1. PARTIES.

To a suit brought against a bank to recover money deposited with it by a corporation, which plaintiffs claimed acted as their agent in making the deposit, and which deposit the bank had applied to the payment of a debt to it from the depositor, the corporation making the deposit was a proper, and even necessary, party; but as, on the rendition of the decree in favor of complainants, that company appeared entitled to no right or relief, and was not subjected to any liability, a dismissal as to it was proper.

2. BANKS—DEPOSIT BY AGENT.

Where the officers of a bank, when they received a deposit which they applied to the payment of a debt due from the depositor to the bank, knew or had reason to believe that the deposit contained moneys belonging to others, for whom the depositor was but the agent or factor, the persons who were in equity the owners of the money were entitled to recover it from the bank.

Appeal from the Circuit Court of the United States for the District of Nebraska.

The appellant is a national bank doing business at the Union Stock Yards at South Omaha, Neb.; and in the year 1895, and prior thereto, the Waggoner-Birney Company was a corporation of the same place, engaged in business as a live-stock commission agent and factor, doing all of its banking business with the appellant, and at the close of business on the 1st day of August, 1895, was indebted to the appellant, upon overdrafts and its checks paid by the appellant, in the sum of \$8,918.10, and upon its two promissory notes, having then considerable time to run before maturity, in the further sum of \$8,774.39. On said 1st day of August, 1895, the appellees brought by railroad to South Omaha a large shipment of cattle, and gave them, for sale upon commission, to the Waggoner-Birney Company aforesaid, who made sale of the cattle on the same day, and, near the close of business of that day, deposited the proceeds of such sale, with some other moneys, in the appellant bank; the entire amount of the deposit being the sum of \$17,666.30. On the receipt of such deposit by the appellant, it assumed to apply the same, as moneys of said Waggoner-Birney Company, in payment and satisfaction of all said indebtedness of said company to said bank, including the said two notes of said company not matured; and on the morning of August 2, 1895, upon the presentation of the check of said company upon said bank for the sum of \$11,773.03, to be paid to the appellees as the net amount belonging to them from the proceeds of the sale of their cattle, all of which proceeds had been included in said deposit of the preceding day, said bank refused to pay the same or any part thereof, and claimed to hold all of said money under said application by it of the same in satisfaction of said indebtedness of the said company to said bank. Whereupon this suit was begun by the appellees, and upon trial thereof the court made the decree in their favor which is appealed from.

J. M. Woolworth (J. L. Kennedy and Myron L. Learned on the brief), for appellant.

C. J. Smyth, for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. Although the Waggoner-Birney Company, from its connection with, and possibility of interest in, the subject of the litigation, was a

proper, and even necessary, party defendant, yet on the rendition of the decree, as it appeared entitled to no rights or relief, and was not subjected to any liability in the action, the dismissal, as to that company, was proper. If the appellant deemed that said company should be retained longer as a party, it should have brought that party here on this appeal, but its rights and interests in the subject-matter are fully determined by the decree to which it was a party.

2. The right of the appellees to recover of the appellant the moneys claimed by the appellees in this suit depended upon the litigated questions of fact, whether the appellees were in equity the owners of the money claimed by them at the time the same was deposited by said company in said bank, and whether the officers of said bank, when it received such deposit, knew, or had reason to believe, that the deposit consisted of or contained moneys not belonging to said company, but to the appellees, or to others for whom the company was but the agent or factor. *Clemmer v. Bank* (Ill. Sup.) 41 N. E. 728; *Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118. The court found these facts in favor of the appellees, and, from a careful consideration of the evidence, we are satisfied with the correctness of such finding. The decree appealed from is affirmed, with costs.

FIRST NAT. BANK OF HUMBOLDT, NEB., v. GLASS et al.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 840.

1. HOMESTEAD—FRAUDULENT CONVEYANCE.

The use of property that is not exempt from execution by a debtor to procure the title to a homestead in his own name is not a fraud upon his creditors. The use of unexempt property by a debtor to vest the title to such a homestead in the name of his wife is held to be a fraud upon creditors in the state of Minnesota, but, under the construction of the constitution of Kansas adopted by the supreme court of that state, it is immaterial whether the debtor takes the title in his own name or in that of his wife. A homestead in Kansas, therefore, purchased with unexempt property in Nebraska, which belonged to a debtor who had removed from the latter state to Kansas, is exempt from execution, although the title to it is taken in the name of his wife.

2. SAME—FEDERAL COURTS—STATE DECISIONS.

Decisions of the highest court of a state as to the homestead exemption under the constitution and statutes of that state establish a rule of property there, binding on the federal courts, where no question under the constitution and laws of the nation and no question of general or commercial law is involved.

Appeal from the Circuit Court of the United States for the District of Kansas.

This appeal challenges a decree which sustained a demurrer to a bill brought by a judgment debtor to subject a homestead, which the debtor had bought and caused to be conveyed to his wife, to the payment of the judgment. The bill disclosed these facts: The statutes of Nebraska exempt from judicial sale a homestead not exceeding in value \$2,000, consisting of a dwelling house in which the claimant resides and the land on which the house is situated, not exceeding 160 acres in extent. *Consol. St. Neb.* 1891, c. 19, p. 430. The constitution of the state of Kansas exempts from forced sale under process of law

a homestead not exceeding 160 acres of farming land, or one acre within the limits of an incorporated town or city, and all the improvements thereon, when it is occupied as a residence by the family of the owner, whatever its value may be. Const. Kan. art. 15, § 9; 1 Gen. St. 1889, par. 235. From May 4, 1892, until March 22, 1894, the appellee, John F. Glass, owned, and with his wife, Harriet H. Glass, resided upon and occupied, 160 acres of land in the state of Nebraska, as their homestead. In May, 1892, Glass purchased of one Gravatte some fruit trees which were planted on his farm, and which enhanced its value \$3,000. He gave Gravatte a span of horses and six of his promissory notes for these trees. The appellant, the First National Bank of Humboldt, Neb., purchased four of these notes before their maturity, and on November 19, 1894, obtained a judgment thereon for \$2,278.44 against John F. Glass, in an action which it had commenced in the district court of Pawnee county, in the state of Nebraska, on June 24, 1893. Glass was insolvent, and he had no property except the farm which he occupied as his homestead. On March 22, 1894, he sold and conveyed this farm to one Huff for \$6,100, and with that money he bought 160 acres of farming land in Franklin county in the state of Kansas, and caused the vendor to convey it to his wife. He and his wife immediately took possession of it, and have ever since resided upon, occupied, and claimed it as their homestead. The bank caused an execution to be issued on its judgment in 1895, and it was returned nulla bona. It then brought an action upon this judgment, and obtained a judgment in that action, and a return of execution unsatisfied, in the district court of Franklin county, in the state of Kansas. Thereupon it exhibited its bill in the court below, and alleged, in addition to the foregoing facts, that the appellees sold their farm in Nebraska, secretly fled to the state of Kansas, and purchased and took possession of their farm in that state with the intent and for the purpose of cheating and defrauding the bank out of its claim against Glass, and for the purpose of preventing it from collecting its judgment from the farm in Nebraska, which was worth \$4,100 more than the value of an exempt homestead, under the statutes of that state. The bank prayed for the sale of the farm in Kansas, and for the application of the proceeds of the sale to the payment of its judgment.

J. W. Deford, for appellant.

C. A. Smart and H. C. Mechem, for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

An insolvent debtor may use with impunity any of his property that is free from the liens and the vested equitable interests of his creditors to purchase a homestead for himself and his family in his own name. If he takes property that is not exempt from judicial sale and applies it to this purpose, he merely avails himself of a plain provision of the constitution or the statute enacted for the benefit of himself and his family. He takes nothing from his creditors by this action in which they have any vested right. The constitution or statute exempting the homestead from the judgments of creditors is in force when they extend the credit to him, and they do so in the face of the fact that he has this right. Nor can the use of property that is not exempt from execution to procure a homestead be held to be a fraud upon the creditors of an insolvent debtor, because that which the law expressly sanctions and permits cannot be a legal fraud. *Jacoby v. Distilling Co.*, 41 Minn. 227, 43 N. W. 52; *Kelly v. Sparks*, 54 Fed. 70; *Sproul v. Bank*, 22 Kan. 238; *Tucker v. Drake*, 11 Allen, 145; *O'Donnell v. Segar*, 25 Mich. 367; *North v. Shearn*, 15 Tex. 174; *Cip-*

perly v. Rhodes, 53 Ill. 346; Randall v. Buffington, 10 Cal. 491. When the appellees sold their farm in Nebraska, and bought and took possession of their homestead in Kansas, the bank had acquired no lien and no specific equitable interest in any of the property of its debtor. It was his simple contract creditor, and it had no vested right in either his property or his residence. He had the right to change his residence from one state to another, and to secure for himself a homestead in any state where he chose to live. If, therefore, he had taken the conveyance of his homestead in Kansas in his own name, it would have been exempt from the judgment of the appellant.

The only question remaining is whether the farm lost this exemption because he caused it to be conveyed to his wife. Upon this question the authorities are not in accord. The supreme court of Minnesota declares that such a transaction is a fraud upon creditors, and subjects the property so acquired to the payment of their debts. Sumner v. Sawtelle, 8 Minn. 309 (Gil. 272); Rogers v. McCauley, 22 Minn. 384. The supreme court of Kansas, on the other hand, holds that a homestead purchased and paid for from the unexempt property of the husband is equally exempt from judicial sale, under the constitution of that state, whether the title is taken in the name of the husband or in that of the wife. Monroe v. May, 9 Kan. 466, 475, 476; Hixon v. George, 18 Kan. 253, 258. The decisions of the highest judicial tribunal of the state of Kansas, which we have cited, settle this question in the case at bar. The question involves the construction and effect of the constitution and statutes of that state, and the decisions of it by that court establish a rule of property there, which has prevailed without modification for a quarter of a century. As was said by Mr. Justice Field in Christy v. Pidgeon, 4 Wall. 196, at page 203, in speaking of a law of the Republic of Mexico which had subsequently become, in effect, a local law of the state of Texas:

"The interpretation, therefore, placed upon it by the highest court of that state must, according to the established principles of this court, be accepted as the true interpretation, so far as it applies to titles to lands in that state, whatever may be our opinion of its original soundness. Nor does it matter that in the courts of other states, carved out of territory since acquired from Mexico, a different interpretation may have been adopted. If such be the case, the courts of the United States will, in conformity with the same principles, follow the different ruling so far as it affects titles in those states."

The construction by the highest judicial tribunal of a state of its constitution or statutes, which establishes a rule of property, is controlling authority in the courts of the United States, where no question of right under the constitution and laws of the nation and no question of general or commercial law is involved. Brashear v. West, 7 Pet. 608, 615; Allen v. Massey, 17 Wall. 351; Lloyd v. Fulton, 91 U. S. 479, 485; Sumner v. Hicks, 2 Black, 532, 534; Jaffray v. McGehee, 107 U. S. 361, 365, 2 Sup. Ct. 367; Peters v. Bain, 133 U. S. 670, 686, 10 Sup. Ct. 354; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655; White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. 309; Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 235, 10 Sup. Ct. 1013; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012; Madden v. Lancaster Co., 27 U. S. App. 528, 535-537, 12 C. C.

A. 566, 570, 65 Fed. 188, 192; *Ottenberg v. Corner*, 40 U. S. App. 320, 22 C. C. A. 163, 76 Fed. 263, 269. The decree below is in accordance with the constitution and statutes of the state of Kansas, as they have been construed by its supreme court, the property in controversy is situated in that state, and its title is fixed by that construction. Let the decree be affirmed, with costs.

SWIFT v. SMITH et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 826.

1. LACHES—VOID ADMINISTRATOR'S SALE.

A delay of 20 years by a daughter after her majority to assert any claim as heir to certain city lots, for which her father held certificates from a town-site company, and which were conveyed to his administrator after his death, was laches, as against persons claiming under mesne conveyances from purchasers at a void administrator's sale; there being no fraud, and she having knowledge of facts sufficient to put her on inquiry leading to a knowledge of all the facts which were spread upon the records of the probate court and the register of deeds, and the lots having, by the growth of the city and by improvements, increased in value from \$250 to \$25,000.

2. SAME—NOTICE.

The facts that plaintiff knew, when she became of age, who was the administrator of her father's estate, and was acquainted with him; that she had lived for several years in the house with her grandfather, who had been her guardian, and had received \$1,000 from this administrator for her benefit; that she knew that her father had lived and died in the county in which her father's estate was administered, and that he owned some property in that state,—were sufficient to charge plaintiff with notice of all the facts, as whatever is notice enough to call for inquiry is notice of everything to which such inquiry would have led.

3. SAME—TRUSTS.

The rule that neither time nor laches will bar the right to enforce an express trust is subject to the exception that when the trust is repudiated, and knowledge of the repudiation is brought home to the *cestui que trust*, the case is brought within the ordinary rules of limitation and laches.

4. LIMITATION OF ACTIONS—FRAUD.

The Colorado statute (Mills' Ann. St. 1891, § 2911) providing that bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting the fraud bars such a suit after three years from knowledge of facts which would put a person of ordinary prudence upon an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the fraud.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was an appeal from a decree dismissing a bill brought to declare and enforce a trust in the title to certain lots in the city of Denver, in the state of Colorado. The statement is contained in the opinion.

G. M. Lamberton (F. M. Hall with him on the brief), for appellant.
James H. Blood (Gustave C. Bartels, Charles S. Thomas, and Victor A. Elliott with him on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. The decision of this court in *Wetzel v. Transfer Co.*, 27 U. S. App. 594, 12 C. C. A. 490, and 65 Fed. 23, is fatal to the bill of the appellant in this case. In that case a land warrant had been issued on September 30, 1848, to Elizabeth Remsen, widow of George W. Remsen, and to Harriet A., Mary Ann, John W., Elizabeth, and George W. A. Remsen, children and heirs at law of said George W. Remsen, deceased, under the provisions of section 9 of the act of congress approved on February 11, 1847 (9 Stat. 123, 125, c. 8). Section 9 of that act provided in substance that, in the event of the issue of a land warrant under it to the minor children of a deceased soldier, "then the legally constituted guardian of such minor children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the orphans' or other court having probate jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested." On October 6, 1848, Elizabeth Remsen qualified as guardian of all the children of her deceased husband, except Harriet A. who was the oldest of them, and was about 17 years of age. On October 11, 1848, Elizabeth Remsen, the mother, without any order or authority from the orphans' court, executed an assignment of this land warrant to Nathan C. D. Taylor, in her own right, "and as guardian of the persons and estates of Mary Ann Remsen, John Wesley Remsen, Elizabeth Remsen, and George W. A. Remsen, minor children of George W. Remsen, deceased." The oldest daughter, Harriet A., joined in this assignment to Taylor, who located the warrant on a tract of land, which is now situated between the cities of St. Paul and Minneapolis, and on March 20, 1850, this land was patented to him as assignee of Elizabeth Remsen, in her own right, and as guardian of the minor heirs of George W. Remsen, deceased. On May 28, 1892, John W. Remsen, who was in 1848 one of these minor heirs, and other parties who were the heirs of the other minor heirs, who were then dead, brought their bill in equity in the United States circuit court for the district of Minnesota against the parties who, by mesne conveyances, had succeeded to the title conveyed to Taylor by his patent, and prayed that the title of the minor heirs to their undivided interest in the land might be established, that the defendants might be adjudged to hold the legal title to that interest in trust for the complainants, and that they might be compelled to convey it to them. The complainants alleged and proved that none of them, except Harriet A., who joined in the assignment, knew of the issue of the land warrant to them, or of its location upon the land in question, until 1889. This court held that, "while it is true that ignorance of one's rights will frequently serve as an excuse in a court of equity for not bringing a suit to enforce them, yet it will never have that effect where such ignorance is fairly attributable to negligence, or to a party's failure to make such inquiries with respect to his rights as, with the information at his command, he ought to have made," and dismissed the bill on account of the laches of the complainants.

In the case at bar, the appellant, Elfleda C. Swift, the sole heir at law of J. H. Russell, who died in Pueblo county, in the state of Colorado, in 1863, brought her bill in the court below against the appellees, Joseph H. Smith and wife, Charles B. Kountze, and Mitchell Harrison, on September 13, 1893, and prayed that they might be adjudged to hold the legal title to two lots in the city of Denver, in the state of Colorado, which they had acquired through mesne conveyances from the administrator of the estate of Russell, in trust for her, and that they might be compelled to convey them to her. These facts were established at the final hearing: At the time of Russell's death, he owned a ranch and some cattle in Pueblo county, and a certificate from the Denver Town-Site Company that he was entitled to the two lots in controversy. On September 12, 1863, John A. Nye was appointed administrator of the estate of Russell by the probate court of Pueblo county, where he had lived. On August 11, 1865, James Hall, the probate judge of Arapahoe county, in the state of Colorado, conveyed these lots to John A. Nye, administrator of James H. Russell, deceased, upon an application which he had made therefor as administrator of the estate of Russell. This application was based upon the certificate of the town-site company. On July 1, 1868, the land which included these lots was patented to Judge Hall, upon an entry made by him on May 6, 1865, under the act of congress approved May 28, 1864 (13 Stat. 94). On July 4, 1864, the probate court of Pueblo county made a decree that Nye, as administrator, might sell all the real and personal property of the estate of Russell at public or private sale, but there was no record of any proper petition for such a sale, or of any notice of any hearing upon such a petition in that court, except a recital in the decree. On August 8, 1863, there was filed in the probate court of Pueblo county an inventory and appraisement of the property of Russell's estate, which described the certificate of right to the lots in question which had been left by Russell. On January 3, 1866, John A. Nye, as administrator, filed his account in that court, in which he charged himself with \$25 cash received on account of these lots, and credited himself with the note of John A. Nye & Co. for \$1,000. The appellant was born in 1853. From 1857 until 1867 she lived in Plainfield, N. J., and from that time, until this suit was commenced, she lived in Nebraska City, Neb. She knew John A. Nye, the administrator of her father's estate, before she went to Nebraska. She had heard that her father owned some property in Colorado, but she first learned that he owned the two lots in question from her husband, who looked them up in the records at Denver in 1891 of his own accord. She knew that her father lived and died in Pueblo county, Colo. There is no evidence in the record that she ever made any inquiry about the property of her father, or that she ever learned any other facts about it prior to 1891. On September 5, 1863, Warren Green, of Plainfield, N. J., the grandfather of the appellant, was appointed the guardian of her person and estate by the orphans' court of Union county, N. J. On July 4, 1864, as such guardian, he filed a petition in the probate court of Pueblo county, Colo., for the sale of the interest of the estate of Russell in Arkansas Valley Ditch. Among the files of the court of Pueblo coun-

ty was a letter of this guardian dated August 24, 1866, directed to the judge of that court, in which he wrote that he had received the note for \$1,000, with which Nye charged himself in his account as administrator; that \$100 had been paid upon it; that he was satisfied with the statement of the estate of Russell made to him by Nye, as administrator; and that the latter's bondsmen might be discharged. In the summer of 1867, Nye, the administrator, sold and conveyed the two lots in question to Abner R. Brown for \$250; and Brown fenced them, built a house on one of them, lived in it, and occupied the lots for some years. Prior to that summer, these lots had been unoccupied and unimproved; but from that time until the commencement of this suit they were occupied, and the taxes upon them were paid by Brown and those who claimed under him. Brown lost his deed, and on March 25, 1869, Nye, as administrator of the estate of Russell, executed and delivered to him an administrator's deed of the lots in regular form, which was shortly after recorded in the office of the register of deeds in Denver. On July 25, 1867, Nye made a warranty deed of these lots to his brother, and whatever rights that deed vested in its grantee were subsequently conveyed to Brown in the year 1876. The title of Brown passed through eight mesne conveyances to the appellee Smith, who paid \$25,000 for it in 1889, and in 1891 gave a trust deed upon it to the appellee Kountze to secure a debt of \$13,000 owing to the appellee Harrison. All these conveyances were recorded about the time they were respectively made, except the first deed to Brown, which was lost. Meanwhile a brick house had been erected on one of the lots by one of the holders of this title, and the growth of the city of Denver, and the improvements upon the lots, made by these purchasers, enhanced their value from \$250, in 1867, to \$25,000, at the time of the commencement of the suit. Then it was that the appellant filed this bill to subject the legal title held by the appellees to the trust in her favor as the heir of Russell. She comes too late. Her case cannot be distinguished in principle from that of *Wetzel v. Transfer Co.*, *supra*, and that of *Percy v. Cockrill's Ex'r*, 10 U. S. App. 574, 589, 4 C. C. A. 73, 81, and 53 Fed. 872, 875.

Conceding, but not deciding, that the records of the deeds to and from Nye, the administrator, were notice to all parties claiming under him that he originally held the title in trust for the appellant, and that the decree of sale of the probate court was void, the appellant presents no case here which entitles her to relief in equity against a purchaser who paid \$25,000 for the title to this land more than 20 years after these deeds were recorded, on the faith of the conveyances of the administrator and the appellant's silent abandonment of the property. Nothing but conscience, good faith, and reasonable diligence can call a court of equity into action. "The strongest equity may be forfeited by laches or abandoned by acquiescence." *Peebles v. Reading*, 8 Serg. & R. 493; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 14 Colo. 90, 95, 23 Pac. 908; *Sullivan v. Railroad Co.*, 94 U. S. 806, 811.

Counsel for the appellant invoke the principle that there can be no acquiescence and no laches where there is no knowledge, and contend that, since the appellant did not know that she had any interest in

these lots until 1891, she cannot be charged with laches in asserting her rights. But ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose. "Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient knowledge to lead him to a fact, he shall be deemed conversant with it." *Kennedy v. Green*, 3 Mylne & K. 699, 722; *Wood v. Carpenter*, 101 U. S. 135, 141; *Rugan v. Sabin*, 10 U. S. App. 519, 532, 533, 3 C. C. A. 578, 581, and 53 Fed. 415, 418, 419; *Scheftel v. Hays*, 19 U. S. App. 220, 227, 7 C. C. A. 308, 313, and 58 Fed. 457, 461. This principle measures the knowledge which the law imputes to those who are charged with laches. *Wetzel v. Transfer Co.*, 27 U. S. App. 594, at page 603, 12 C. C. A. 490, and 65 Fed. 23; *Percy v. Cockrill's Ex'r*, 10 U. S. App. 574, 589, 4 C. C. A. 73, 81, and 53 Fed. 872, 875; *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 451, 13 Sup. Ct. 944; *Felix v. Patrick*, 145 U. S. 317, 330, 331, 12 Sup. Ct. 862; *Johnston v. Mining Co.*, 148 U. S. 360, 370, 13 Sup. Ct. 585.

When the appellant became of age, in 1871, she had met and was acquainted with John A. Nye, who had been the administrator of her father's estate. She had lived for 10 years (from the age of 4 to the age of 14 years) in the same town, and for 4 years in the same house, with her grandfather, who had been her guardian, and had received \$1,000 from this administrator for her benefit. She knew that her father had lived and died in Pueblo county, in the state of Colorado; that he owned some property in that state; and that Nye had been the administrator of his estate. If these facts were not sufficient to excite attention and call for inquiry as to the property of this estate left unsold or improperly sold by the administrator, we are at a loss to know what facts would have been sufficient. The least investigation in the natural and usual place to make such an inquiry would have led unerringly to a discovery, in 1871, of all the facts which the husband of the appellant learned of his own accord, and brought to her attention in 1891, without any inquiry on her part. She was not the victim of any actual fraud or of any concealment. All the facts on which she now relies for relief were spread upon the records of the probate court of Pueblo county, and upon the records of the register of deeds at Denver, in 1871, open and ready for her inspection. The natural place to inquire after property of the estate of Russell, when she knew that he had lived and died in Pueblo county, in the state of Colorado, was in the probate court of that county. An inquiry there would have disclosed a sufficient description of these lots and their location, both in the inventory of her father's estate and in the account of the administrator, to have led to a discovery of their occupation by Brown, and of the record of the deeds of them in the register's office at Denver. Under the principle of law to which we have referred, the appellant must be charged with the knowledge, in 1871,

of all the facts on which this suit is founded, because she then knew facts sufficient to put a person of ordinary prudence and sagacity upon an inquiry which would have led inevitably to a knowledge of those facts, if it had been pursued with reasonable diligence. Moreover, if the records of deeds to and from the administrator were constructive notice to all who purchased the title under them that Nye originally held this title in trust for the appellant, it is difficult to perceive why those records and the records of the deeds which followed them were not constructive notice to the appellant of all the facts which they disclosed.

Another contention of counsel for the appellant is that the record of the deed of the judge of the probate court of Arapahoe county to Nye, the administrator, disclosed an express trust in favor of the appellant; and they cite the principle that neither time nor laches will bar the right to enforce such a trust, because the possession and use of the trust property by the trustee is presumed to be the possession and use of the cestui que trust, and never adverse to him. *Speidel v. Henrici*, 120 U. S. 377, 386, 7 Sup. Ct. 610; *Lemoine v. Dunklin Co.*, 38 Fed. 567. The principle is sound, but it is subject to the express exception that when the trust is repudiated, and knowledge of the repudiation is brought home to the cestui que trust, the case is brought within the ordinary rules of limitation and laches. The purchase of these lots from Nye, as administrator, in 1867, the payment to him by Brown of their full value, Brown's occupation of them as his residence, his improvement of them, the administrator's deed to him in 1869, the subsequent sales and conveyances of them, the payment of taxes upon them, and their improvement by the purchasers, were all acts of repudiation of this trust, acts utterly inconsistent with any admission of its existence. The appellant was chargeable, under the law, as soon as she became of age, in 1871, with knowledge of all these acts which had been done prior to that date; and, upon the same principle, she was chargeable with knowledge of the later acts as they occurred. This case therefore falls under the exception to the rule, and the inexcusable negligence and delay of the appellant are fatal to her recovery. *Naddo v. Bardon*, 4 U. S. App. 642, 682, 2 C. C. A. 335, 338, and 51 Fed. 493, 495, and cases last cited *supra*. Any other conclusion in this case would be unconscionable and inequitable. The court in which the appellant exhibited her bill is a court of conscience, bound by its principles and inspired by its history to prevent, but never to perpetrate, injustice and wrong. The purchasers under the administrator of the estate of the appellant's father improved this property, and held undisputed possession of it for more than 20 years after the appellant became of age. They built houses upon it. They discharged the burdens imposed upon it for its protection and for the support of civil government. Under their improvement and care, the lots advanced in value from about \$1,000, in 1871, to \$25,000, in 1889. Meanwhile the appellant paid no taxes and made no inquiry about her interest in the property, although all the facts lay spread upon the public records of Pueblo county, in the state of Colorado, where she knew her father lived and died seised of some property. Neither con-

science nor reasonable diligence called upon the court below to come to her aid, and its decree dismissing her bill was right, both upon principle and authority.

The conclusion we have reached upon equitable principles is in accord with the statutes of limitation in the state of Colorado. Those statutes provide: (1) That no person shall commence an action for the recovery of lands unless within 20 years after the right first accrued, and that, where the land is claimed by an heir or devisee, his rights shall be deemed to have accrued on the death of his ancestor (Sess. Laws Colo. 1893, pp. 327-330, §§ 1, 3); and (2) that bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting the fraud, and not afterwards (Mills' Ann. St. Colo. 1891, § 2911). It is plain that section 1, *supra*, would have barred the appellant from maintaining an action for the recovery of these lots when she commenced this suit, because it was then 30 years after her right had accrued, and 22 years after she became of age.

Counsel for the appellant contend, however, that the execution and delivery of the administrator's deed to Brown was in law a fraud upon the appellant, because it was a breach of duty by a trustee; and from this they argue that this suit is governed by section 2911, and is not barred, because the appellant did not discover this fraud until within 3 years before the commencement of the suit. But if the execution of the administrator's deed and the repudiation of the trust thereby were "facts constituting a fraud," within the meaning of this section, the appellant was, as we have shown, chargeable with knowledge of these facts in 1871, 22 years before she commenced this suit, and her cause of action was therefore barred by this section. The provisions of this statute bar a suit, not only after 3 years from actual knowledge of facts constituting the fraud, but also after 3 years from knowledge of facts which would put a person of ordinary prudence upon an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the facts constituting the fraud. *Pipe v. Smith*, 5 Colo. 146, 159; *Rugan v. Sabin*, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, and 53 Fed. 415, 420; *Burke v. Smith*, 16 Wall. 390, 401; *Parker v. Kuhn*, 21 Neb. 413, 421, 426, 32 N. W. 74; *Wright v. Davis*, 28 Neb. 479, 483, 44 N. W. 490.

The decree below must be affirmed, with costs; and it is so ordered.

CITY OF NEWTON et al. v. LEVIS.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 879.

1. PRELIMINARY INJUNCTION.

A city, after recognizing for more than eight years the validity of an ordinance upon the faith of which an electric plant had been constructed, poles erected, and wires strung at a large expense, suddenly repealed the ordinance, after the owner had mortgaged the property for a large sum, and threatened to remove the poles and wires and secure to itself the customers of the owner, its competitor in business. *Held*, that a preliminary

injunction was properly granted, the questions to be ultimately decided being serious and doubtful.

2. **SAME.**

A preliminary injunction to maintain the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

This is an appeal under the seventh section of the act to establish the circuit courts of appeals, approved March 3, 1891 (26 Stat. 826, 828, c. 517, § 7; 1 Supp. Rev. St. 904), as amended by the act of February 18, 1895 (28 Stat. 666, c. 96), from an interlocutory decree which granted a preliminary injunction on a bill exhibited in the court below by the appellee, Howard C. Levis. These facts were disclosed by the bill: On January 23, 1885, the appellant the city of Newton, a municipal corporation, made a contract with the Newton Electric Light Company to pay it \$1,000 per annum for five years for furnishing that city with electric light for street purposes, and the electric light company furnished the light under the contract until April 1, 1888, when it assigned its contract to the Thomson-Houston Electric Company. On April 16, 1888, the city ratified the assignment, and requested the Thomson-Houston Company to fulfill the contract; and thereupon it furnished electric light to the city under this contract until it expired, on January 23, 1890. On January 20, 1887, the city of Newton enacted its ordinance, No. 129, by which it granted to H. M. Vaughan and his assigns the permanent and perpetual right to erect and maintain in the streets and alleys of the city of Newton, in such manner as would not obstruct the use of or travel over them, the necessary poles and wires to transmit electric light and power throughout the city. In reliance upon this franchise, Vaughan and the Thomson-Houston Company immediately purchased real estate in the city of Newton, constructed an electric plant thereon, erected poles throughout the city, strung wires upon them, and furnished the inhabitants of the city, and the city itself, with electric light and power. In the purchase of this real estate and the erection of these improvements, they expended more than \$12,000 before 1889; and it was from this plant that the Thomson-Houston Company furnished light to the city, under the contract of 1885, from April 1, 1888, until January 23, 1890. In October, 1887, Vaughan assigned all his rights under the ordinance, and conveyed all his interest in the electric plant and in the poles and wires, to the Thomson-Houston Electric Company. In 1890 the city of Newton constructed an electric plant, and commenced, and has since continued, to furnish electric light and power to private consumers, and to light its own streets. On March 1, 1896, the Thomson-Houston Company sold and conveyed its electric plant, the land on which it was situated, all its poles and wires in the city of Newton, and all its rights and privileges under Ordinance No. 129, to the Newton Electric Company, a corporation, for \$16,000; and the latter corporation made a trust deed of this property to the appellee, Howard C. Levis, to secure the payment of a debt of \$10,000 on account of the purchase price of this property, which was evidenced by its promissory notes. In March, 1896, the population of the city of Newton was about 3,500. The city and the Newton Electric Company were active competitors with each other for the business of furnishing electric light and power to private consumers in that city, and had about an equal number of customers. Thereupon, on March 30, 1896, the city passed its ordinance, No. 211, which by its terms repealed Ordinance No. 129, and required the electric company to remove all its poles and wires from the streets of the city within 90 days. The electric company failed to do this, and the appellants, the city and A. K. Larkin, its mayor, were about to cut down the poles and remove them and the wires of this company by force, when the appellee filed his bill in the court below. In addition to the foregoing facts, he alleged that the electric company was in-

solvent; that it had no property except the electric plant, the land on which it stood, its poles and wires, and that it was unable and unwilling to resist the destruction of this property by the city; and that the security held by the appellee for the payment of the \$10,000 would be utterly destroyed unless the appellants were enjoined from taking their threatened action. No demurrer or answer was interposed to this bill, and on motion the court enjoined the appellants from interfering with the poles or wires of the electric company until the further order of the court. The appeal is from the decree granting this injunction.

N. T. Guernsey (O. C. Meredith and Wm. H. Baily were with him on brief), for appellants.

William Connor and James S. Cummins, for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

To state this case is to decide it. In reliance upon an ordinance of the city of Newton, whose validity that city had repeatedly and constantly recognized for more than eight years, an electric plant had been constructed, poles had been erected, and wires had been strung, at an expense of \$12,000, and the owner of this property was supplying half the private consumers in this city with electric light and power. This owner had mortgaged this property to the appellee for \$10,000. The city was its active competitor in business. Suddenly that city repealed the ordinance on the faith of which these improvements were made, and threatened to cut down the poles of this owner, to remove its wires, and to secure to the city itself all the customers of its competitor, and thus utterly to destroy both its business and its property. The appellee denied the right of the city to take any such action, and appealed to the court below to restrain it from destroying the property and the business until its right to do so could be adjudicated.

The granting or withholding a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal is whether or not the court below erred in the exercise of that discretion, under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. When the appellee made his motion for an injunction, grave questions of law were presented, which required careful and deliberate examination. The exhaustive opinion of the court below in this case, which was published in 75 Fed. 884, the opinion of this court upon cognate questions in *Illinois Trust & Sav. Bank v. City of Arkansas City*, 22 C. C. A. 171, 76 Fed. 271, and the fact that counsel have devoted 200 printed pages to their discussion in this court, sufficiently demonstrate the importance and difficulty of these questions. But the court below knew that it must ultimately consider and determine these matters at the final hearing of the case. If, meanwhile, it refused to issue the injunction, the property and business of the electric company, and the security of the appellee, would be immediately destroyed. Its final decree, if it should be in his favor, would be utterly nugatory. If it granted the

injunction, it would do no more than to hold the parties in the same relation, and their property in the same situation, in which they had been, with the consent of the appellants, for more than eight years, and it would inflict no substantial loss or injury if the final decree should be in their favor. In other words, to grant the injunction was to preserve the property of all parties in statu quo, and prevent substantial damage to any one, whatever the final decree might be, while to refuse it was to permit the immediate destruction of the property of the electric company and the security of the appellee, to allow the infliction of irreparable loss upon them, and to render the suit and its decision useless, if the final decree should be in favor of the appellee. There can be no question of the duty of the chancellor to issue an injunction under such circumstances. The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irreparable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great, and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted. A preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. *Great Western Ry. Co. v. Birmingham & O. J. Ry. Co.*, 2 Phil. Ch. 597, 602; *Glascott v. Lang*, 3 Mylne & C. 451, 455; *Shrewsbury & C. Ry. Co. v. Shrewsbury & B. Ry. Co.*, 1 Sim. (N. S.) 410, 426; *Georgia v. Brailsford*, 2 Dall. 402; *Blount v. Société Anonyme du Filtre*, 6 U. S. App. 335, 3 C. C. A. 455, and 53 Fed. 98; *Dooley v. Hadden*, 38 U. S. App. 651, 20 C. C. A. 494, and 74 Fed. 429; *Jensen v. Norton*, 29 U. S. App. 121, 12 C. C. A. 608, and 64 Fed. 662.

The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration, and, whatever the ultimate answers to them may be, the preliminary injunction was rightfully issued, because it simply maintained the existing conditions, prevented irreparable loss to the appellee, and inflicted very slight, if any, loss or inconvenience upon the appellants. The decree below is affirmed, with costs.

EASTERN OREGON LAND CO. v. WILCOX.

SAME v. MESSINGER.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

PUBLIC LANDS—FORFEITURE OF RAILROAD GRANTS.

The decision in *Oregon & C. R. Co. v. U. S.*, 23 C. C. A. 15, 77 Fed. 67, as to the effect of the forfeiture of unearned railroad grants declared by the act of September 29, 1890 (26 Stat. 496), and as to the effect of the acts of the Northern Pacific Railroad Company in regard to the withdrawal of lands within the limits of the grant to it, followed and reaffirmed.

Appeal from the Circuit Court of the United States for the District of Oregon.

Dolph, Nixon & Dolph, for appellant.

John M. Gearin and J. L. Story, for appellees.

Before ROSS, Circuit Judge, and HAWLEY and MORROW, District Judges.

HAWLEY, District Judge. Both of these cases present the identical questions that were involved in the case of *Oregon & C. R. Co. v. U. S.*, 23 C. C. A. 15, 77 Fed. 67, and are necessarily controlled by the decision in that case. We adhere to the views therein expressed, and upon the authority of that case the judgments and decrees in these cases are reversed, with instructions to the circuit court to enter a decree in favor of the complainant in each case.

DENNY v. CITY OF SPOKANE.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 302.

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—INVALID ASSESSMENT—RIGHTS OF CONTRACTOR.

The city of S. entered into a contract with one M. for the making of a public improvement, by which contract it agreed to levy and collect, without any delay, an assessment to pay for such improvement. It then proceeded to levy the assessment, but, pending its collection, the ordinance under which it was made was declared void by the courts, and the city proceeded, under power conferred by the legislature, to make a reassessment, but before it was completed some of the claims for benefits had become outlawed. *Held*, that the city, not the contractor, must be responsible for its mistake in the construction of the law, and that it was liable to him for the damages caused by its delay in levying a valid assessment. *McEwan v. City of Spokane* (Wash.) 47 Pac. 433, followed.

2. SAME—EXCESSIVE INDEBTEDNESS.

Under the provision in section 19 of the charter of the city of Spokane, Wash., that the indebtedness of the city must not, at any one time, exceed \$25,000, excluding its indebtedness for waterworks and assessments for improving streets, a debt arising upon warrants issued to a contractor for a street improvement, in anticipation of the collection of the assessment, is not within the prohibition, notwithstanding the city may become liable to the contractor in damages for delay in collecting the assessment.

Appeal from the Circuit Court of the United States for the Eastern Division of the District of Washington.

This action was brought by appellant against appellee to recover judgment against it on certain street-grade warrants issued in settlement of various contracts entered into by it prior to October, 1889, for the purpose of grading the public streets of the city; the gravamen of the action being the neglect and failure of the officers of appellee to create a fund out of which to pay said claims. The defense is that the officers have done all in their power to create the fund, and that there is a want of authority to pay, on account of the limit of indebtedness of the city having been reached. At the close of the testimony, appellee moved the court for an instruction to the jury to find a verdict in favor of appellee, which motion was granted.

Section 7 of the charter of the city of Spokane Falls, approved January 29, 1886 (St. 1885-86, pp. 300, 302), reads as follows: "The city of Spokane Falls shall have power to construct and repair sidewalks, and to curb, pave, grade, plank, macadamize and gutter any street or streets, highway or highways, alley or alleys therein or any part thereof, and to levy and collect a special tax or assessment on all lots and parcels of land fronting on such street or streets, highway or highways or on any part thereof, sufficient to pay the expenses of such improvement, and for such purpose may establish assessment districts consisting of all lots and parcels of land fronting on a portion or the whole of any such street or streets, alley or alleys, highway or highways, as may be deemed advisable. Provided, however, that all such assessment districts shall in all cases extend back to the middle of the block fronting on such improvement; provided, further, that in all assessments and levies to pay the expenses of such improvements the real estate only shall be assessed, excluding from such assessment all improvements thereon, whether the same are affixed to the land or not, and the improvements on such lands shall not be taken or assessed as any part of the land, or at all; and provided further, that unless the owners of more than one half of the land subject to assessment for such improvement, petition the council to make such improvement, the same shall not be made unless six members of the council are present and vote in favor of making same."

By an act relating to and authorizing the collection of the assessments for local improvements by a new assessment or reassessment of the cost and expenses of making the same in cities and towns and declaring an emergency, approved March 9, 1893 (Laws Wash, 1893, p. 226), it was provided that whenever an assessment for laying out, establishing, grading, macadamizing, etc., any street, avenue, or alley, or for any local improvement, "has been or may be hereafter declared void and its enforcement under the charter or laws governing such city or town refused by the courts of this state, * * * the council of such city or town shall by ordinance order and make a new assessment or reassessment upon the lots, blocks, or parcels of land which have been or will be benefited by such local improvement." Section 12 of this act provides: "Whereas the assessments for local improvements in the cities of this state have in several instances been set aside and declared void for irregularities and no adequate law now exists for re-assessments therefor an emergency is declared to exist." On the 14th day of July, 1888, the city of Spokane Falls (now Spokane) entered into a contract with one V. M. Massey, wherein said Massey, "in consideration of the agreements and payments hereinafter named, and to be made by said city of Spokane Falls, hereby agrees that he will clear, grub, and grade Monroe street, in said city, * * * in accordance with the plans and specifications * * * on file with the city clerk"; that he will do said work and complete the same within a reasonable time. The city of Spokane Falls, upon its part, agrees to pay a certain sum of money specified in the contract, 80 per cent. of the value of the work performed at the end of each month, to be estimated by the city engineer, and the balance upon the completion and acceptance of the work; "and further agrees that it will proceed, as soon as its laws provide, to levy and collect a special tax or assessment upon the property within the assessment district created for said improvement for the payment of the sums herein agreed to be paid, and to collect the same, and to pay the same as herein provided; and said city expressly

covenants that it will prosecute the business of levying and collecting such special tax or assessment without any delay whatever in any part of the proceedings, and in the shortest time possible under its charter and ordinances relating thereto. And it is further agreed that if, at the time any payment becomes due on this contract as aforesaid, the said city shall not have received from said special tax or assessment sufficient money with which to pay the same, it shall issue to V. M. Massey its warrant for the amount of such deficiency, payable to him or his order out of said Monroe street grade fund, not more than one year from the date of this contract, with interest at the rate of 8 per cent. per annum; such warrants to be drawn in such denominations as said Massey may request. And the said city of Spokane Falls further agrees that, in case such warrants are issued and accepted by said Massey as aforesaid, it will redeem and pay them before due, if presented, as fast and whenever it collects the money from such special tax or assessment: provided, however, that warrants issued for payment accruing during progress of the work shall not be paid until the work is completed; and money received during said time shall be applied to cash payments." It is stipulated and agreed: "That in pursuance of the aforesaid contract the said V. M. Massey fully and completely performed the same, and that the city of Spokane Falls (now Spokane) upon its part issued the warrants set forth in the said fifth cause of action in the complaint; that the same were duly presented for payment to the treasurer of said defendant at the time mentioned in the complaint, and payment thereof was refused for want of funds; that said warrants were assigned and transferred to the Portland Savings Bank for a valuable consideration, and are now in possession of the plaintiff as receiver. * * * The balance unpaid on said warrants was, on the 25th day of June, 1895, the sum of \$21,461.98, and that the defendant has taken no other or further steps to create the fund out of which said warrants are payable than as are hereinafter mentioned. * * *

It is further stipulated and agreed that at the time of entering into the contract * * * and the passage of the ordinances for the grading of the several streets the defendant, the city of Spokane Falls (now Spokane) was indebted in an amount exceeding the sum of \$25,000, excluding its indebtedness for waterworks and assessments for improving streets under the provisions of section 7 of chapter 2 of the act of the legislature of the territory of Washington entitled 'An act to amend an act entitled "An act to amend an act to incorporate the city of Spokane Falls, approved November 28, 1883," approved January 29, 1886.' " On July 7, 1886, a valid ordinance (No. 33) was passed by the city council, which, among other things, provided that whenever the city shall cause any part of any street, highway, or alley to be curbed, planked, paved, graded, or guttered, or any sidewalk to be constructed or repaired in any such street, etc., "the whole cost of such improvements shall be levied and become a lien upon the taxable real estate fronting such street or alley as may be improved as may be within the assessment district established." Section 2 of this ordinance provides that: "All assessment for such improvements shall be according to value, so that each lot or other smallest subdivision of real estate subject to, assessment shall be held for such portion of the whole cost of the improvements within any assessment district as the value of such lot or smallest subdivision of real estate bears to the aggregate value of assessable property within said assessment district; and in fixing values all improvements upon real estate shall be excluded, and the land shall only be assessed, and the cost of any such improvements shall include all lawful charges and expenses incident to such improvements and of making and collecting the assessment thereof." On September 28, 1887, the city council undertook to amend section 2 of said Ordinance No. 33 by Ordinance No. 83, so that the latter clause in section 2 should read as follows: "In fixing value, all improvements upon the real estate shall be included, and the cost of any such improvements shall be assessed and included, and all lawful charges and expenses incurred incident to such improvements and of making and collecting the assessment shall be included." Pending the collection of said assessments, the supreme court, in *City of Spokane v. Browne*, 3 Wash. St. 84, 27 Pac. 1077, decided that Ordinance No. 83, providing for and including both the land and all the improvements thereon in all assessments for the grading of streets, was void, as being in contravention of section 7 of the charter of said city, author-

lizing assessments on real estate only, and that assessments made under such ordinance could not be sustained. On June 26, 1894, the city passed an ordinance (No. A434), known as the "Reassessment Ordinance," to provide for the assessment of all lots and parts of lots or parcels of land fronting or abutting on or adjacent to Monroe street, in the city of Spokane, for the purpose of raising money to pay for the grading and improving of said Monroe street heretofore made. This ordinance, after setting forth the fact that previous ordinances had been declared invalid by the supreme court, provided that "the board of public works of the city of Spokane is hereby authorized and directed to immediately reassess all the lots or parts of lots or parcels of land to the center of the block lying on each side of said Monroe street between the south line of Riverside avenue and the south line of Cliff street, now Ninth avenue, and rate them according to their value, exclusive of all improvements, whether said improvements were attached to or annexed to the land or not, with its just quota of the actual cost and expense of grading and improving said Monroe street, together with any interest that shall have lawfully accrued thereon." On February 26, 1895, the city council passed Ordinance No. A555, approving and confirming the reassessment roll for the assessment district established for the grading of Monroe street, and to provide for the payment of the same. Other ordinances of similar import are set out in the record. It was stipulated by and between the respective parties "that the delay in collecting the original assessment complained of and mentioned in the pleadings in this cause was due to a mistake, misunderstanding, or ignorance of the law by the city officials prior to the 9th day of March, 1893."

Jones, Belt & Quinn, for appellant.

W. H. Plummer, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). Upon the foregoing facts there are but two questions to be decided: (1) Was the city of Spokane negligent in not earlier creating a fund out of which appellant's warrants are payable? (2) Did the city of Spokane have power, at the time it entered into the contract with Massey, to make a contract, the result of which, if performed, would render the city liable for the grading of the streets?

1. If the city was negligent in failing to provide a fund out of which the warrants issued by it could be paid within a reasonable time, it is liable for any damages which the contractor or bank has suffered by reason of such neglect of duty. In *Reilly v. City of Albany*, 112 N. Y. 30, 41, 19 N. E. 508, in a case similar in many respects to the case under consideration, the court said:

"It is not disputed but that the contract was lawful in all respects, and conformed to the provisions of the law authorizing such contracts on the part of the city, not only as to the officers by whom it was made and executed on its behalf, but as to all of its material provisions. The rights and liabilities of the parties must, therefore, be determined by the obligations of the contract. An examination of that instrument, so far as the questions involved in this case are concerned, shows that the obligation resting upon the contractor was, concisely stated, to perform the work and furnish the materials required under his contract according to its plans and specifications. Having done this, he became entitled to demand payment for his labor when the funds for that purpose should be assessed, levied, and collected by the regular agencies of the city having authority to raise means to discharge its liabilities. In case of a performance of the contract and the filing of the commissioner's certificate to that effect, the city's obligation was to prosecute, in good faith, the means afforded to it by its charter to obtain and pay over the sums necessary to redeem

its obligation. When the contractor had performed his work according to his contract, he had no duty remaining to discharge, and then had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government, over whom he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations. That was a power lodged in the hands of the city, and the clear intent of the contract was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement. For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty."

See *Leavenworth v. Mills*, 6 Kan. 288; *Leavenworth v. Stille*, 13 Kan. 539; *Commercial Nat. Bank v. City of Portland (Or.)* 33 Pac. 532, 534; *Cummings v. Brooklyn*, 11 Paige, 596, 602; *City of Memphis v. Brown*, 20 Wall. 289, 311.

Was the city negligent? It contends that it was not, and relies upon several decisions of the supreme court of Washington to sustain its contention.

In *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384, 1080, the court held that, if the plaintiff "could recover at all, it must be upon the contract of his assignor or upon his warrants," and in the course of the opinion said:

"After the decision in the *Wilson Case* (*Wilson v. City of Seattle*, 2 Wash. St. 543, 27 Pac. 474), the delay arose entirely from honest doubt as to the law of the case, in which the respondent seems to have shared, inasmuch as he never moved to have a new assessment made. Under these circumstances we do not think the respondent was entitled to the judgment awarded him; but in so concluding we desire to have it understood that the controlling reasons of this decision are the peculiar provisions of the charter of 1886, which left it to the city to regulate special assessments, the terms of the contract with Smart, and the fact that in June, 1890, the city of Seattle was prohibited from making an open contract for such street work by reason of the debt limit of one and one-half per cent., which it had largely exceeded. We leave it an entirely open question whether municipalities may not, under different circumstances, make themselves liable by omissions of the character presented here."

In answering the petition for rehearing, the court said:

"But the main point upon which the case was decided was that the respondent had mistaken his remedy by reason of the fact that his contract with the city was of such a character that it would not justify the charge of negligence against the city until it had been fully moved to levy and collect a local assessment to pay for the work. This ground alone, in our judgment, authorized the dismissal of the case."

In *Cloud v. Town of Sumas*, 9 Wash. 399, 37 Pac. 305, the court held that an action could not be maintained upon a warrant issued by a municipal corporation evidencing its indebtedness to the holder; that the proper remedy was by mandamus to compel the treasurer of the city to pay the same.

In *Stephens v. City of Spokane* (Wash.) 39 Pac. 266, which was an action brought on certain street-grade warrants, and came before the supreme court from a judgment sustaining a demurrer to the complaint, the court said:

"The allegation [of the complaint] is that the city of Spokane has wholly failed, neglected, and refused to take any steps for the purpose of creating a fund to be known and designated as the 'Malon Street Fund'; that it has failed,

neglected, and refused, and still fails, neglects, and refuses, to carry out said contract on its part by the payment to this plaintiff, or to any other person for him, of the amount of said warrants. * * * It seems to us that under the former rulings of this court and the well-settled law, if the allegations of the complaint are true that a contract was duly made, and that no steps had been taken for five years on the part of the city to collect the necessary funds for the payment of these warrants, the plaintiff has a legal grievance against the city, and that the complaint in every respect states a cause of action."

In *Stephens v. City of Spokane* (Wash.) 44 Pac. 541, when the case came before the court upon its merits, the court held that under the charter of the city of Spokane, giving the city power to improve streets, and defray the expense thereof by special tax assessed against the property benefited thereby, the general fund of the city is not liable for the payment of warrants drawn against the special fund created by the assessment unless it appears that the city has failed to take steps to provide such special fund, or has been so negligent in its attempts to create the fund that the right thereto has been lost.

These cases, while modifying the rule as stated in *Reilly v. City of Albany*, supra, to the extent that the city would be relieved from liability until the proceedings instituted by it had been carried to a conclusion, "and had failed to produce the necessary funds for the payment of the warrants," fall far short of answering the question whether or not the facts of this case do not, in the light of all the authorities, clearly show that the city has been so negligent as to render it liable in this action. We are of opinion that the case of *McEwan v. City of Spokane* (recently decided by the supreme court of Washington) 47 Pac. 433, virtually decides this question adverse to the views contended for by appellee. That case seems to be directly in point. In passing upon the questions there involved, which are directly applicable to this case, the court said:

"Under the special contract in this case and under the law it was not the duty of the contractors to look after the assessment. That was a duty which not only the law imposed upon the city, but which the special conditions of its contract imposed upon it; and, if the city was mistaken in regard to its construction of the law, the city must be responsible for such mistake, and not the contractors, who were not authorized to construe or enforce the law. *Eidemiller v. City of Tacoma* (Wash.) 44 Pac. 877. The record shows that the statute of limitations, under the rule laid down by this court in *City of Spokane v. Stevens* (Wash.) 42 Pac. 129, has run against a portion of these grade taxes, and the city, having failed to collect the said taxes until after the statute has run, would, of course, be powerless to collect them now; hence it must necessarily follow that the city is liable to the plaintiff for its failure to collect them within a reasonable time, as a reasonable time must necessarily be a time prior to the time when the statute of limitations runs."

2. From the facts stipulated in this case it appears that at the time of entering into the contract and at the time of the passage of the ordinances for the grading of the several streets the city was indebted in an amount exceeding the sum of \$25,000, excluding its indebtedness for waterworks and assessments for improving the streets, under the provisions of section 7 of chapter 2 of the act of the legislature of the territory of Washington approved January 29, 1886. Does the contract in question, by virtue of which the warrants were issued upon which this suit was brought, come within the prohibition of the charter in limiting the amount of indebtedness which the city was

authorized to incur? See sections 3 and 19 of the charter (Laws Wash. 1885-86, pp. 301, 307). Section 19 provides that:

"The city of Spokane Falls has power to borrow money on the credit of the city for any purpose within the authority of the corporation, including the payment of any existing debt, and for such purpose may issue its warrants on the city treasurer, payable at a specified time, with a rate of interest therein named, not exceeding the rate of 8 per cent. per annum, and has further power to levy and collect a tax sufficient to pay the principal and interest on such sum borrowed and for the existing indebtedness and interest thereon: provided, the entire indebtedness of said city must not at any one time exceed the sum of \$25,000.00, excluding its indebtedness for water-works and assessments for improving streets under the provisions of section 7 of this chapter."

Does the limitation therein expressed apply to the indebtedness created by the contract in this case?

In *Hitchcock v. City of Galveston*, 96 U. S. 341, 349, it was argued that the contract entered into by the city for the improvement of its streets and construction of sidewalks would impose upon the city a liability exceeding \$50,000, and that it was, therefore, in violation of the provision in the charter of the city which prohibited the council from borrowing for general purposes more than that sum. The court held that this provision in the charter did not limit the debt of the city, nor prohibit the council from entering into a contract involving an expenditure exceeding that amount for special improvements, such as grading and paving of streets and the construction of sidewalks, which were authorized by the charter.

In *Seymour v. City of Spokane*, 6 Wash. 362, 33 Pac. 832, the court held that section 19 of the charter, limiting the interest on the city warrants to 8 per cent. per annum, applied only to warrants given for money borrowed on the credit of the city.

In *Winston v. City of Spokane*, 12 Wash. 524, 527, 41 Pac. 888, where the contract under consideration was in relation to the construction of a system of waterworks, the question presented was whether the obligations provided for in the contract would create an indebtedness of the city within the meaning of the provisions of the constitution (article 8, § 6) in relation thereto. The court, in passing upon this question, said:

"The general credit of the city is in no manner pledged except for the performance of its duty in the creation of such special fund: The transaction, therefore, is no more the incurring of an indebtedness on the part of the city than is the issue of warrants payable out of a special fund created by an assessment upon property to be benefited by a local improvement. Hence the question is upon principle within the one decided by this court in *Baker v. City of Seattle*, 2 Wash. St. 576, 27 Pac. 462, in which it was held that warrants issued to a contractor for a street improvement, and payable out of a special fund, to be created by an assessment therefor, were not an indebtedness of the city within the meaning of our constitution. In that case it was not decided whether or not the city would be liable for negligence in failing to take the necessary steps for the creation of the special fund out of which the warrants were to be paid; but from what was decided it is clear that in the opinion of the court the fact of such contingent liability, if it existed, was not sufficient to make the obligations issued against the fund a part of the indebtedness of the city. The case at bar is, in our opinion, within the principle decided in that one, and, as we are satisfied with what was therein held, it is not necessary to further pursue the subject. We would, however, call attention to the case of *City of Valparaiso v. Gardner*, 97 Ind. 1, which seems to fully

sustain the contention of the appellants. A large number of other cases to the same effect might be cited."

The decision in *McEwan v. City of Spokane* seems to be as conclusive upon this question as the one just disposed of. The averments in the answer in that case were substantially the same as the agreed facts in this case as to the indebtedness of the city. The court said:

"There is an attempt to plead an indebtedness by the city beyond its charter limit, but we think that no such indebtedness was pleaded under the rule announced in *Baker v. City of Seattle*, 2 Wash. St. 576, 27 Pac. 462, and *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888."

Under the decisions of the supreme court of Washington construing the statutes of that state applicable to this case, it follows that the circuit court erred in instructing the jury to find a verdict for defendant. It is proper to add that the opinion in *McEwan v. City of Spokane* was rendered after the decision of the circuit court in this case. The judgment of the circuit court is reversed, and cause remanded for a new trial in accordance with the views expressed in this opinion.

**BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v.
OBERDER.**

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

No. 305.

1. BILL OF EXCEPTIONS.

Where a judge, in certifying a bill, provides that, if exceptions to certain testimony are relied upon in any appellate proceedings, "at least the direct examination of such witnesses must be produced before the appellate court, and in such appellate court the full charge, as given the jury, must be also produced," such a certificate does not amount to any settlement of the bill at all, and it cannot be considered.

2. SAME.

A bill of exceptions which the record says is a "substitute for first part of No. 9" cannot be considered, there being nothing to inform the court what No. 9 is.

3. SAME.

A bill of exceptions entitled "To be Substituted for Instruction No. 8" cannot be considered, it not being the office of a bill of exceptions to serve as an instruction.

4. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

Where the servant seeks to charge the master for personal injuries resulting from a defect in the roof of a mine in which the servant was employed, the master cannot complain of an instruction that, in order to charge the servant with contributory negligence, the dangers and defects must have been so obvious and threatening that a reasonably prudent man would have avoided them.

5. SEALED VERDICT.

It was not error to authorize the jury, against the objections of defendant, to return a sealed verdict.

In Error to the Circuit Court of the United States for the District of Idaho.

W. B. Heyburn and John Garber, for plaintiff in error.

Albert Allen, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The record in this case contains five purported bills of exceptions. One, commencing on page 59, and ending on page 65, of the transcript, and purporting to give certain proceedings in the court below in respect to the deposition of William Williams and certain proceedings in respect to the testimony of William Powers, James Dougherty, and Joseph McDonald, is not signed by the judge, or otherwise certified. Another, commencing on page 65, and ending on page 82, of the transcript, concludes as follows:

"And the defendant hereby presenting the above and foregoing bill of exceptions and the points therein mentioned for the allowance, settlement, and signature of the court, and the said bill of exceptions having been examined, is amended as above noted and marked; also it is provided that, if exception No. 1, concerning deposition of Williams, and the exceptions Nos. 3 and 4, concerning the testimony of Powers, are relied upon in any appellate proceedings, at least the direct examination of such witnesses must be produced before the appellate court, and in such appellate court the full charge as given to the jury must be also produced. And said bill of exceptions, as thus amended, is now allowed, settled, and signed this 13th day of December, 1895.

"Jas. H. Beatty, Judge."

There is nothing in the last-mentioned bill of exceptions to indicate that it contains the amendments spoken of in the certificate of the judge, and, even if a bill of exceptions improperly and insufficiently settled and certified can be made sufficient by producing before the appellate court the examination of witnesses that occurred in the trial court, no such testimony has been brought here. Such a certificate as that above quoted does not amount to any settlement of the bill of exceptions at all, and we are clearly of the opinion that it cannot be regarded.

Another bill of exceptions, signed by the judge, and found on page 48 of the transcript, is entitled: "Defendant's Bill of Exceptions. (To be Substituted for Instruction No. 8);" and this is followed immediately by another bill of exceptions, signed by the judge, which the record says is a "substitute for first part of No. 9." What No. 9 is, the record does not inform us. It may or may not qualify what is stated in this bill; for which reason, if for no other, the latter cannot be considered. Nor can the bill of exceptions, "To be Substituted for Instruction No. 8," be considered. To serve as an instruction is not the office of a bill of exceptions.

The one remaining bill of exceptions in the record is that found on pages 46 and 47 of the transcript, which contains an exception to the refusal of the court below to give the 1st, 6th, 9th, 10th, 13th, 15th, 16th, 17th, 18th, 19th, 20th, 22d, 23d, 24th, 25th, 26th, 27th, 28th, 29th, 30th, and 31st instructions requested by the defendant, and also an exception "to the instruction of the court given to the jury that the master was bound to furnish a safe place in which servant should work, without sufficiently instructing the jury as to what constituted a safe place"; and also an exception "to the first instruction given at the request of the plaintiff, as

to the requirement that there was a difference in amount of care, whereby the master is required to exercise a greater care than the servant"; and an exception "to the giving instructions No. 2 and No. 5 requested by plaintiff." None of the evidence given in the case is properly before us; but a careful examination and consideration of the charge of the court satisfies us that the law properly applicable to the issues presented by the pleadings was given to the jury by the court, and that, so far as the court can see from the issues in the case, such instructions requested by the plaintiff as were applicable and proper were, in substance, embodied in the charge of the court. That being so, the plaintiff has no just ground of complaint because of the failure of the court to give the instructions in the language requested. Instructions 2 and 5 requested by the plaintiff in the court below, and as given by the court, are as follows:

"No. 2. I further instruct you that the degree of care required of the master and servant also differ, because defects in the roof of a mine, that to the mind of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great danger, may have no such significance to a laborer or miner who has had no experience in watching or caring for the roof or slopes or timbers in a mine, and the servant is not chargeable with contributory negligence unless he sees or knows the defects, or unless a reasonably intelligent and prudent man would, under like circumstances, have known and apprehended the risks which those defects indicate. To the servant the dangers and defects must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence."

"No. 5. By 'ordinary care and diligence' is meant such as men of ordinary sense, prudence, and capacity under like circumstances take in the conducting and managing of their own affairs. This varies according to the circumstances, as the risk is greater or less, and must be measured by the character and risks and exposure of the business."

In these instructions we see no error of which the plaintiff in error can properly complain.

That the court did not err in authorizing the jury, against the objections of the defendant, to return a sealed verdict, is held in the case of *Concentrating Co. v. Schmelling*, 79 Fed. 263. Judgment affirmed.

VALLEY COUNTY v. McLEAN.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 835.

1. COUNTIES—VALIDITY OF BONDS.

Under the Nebraska Laws of 1877 and 1879, authorizing county commissioners to issue coupon bonds sufficient to pay the outstanding warrants and indebtedness, with the proviso "that in no event shall bonds be issued to a greater amount than ten per cent. of the assessed valuation of such county," the ten per cent. limitation is confined to the bonds to be issued under the provisions of these acts, without regard to bonds previously issued. 74 Fed. 389, affirmed.

SAME.

Where a statute authorized a county to issue bonds to an amount not exceeding a certain per cent. of the assessed valuation of the county, a

purchaser of the bonds, in determining whether the aggregate issue exceeded the statutory limit, had the right to rely upon the abstract of assessment of property in the county made by the county clerk, and by him certified to the auditor of the state; that being a public record of the assessment, which the statute required to be so made and transmitted after the assessment books had been equalized and corrected by the county board, and the county will not be allowed to question its verity. 74 Fed. 389, affirmed.

3 SAME.

Under a statute (Laws Neb. 1879, p. 364, § 30), authorizing a county to issue its bonds provided the county board shall first submit the question to a vote of the electors of the county, and further providing that "If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax," a purchaser of the bonds need look no further than this record to determine whether there has been a compliance with the requirements of the law. 74 Fed. 389, affirmed.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action at law brought by Hector McLean against the county of Valley, in the state of Nebraska, upon overdue coupons upon certain county bonds. Judgment having been rendered in favor of plaintiff, the defendant brought this writ of error. The opinion of the circuit court is reported in 74 Fed. 389.

The legislature of the state of Nebraska passed an act approved February 17, 1877, entitled "An act to provide for the funding of the warrants and outstanding indebtedness of counties." Section 1 reads as follows: "That the county commissioners of any county in the state of Nebraska be and are hereby authorized and empowered to issue coupon bonds, of such denomination as they may deem best, sufficient to pay the outstanding and unpaid warrants and indebtedness of such county; provided that the county commissioners of any such county may limit the provisions of this subdivision to any fund or funds of said county; provided further, that in no event shall bonds be issued to a greater amount than ten per cent of the assessed valuation of such county, and provided further, that the county board shall first submit the question of issuing such bonds to a vote of the qualified electors of such county." By section 132, p. 387, Laws 1879, which went into effect September 1, 1879, the foregoing section is re-enacted verbatim, except that the word "commissioners" is changed to "board" in the late act. By another provision in the Laws of 1879 it is enacted: "If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the county board." Laws 1879, p. 364, § 30.

At a regular meeting of the board of county commissioners of said Valley county, Neb., held October 7, 1879, it was resolved that the proposition be submitted to the qualified electors of said county of Valley to issue the coupon bonds of said county of specified denominations to the amount of \$32,000, to pay the outstanding indebtedness of the said county in a specified order; such bonds to be dated January 1, 1880, and payable at the office of the county treasurer of said county, and to run 20 years, with interest at the rate of 7 per cent., payable annually, with a provision to be inserted in the bonds that they should be redeemable after 10 years upon specified notice; that the bonds should not be sold for less than 90 per cent. of par value; that a tax should be levied and collected annually, as provided by law, to pay the interest and provide for the principal, with limitations; and that the said

proposition be submitted to be voted on by ballot (the forms of which were prescribed) at the general election to be held November 4, 1879. In accordance with the terms of such resolution, the question of issuing said bonds, and levying and collecting taxes therefor, was regularly submitted to the qualified electors of said Valley county at the said general election on November 4, 1879, and the vote thereon was duly canvassed, and the proper abstract showing the result of the election and such vote was returned to the board of county commissioners; and on November 24, 1879, at a legal meeting of said board, the following resolution was adopted and entered at large upon the book containing the records of their proceedings: "Whereas, the board of county commissioners of Valley county, Nebraska, did on the 7th day of October, 1879, submit to the people of said county the question of raising \$32,000 in bonds of said Valley county, for the purpose of funding the outstanding and unpaid warrants and indebtedness of said county; and whereas, the official abstract of votes cast at the general election held in said county of Valley and state of Nebraska, on the 4th day of November, A. D. 1879, regarding said proposition, was laid before the board at a regularly called meeting thereof, held this 24th day of November, A. D. 1879, said abstract showing that two hundred and twenty-seven (227) votes were cast in favor of said proposition, and that nine (9) votes were cast against said proposition, and it appearing that more than two-thirds of the votes cast were in favor of said proposition: Now, therefore, be it resolved that the proposition for issuing \$32,000 in bonds of said county, for the purpose above stated, be, and the same is hereby, adopted. Resolved, that we issue coupon bonds in denominations not less than \$50.00, or more than \$1,000.00, not exceeding \$32,000, to pay the outstanding and unpaid warrants and indebtedness of said county; said bonds to be issued and sold in accordance with the proposition submitted to the legal electors of said county at the general election held on the 4th day of November, 1879, and now of record on page 157 of Commissioners' Records." Thereafter, on the 6th day of January, 1880, said board of county commissioners issued the coupon bonds of said Valley county, as stated in the petition, to the amount of \$32,000, viz. 60 bonds of \$500 each, and 20 bonds of \$100. Each of said bonds contained on its face the following recitals: "This debt is authorized by an act of the legislature of the state of Nebraska, entitled 'An act to provide for the funding of the warrants and outstanding indebtedness of counties,' approved February 17th, A. D. 1877, in pursuance whereof, on the 4th day of November, A. D. 1879, the commissioners of Valley county, in said state, submitted to the electors thereof, in the manner prescribed by law, the following proposition: 'Shall the county of Valley issue its coupon bonds, in denominations of not less than fifty, or more than one thousand dollars, to the amount of thirty-two thousand dollars, to pay the outstanding and unpaid warrants and indebtedness of said county, in the following order: First, the general fund; second, the special bridge fund; third, the land road fund,—said bonds to be dated January 1, 1880, and payable at the office of the county treasurer of said county, and to run twenty years, with interest at the rate of seven per cent. per annum, payable annually; provided that such bonds shall be redeemable at any time after ten years, upon giving at least thirty days' notice of such time of payment, in a paper published in said county; and, after the completion of said publication, said bonds shall cease to draw interest?' Which said proposition, upon the 4th day of November, at the general election, was decided in the affirmative by a majority of the electors of said county. In accordance therewith, the said commissioners have entered the same upon the records of said county, given due notice of the adoption of said proposition, and executed the bonds here issued." Said bonds were all sold to one Taylor, a resident of Nebraska, for 92 cents on the dollar of their face value, and the proceeds of the sale was paid into the treasury of said Valley county. Within two years thereafter, they were sold to the present holders for 97 cents on the dollar. At the same general election held on November 4, 1879, there were cast in said Valley county 361 votes for candidates for a judicial office. After the assessment rolls returned by the precinct assessors in the spring of 1879 came before and were acted upon by the county board of equalization, the county clerk of Valley county

made out in due form, and certified and delivered to the auditor of the state of Nebraska, his official abstract of the assessment of said Valley county for the year 1879, showing the total assessed valuation of said county for that year to be the sum of \$326,768, and the state and county taxes for that year were levied upon the assessment shown by the said abstract. Said abstract did not on its face purport to cover the assessment of any property outside of Valley county. The precinct assessment rolls of that county proper, when footed, only showed an assessed valuation of \$279,349, and there was some unorganized territory then attached to said Valley county for judicial, election, and revenue purposes, the assessed valuation of which may have been included in said abstract, but did not on the face of said abstract appear to have been so included. For the years 1881 to 1892, inclusive, said county of Valley raised by taxation, and paid, all the interest accruing annually on said bonds, and including and since the year 1893 it has refused to pay any of the coupons maturing upon said bonds. Before and at the time when said proposition to issue said bonds was submitted to vote as aforesaid, and when said bonds were issued as aforesaid, there were outstanding and unpaid other bonds issued by said Valley county, as bridge bonds, issued for works of internal improvement, to the amount of \$6,000. The defendant in error is a bona fide holder of the bonds to which belonged the coupons for which he recovered judgment, and of such coupons, without any actual notice of any alleged defects or irregularities connected with the issue of such bonds.

L. C. Burr (Charles L. Burr, O. A. Munn, Clements Bros., and Coffin & Stone with him on the brief), for plaintiff in error.

C. C. Flansburg (H. A. Babcock with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The acts of the Nebraska legislature of 1877 and 1879, above referred to, authorized the issuance of the bonds of a county to pay its outstanding and unpaid warrants and indebtedness, upon the requisite action of the county board and vote of the qualified electors, to an amount not exceeding 10 per cent. of the assessed valuation of the county, irrespective of bonds previously issued for works of internal improvements or other lawful special purpose. The language of these acts plainly confines the 10 per cent. limitation contained in them to the bonds to be issued under the provisions of those acts. The case of *State v. Babcock*, 18 Neb. 141, 24 N. W. 556, related to bonds issued after the amendment of 1883, which made a material change in the law.

2. The abstract of assessment of property in Valley county for the year 1879, made by the county clerk, and by him certified and transmitted to the auditor of the state, was a public record of the assessment which the statute required to be so made and transmitted, after the assessment books had been equalized and corrected by the county board. A purchaser of bonds, in determining whether the aggregate issue exceeded the statutory limit of 10 per cent. of the assessed valuation, had the right to rely upon this abstract as a public record, authorized by statute to be made, as showing the amount of the assessment as finally corrected and established by

the board of equalization, and was not required to look through the books of the precinct assessors, and minutes of the board of equalization, if such minutes were kept, to verify such public record. It is needless, therefore, to consider whether the indebtedness funded by these bonds may not have rested upon the attached territory, as well as upon Valley county proper.

3. By the Laws of 1879 (page 364, § 30) provision is made for ascertaining and making a public record of the result of the vote of the qualified electors of a county, where such a proposition has been submitted to vote, pursuant to law. It is enacted:

"If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings."

This vests in the county board the power of determining whether or not it appears that two-thirds of the votes cast are in favor of the proposition, and whether or not the requirements of the law have been fully complied with. And, if they so determine, the act makes it their duty to enter such determination at large upon the book containing the record of their proceedings. Such action by the county board, and entry thereof in its records, constitutes the final and complete record evidence provided for by the legislature, of the submission of the question, the compliance with all requirements, and of the result of the vote. A purchaser of bonds need look no further than to the record so provided for. In this case such record was full and complete, and showed upon its face that the proposition submitted had been carried by a greater than two-thirds vote, and that the requirements of the law had been complied with. The judgment is affirmed.

THAYER, Circuit Judge. I concur in the view that a purchaser of the bonds in suit was entitled to rely on the abstract of the assessment which was made by the county clerk, and certified to the auditor of the state of Nebraska, for the following reasons: The act under which the assessment was made (Laws Neb. 1879, p. 276, §§ 52, 54, 65) did not require the precinct assessors to state the aggregate value of property, real and personal, found in their respective precincts; and a person who consulted the precinct assessment books after they had been returned to the county clerk could not ascertain therefrom the aggregate valuation of all property in the county, except by a careful examination and computation. Besides, the board of equalization was authorized to make changes in the assessments after the precinct assessment books had been returned to the county clerk (Id. § 70); and no provision of the act, so far as I am able to discover, made it the duty of the board to note the changes thus made on the precinct assessment books. The act, however, did require the clerk to make an abstract of the assessment, showing the total assessed valuation of all property, real and personal, which abstract was to be made and certified to the auditor after the board of equalization had discharged its functions, and had made such alterations in the va-

rious precinct assessments as it deemed proper. The act further directed that "the values to be given in said abstract shall be the valuations assessed by the assessor, and equalized and corrected as hereinbefore provided." *Id.* § 72. Moreover, the special finding of facts which was made by the trial court shows that the levy of taxes for the year 1879, for state and county purposes, was made upon the basis of the abstract which was made by the county clerk, showing a total assessed valuation of \$326,768. Under these circumstances, the abstract of the assessment which was certified by the county clerk to the auditor of the state would seem to have been the only authentic public record showing the total assessed valuation, and upon that record a purchaser of the bonds in suit was entitled to rely. I also concur in the further views expressed in the opinion in chief.

REPUBLICAN MIN. CO. V. TYLER MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1897.)

No. 306.

1. APPEAL AND ERROR—SECOND WRIT OF ERROR—PRIOR DECISION.

Where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; and the appellate court is not bound to consider any of the questions which were before it on the first writ of error.

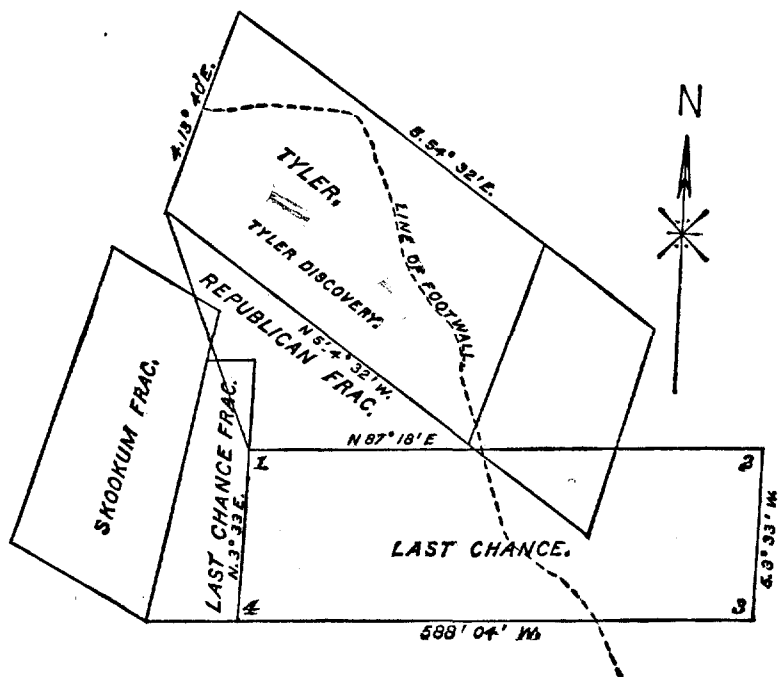
2. MINING LOCATIONS—EXTRALATERAL RIGHTS.

When a lode enters an end line of a regularly located mining claim, and runs in its course lengthwise, nearly parallel with the side lines of the claim for the greater part of the length of the claim, the owners of the claim are not deprived of the extralateral rights attached to it because the lode crosses a side line before reaching the other end line, but the extralateral rights will extend from the end at which the lode enters to the point at which it crosses the side line, whether a new end line is regarded as being drawn at that point or not. *Mining Co. v. Sweeney*, 4 C. C. A. 329, 54 Fed. 284, and *Last Chance Min. Co. v. Tyler Min. Co.*, 9 C. C. A. 613, 61 Fed. 557, reaffirmed.

In Error to the Circuit Court of the United States for the District of Idaho.

This cause was tried before the circuit court, a jury having been waived by stipulation of the parties, as provided by section 649 of the Revised Statutes, upon an agreed statement of facts, which will be found in *Mining Co. v. Sweeney*, 79 Fed. 277, to which reference is here made. The portion which relates particularly to this case, and is not copied in that case, is as follows: "It is further agreed that the Republican Fraction mining claim was duly located on the 1st day of November, 1885, and that the said location, so far as the making said discovery, marking said surface boundary, and recording such locations are concerned, was made in conformity with the law, and that the annual labor required by law has been duly performed therein; that the vein discovered in the said Republican Fraction mining claim is the same vein which passes out through the southerly side line of the Tyler claim. It is agreed that the vein on which the said Tyler, Last Chance, and Republican Fraction claims are located passes on its said dip underneath the surface limits of the Last Chance Fraction and Skookum Fraction claims, as they are laid down in said diagram." The diagram referred to in the statement of facts will be found in *Mining Co. v. Sweeney*, 79 Fed. 277.

The following diagram shows the relative position of the said claims upon which the lode is shown to pass, it being of the width of about 300 feet. It also shows the tunnels and works passing from the Tyler claim into the Republican Fraction claim, and the slope from which the Tyler Mining Company has been, and now is, seeking to extract ore, within the lines of the Republican Fraction claim, and the dates of the respective locations.



W. B. Heyburn, for plaintiff in error.

John R. McBride, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). It is claimed that the court erred, among other things, in finding, as a conclusion of law:

"That the plaintiff, the Tyler Mining Company, is entitled to judgment against the Idaho Mining Company and the Republican Mining Company for the possession of those certain premises described in the complaint and in the agreed statement of facts, to wit, that certain ledge or vein in place bearing valuable minerals, having its outcrop and apex within the limits of the Tyler mining claim, as described in said agreed statement of facts, with the right to follow, as against the Republican and Idaho Mining Companies, such ledge or vein upon its descent into the earth to any depth between the two perpendicular planes continued in their own direction past through the two end lines of the Tyler claim, as the same is now described in the patent issued by the United States for such claim, even though such vein shall extend outside the vertical side line of said Tyler mining claim, and under the Republican Fraction, the Last Chance Fraction, and the Skookum Fraction mining claims, claimed by said defendant the Republican and Idaho Mining Companies."

The conclusions of law upon the agreed statement of facts are in harmony with the decisions of this court, as will hereafter more clearly appear.

The contention of the plaintiff in error is that the defendant in error has no extralateral right to follow the lode or vein in the Tyler mining claim in its downward course beyond the southerly side line of the Tyler claim, for the reason that, as is shown in the diagram, the lode or vein passes through the side line of the Tyler location. It is further contended that any rights which the defendant in error may have by virtue of its ownership of the Tyler claim must date from the establishment of "the intermediate end line first made on the ground after the commencement of this action."

Both of these questions have been decided by this court adversely to the contention of plaintiff in error. It is well settled by numerous decisions of the supreme court that where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error.

In *Roberts v. Cooper*, 20 How. 481, the court said:

"It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. See *Sizer v. Many*, 16 How. 98; *Corning v. Iron Co.*, 15 How. 466; *Rose v. Himeley*, 5 Cranch, 515; *Canter v. Insurance Co.*, 1 Pet. 511; *The Santa Maria*, 10 Wheat. 431; *Martin v. Hunter's Lessee*, 1 Wheat. 304; and *Sibbald v. U. S.*, 12 Pet. 488."

In *Mining Co. v. Sweeney*, 4 C. C. A. 329, 54 Fed. 284, and *Last Chance Min. Co. v. Tyler Min. Co.*, 9 C. C. A. 613, 61 Fed. 557, this court decided that where a lode enters an end line of a regularly located mining claim, and runs in its course lengthwise, nearly parallel with the side lines of the claim for the greater part of the length of the claim, the owners of the claim are not deprived of the extralateral rights attached to the claim, under the provisions of section 2322, Rev. St., because the lode or vein crosses a side line before reaching the other end line; that the true construction of the statute is that, when the lode or vein crosses a side line before reaching the other end line, the owner's extralateral rights will extend from the end at which the lode enters to the point on the lode at which it crosses the side line. Numerous authorities were cited in support of these views. The following additional authorities sustain the principles therein announced: *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 63 Fed. 540, 546; *Del*

Monte Mining & Milling Co. v. New York & L. C. Min. Co., 66 Fed. 212, 215.

In reply to the criticism of counsel with reference to the right to draw the intermediate end line at the point where the lode crosses the southerly side line of the Tyler, we quote the language of Judge Hallett in *Del Monte Mining & Milling Co. v. New York & L. C. Min. Co.*, supra, as follows:

"It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extra-lateral right that may be recognized without drawing any line; and, if there be magic in the word 'line,' it will be better not to use it."

In *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 696, 15 Sup. Ct. 733, the court declined to consider this question, because, under the views expressed by the court upon another branch of the case, it was deemed unnecessary so to do.

There is no decided case to which our attention has been called in opposition to the views heretofore expressed by this court upon the questions involved in this case. The judgment of the circuit court is affirmed, with costs.

HENDERSON v. WANAMAKER.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

1. VENDOR AND PURCHASER — BONA FIDE PURCHASER — POSSESSION BY THIRD PARTY.

Possession of lands by a third party at the time of sale is notice to the purchaser of every defect in and defense to the vendor's title which said third party could make, including a prior unrecorded deed by the vendor to another.

2. SAME — *LIS PENDENS*.

A purchaser of lands from a plaintiff in ejectment, pending the suit, is chargeable with notice of an outstanding unrecorded deed from the vendor to another, which the defendant would be entitled to introduce as a defense under the pleadings.

3. EJECTMENT — PLEADING — GENERAL DENIAL.

The defendant in ejectment is never required to plead specific defenses to a title which the plaintiff does not disclose in his complaint, and of which defendant may be ignorant, but may introduce under his general denial any evidence that will defeat it.

4. SAME — ADMISSIONS.

The admissions of a grantor against his interest, made while he held all the title that his grantee has acquired or relied upon, are always admissible against the latter, unless he is protected as an innocent bona fide purchaser.

5. SAME.

A defendant in possession may defeat a recovery by a plaintiff in ejectment who relies upon his title, by proof of an outstanding title in a third person, and such outstanding title, while it must be subsisting and valid as against plaintiff at the time of the trial, need not be so as against the defendant.

In Error to the Circuit Court of the United States for the District of Colorado.

A. S. Blake, for plaintiff in error.

M. F. Taylor (E. T. Wells and John G. Taylor with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This writ of error was sued out to reverse a judgment in favor of a defendant in possession in an action at law to recover specific real property. On February 11, 1890, John Baker brought this action against Jonas E. Wanamaker, the defendant in error. In his complaint he alleged that he was the owner and in possession of the land in dispute, on December 18, 1888; that about December 21, 1888, the defendant wrongfully ousted him from the possession, and thereafter withheld it from him. The defendant answered. In his answer he denied that Baker was ever the owner or in possession of the property, denied that he was ever entitled to the possession, denied the ouster, and averred that he, the defendant, and his grantors, had for more than five years preceding the commencement of the action held the peaceable possession of the property, under color of title, in good faith, and had paid all the taxes against the property during that time. In November, 1890, Baker sold and conveyed the land to the plaintiff in error, J. A. Henderson, and he was substituted for Baker as plaintiff in the action on November 5, 1890. The statutes of Colorado provide that the adverse possession of real estate under color of title in good faith, and the payment of taxes for five consecutive years, shall constitute an unassailable title to land. 2 Mills' Ann. St. § 2923. On November 3, 1894, the defendant, by leave of the court, filed a further answer to the effect that, before the commencement of the action, Baker had conveyed to and vested in Michael D. Clifford all the title and interest he ever had in the property. Replications were filed to both of these answers, and upon the trial there was evidence of these facts: The title, according to the records, in 1890, was in the name of Baker. He had, however, conveyed the land to Clifford in 1873 by a deed that had never been recorded, and from that time until 1887 it was vacant and unoccupied, and neither Baker nor Clifford paid any taxes upon it or exercised any acts of ownership over it. In 1887 the grantor of the defendant, who claimed the land under a void tax deed, entered upon and fenced it, and from that time he and the defendant had possession of it and paid the taxes upon it. When this action was commenced the title of the defendant by five years' continuous possession had not matured, so that the action of Baker was not barred by the statute. When, however, in 1894, the defendant first specifically pleaded the defense that Baker had conveyed to Clifford, he and his grantor had been in possession and paid taxes for more than five years, so that any claim of Clifford to the land was then barred by the statute as against the defendant in possession.

1. It is assigned as error that the court charged the jury that the present plaintiff stood in the shoes of the original plaintiff, Baker,

and could not successfully claim the rights of a bona fide purchaser without notice of the unrecorded deed to Clifford. The court below was right, (1) because the defendant was in possession of the land when the plaintiff bought of Baker, and that possession was in itself notice of every defect in and defense against Baker's title which the defendant could make (*Leighton v. Young*, 10 U. S. App. 298, 314, 3 C. C. A. 176, 197, 52 Fed. 439, 445); and (2) because the plaintiff bought the title of Baker pendente lite. The answer in the case which was on file when he bought denied that Baker had any title to the property. As Baker contented himself with a general allegation of title, and did not attempt to deraign it, the general denial of that title in the answer was a sufficient pleading to entitle the defendant to prove a conveyance by Baker, or any other fact which would show that he had no title when the action was commenced. The defendant in ejectment is never required to plead specific defenses to a title which the plaintiff does not disclose in his complaint, and of which the defendant may be ignorant, but, when that title is presented by the proof, he may introduce under his general denial any evidence that will defeat it. *Kipp v. Bullard*, 30 Minn. 84, 14 N. W. 364; *Lain v. Shepardson*, 23 Wis. 224; *Mather v. Hutchinson*, 25 Wis. 27; *Marshall v. Shafter*, 32 Cal. 177. The action and the original answer of the defendant were therefore notice to the purchaser, Henderson, of every act and conveyance of the original plaintiff, Baker, by which the defendant might show that Baker had no title at the date of the alleged ouster and at the date of the commencement of the action. When he bought the title openly challenged by the possession and answer of the defendant, he bought with it his grantor's lawsuit and notice of every defense which Wanamaker might lawfully make to it. He could not purchase in the face of this action, answer, and possession, and then interpose against defeat the shield of a bona fide purchaser without notice. *Kinney v. Mining Co.*, 4 Sawy. 382, 451, Fed. Cas. No. 7,827; *Skews v. Dunn*, 3 Utah, 186, 191, 2 Pac. 64.

2. Complaint is made that the court below admitted evidence of declarations made by Baker before he conveyed to the plaintiff to the effect that he had previously conveyed his title to Clifford, and had no interest in the property in dispute. But the admissions of a grantor against his interest, made while he held all the title that his grantee has acquired or relies upon, are always admissible against the latter, unless he is protected by his character of an innocent bona fide purchaser, as the plaintiff here is not. *Baker v. Humphrey*, 101 U. S. 494, 499.

3. The assignment of error upon which counsel for plaintiff seems to rely most confidently is, however, that the court below refused to instruct the jury that Baker's conveyance to Clifford constituted no defense to this action, if Clifford's claim to the land was barred in 1894, when the defendant first specifically pleaded it, by virtue of the statute of limitations and the defendants five years' possession thereunder, and did charge them that if Baker had conveyed all his title to Clifford before he commenced the action, and before he conveyed to the plaintiff, that fact constituted a perfect defense to the

action. He bases this assignment upon the rule frequently announced in the books that an outstanding title is not available as a defense in ejectment, unless it is valid, subsisting, and paramount at the time of the trial. The purpose of the adoption of this rule, however, was to prevent the manifest injustice of permitting the defendant to defeat a recovery by a plaintiff who in fact had the title and right of possession by proof of an outstanding title which had been purchased by the plaintiff after the commencement of the action, or had otherwise become void as against him before the trial. This seems to have been the only reason for the rule, and where the reason ceases the rule ought to cease. There never was any reason for holding that an outstanding title, valid and subsisting as against the plaintiff, but barred by the statute of limitations or otherwise invalid as against the defendant, constituted no defense to the action in ejectment. The limitation of the rule, which is no less binding than the rule itself, is that an outstanding title, to be available as a defense to an action in ejectment, must be subsisting and valid as against the plaintiff at the time of the trial, but need not be so as against the defendant. It is true, as counsel for the plaintiff in error has shown, that in some of the cases the rule is stated without this limitation. *Reusens v. Lawson* (Va.) 21 S. E. 347, 352; *Robinson v. Thornton* (Cal.) 31 Pac. 936, 937; *Jackson v. Harder*, 4 Johns. 202, 211. But the fact must be borne in mind that courts frequently state the general rules of law applicable to the facts of particular cases before them without attempting to set forth all the limitations and exceptions to the rules, which do not affect the cases in hand. For example, cases may be found in which the statement is broadly made that the defendant in ejectment cannot avail himself of an outstanding title in a stranger; and he may not, in a case where neither party has any title to the premises, and the plaintiff relies solely upon his prior possession and his wrongful ouster by the defendant, because a mere trespasser or intruder cannot forcibly turn out the party in possession. *Newell, Ej.*, p. 654, § 16; *Jackson v. Harder*, 4 Johns. 202. But this rule is inapplicable to a case in which the plaintiff relies solely upon his title and never was in possession. So, when the facts of the cases, in which the rule upon which the plaintiff relies is stated without its restrictions, are carefully considered, with due reference to the reason of the rule, we think that few, if any, of them will be found inconsistent with its limitation. It is correctly stated in *Humble v. Spears*, 8 Baxt. 156, 158. It is properly applied in *Howard v. Massengale*, 13 Lea, 577; *Peck v. Carmichael*, 9 Yerg. 325; *Foust v. Ross*, 1 Watts & S. 501; *Bennett v. Horr*, 47 Mich. 221, 224, 10 N. W. 347; *McDonald v. Schneider*, 27 Mo. 405, 410; *Greenleaf's Lessee v. Birth*, 6 Pet. 302, 312, 313.

After a careful consideration of the reason of the rule, and an attentive reading of the authorities, we are convinced that this is a correct statement of it: A defendant in possession may defeat a recovery by a plaintiff in ejectment who relies upon his title, by proof of an outstanding title in a third person, and such outstanding title must be subsisting and valid as against the plaintiff at the time of the trial, but need not be so as against the defendant. Thus stated, it is a

just, sound, and salutary principle, but without this limitation it would be vicious and absurd.

The attempt of counsel for the plaintiff to apply the rule without the limitation to the case at bar compels him to maintain the contention that a grantor who has never had possession of the real estate, and has conveyed away his title to it, so that he has neither title nor right of possession at the time of the commencement of his action of ejectment, may nevertheless maintain that action against a defendant in possession by the simple proof that his grantee cannot maintain such an action. The proposition is that one who has no title to, or right to the possession of, real estate may maintain ejectment for it on the sole ground that his grantee cannot. The statement of the proposition is its best refutation. The universal rule is that a plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. Much less can he recover on the weakness of a stranger's title. It is always a good defense to an action of ejectment, in which the plaintiff relies solely upon his title, that he had conveyed the property to a third party before he brought the action, so that he had neither title nor right of possession at or after its commencement. *Mallett v. Mining Co.*, 1 Nev. 188, 196, 200; *Moss v. Bank*, 7 Baxt. 216, 219, 220; *Eaton v. Smith*, 19 Wis. 537; *Salcido v. Genung* (Ariz.) 43 Pac. 527; *Woods v. Bonner* (Tenn. Sup.) 18 S. W. 67; *Hobby v. Bunch* (Ga.) 10 S. E. 113; *Cobb v. Lavallo*, 89 Ill. 331. Baker conveyed this land to Clifford in 1873. When he commenced this action, in 1890, he had neither title nor right to the possession of the property. Since he had no title or interest in it when he subsequently made his deed to the plaintiff, in 1890, the latter took nothing by that deed, and the rulings of the court and the judgment below were right. Let the judgment be affirmed, with costs.

RHODES v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 833.

1. PENSIONS—PAYMENT PROCURED BY FRAUD—ACTION TO RECOVER BACK.

The statement by an applicant for a pension that he contracted a certain disease in the line of his duty as a soldier was not false if, although he had the disease before he enlisted, he was then cured of it, and contracted it again while in the service; and the United States cannot recover back the money on the ground it was obtained by fraud.

2. SAME.

Under Rev. St. §§ 4693, 4694, providing that a soldier who was "disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty" shall be entitled to a pension, a disease cannot be regarded as having been contracted "in the line of duty" unless the service was the cause of the disease.

3. WEIGHING OF TESTIMONY—INSTRUCTIONS TO JURY.

It is not error to charge the jury that it is for them to consider how much certain testimony of a negative character is worth as against positive testimony, and that ordinarily the evidence of a witness who swears

positively that he saw something is more valuable than that of witnesses who say they did not see it.

4. APPEAL AND ERROR—REVIEW.

There can be no reversal for error in admitting remarks of counsel to the jury when the record does not disclose the substance or character of the remarks.

5. SAME.

An objection to testimony cannot be considered by an appellate court where no ground of objection was stated at the trial.

6. SAME—MOTION FOR NEW TRIAL.

A motion for new trial is addressed to the sound discretion of the court, and the ruling upon it is not reviewable upon appeal.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

On October 25, 1895, the United States, the defendant in error, filed a petition in the court below to recover from Francis M. Rhodes, the plaintiff in error, \$9,847.40, which it alleged that it had been induced to pay to him by his fraudulent representations that he contracted catarrhal ophthalmia while engaged in its service, and in the line of his duty as a soldier, when in fact he had contracted the disease before he entered its service. The plaintiff in error interposed an answer, in which he denied that his representations had been fraudulent, and averred that he did contract his disease while in the service of the government. There was a trial of the case to a jury, and a verdict and judgment for the United States. The writ of error challenges this judgment.

B. R. Dysart and R. S. Matthews (R. G. Mitchell with them on the brief), for plaintiff in error.

Walter D. Coles (William H. Clopton with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The chief complaint in this case is that the court below submitted to the jury the issue whether or not the disease of the plaintiff in error was contracted "in the line of duty," when that issue was not raised by the pleadings or by the evidence, and that it erroneously stated the law governing the issue in the following paragraphs of its charge:

"If you find that he did have ophthalmia—a disease of the eyes—prior to the time of his entering into the army, then you should, under one phase of the evidence, also consider another question; that is, the possibility of his having had that disease, and of having been cured, before he entered the service, so that he was entirely free therefrom when he enlisted. If you find that he had had such disease, and was entirely cured, and that after his enlistment the disease reappeared, then there were no false or fraudulent representations in defendant's application for a pension. * * *

"Second. If, now, under the foregoing general directions, you find either that the defendant never had the disease in question before he enlisted, or that he had been afflicted therewith, but had entirely recovered therefrom, before his enlistment, then, inasmuch as there appears to be no doubt but what he suffered from the disease while in the service, you must next inquire whether he contracted it in the line of duty. This means that he must have contracted the disease as a result of his service, or as a result or by reason of the fact that he was in the service. The service must have been the cause of the disease,

not merely a coincident in time. An attack of epilepsy, for instance, while a soldier in the army, not resulting from any connection with the army, or any risk, hazard, or danger thereof, but as a result of an hereditary predisposition, would not entitle a soldier to a pension on the ground that he contracted that disease while in the service, because such disease would not have been contracted in the line of duty."

The acts of congress provide that a soldier who was "disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty" shall be entitled to a pension. Rev. St. §§ 4693, 4694. In its petition in the court below, the government alleged that on March 9, 1878, the plaintiff in error filed with the bureau of pensions his application for a pension under these sections of the statutes, and thereby claimed and represented that he contracted catarrhal ophthalmia of both eyes "while a private in Company K of the 42d regiment of Missouri volunteer infantry, and while in the line of duty as a member of the organization aforesaid"; that upon this statement it allowed and paid him the pension; that he "did not become disabled by catarrhal ophthalmia of both eyes while a soldier in the armies of the United States, and in the line of his duty as such soldier, as aforesaid, but that he had contracted said disease long before enlisting in the army of the United States, and had had said disease and disability prior to engaging in said service, and that said disease and disability were not due to said service, and that the representation made in the application of said defendant for a pension under the pension laws of the United States that he incurred the disability aforesaid while in the army of the United States as aforesaid was false and fraudulent."

The plaintiff in error answered that he made the representation, that it was true, that he did not contract his disease before he entered the service, and that it was contracted in and was due to the service. Most of the evidence on the trial of the case was directed to the issue whether Rhodes contracted the disease before or after he enlisted as a soldier. He testified that he contracted it after his enlistment, and that he thought he caught it while he was visiting his cousin in another company, as one or two people in that company had sore eyes.

In this condition of the pleadings and proof, the question was fairly presented whether or not the plaintiff in error contracted his disease in the line of his duty. The charge against him was that he had fraudulently stated that he contracted it in the service and in the line of duty. The government had produced convincing evidence that he had suffered from it before he enlisted. But the court was trying a charge of fraud. The veteran was protected by the presumption of innocence and honesty. Every intendment was in his favor. Hence the judge rightly charged that, although he might have contracted the disease before he entered the service, yet, if he was cured of it, so that he was a sound man when he enlisted, and he subsequently contracted it again while he was in the service and in the line of duty, his statement in his application to the government was not false, and the United States could not recover. If the court had been requested to give this portion of the charge, it would clearly have been error to have refused. And it would have been no less error to have given

this charge without the limitation that the disease must have been contracted in the line of duty, because the plaintiff in error had represented that it was so contracted, and because the acts of congress authorize no pension for a disease not contracted in the line of duty.

Nor was there any error in the definition which the court gave to the jury of a "disease contracted in the line of duty" when he declared that "the service must have been the cause of the disease, and not merely coincident with it in time." This is the patent and natural meaning of the language of the statute. It places the service and the discharge of duty in the relation of causes to the injuries and diseases that warrant the grant of pensions. It allows a pension for wounds or injuries received, and for diseases contracted, in the service and in the line of duty. No one would seriously contend that every wound, injury, or disease received or contracted during the term of service is pensionable under this law. A wound or injury inflicted upon himself by a soldier, or received by him while hunting wild animals, or squabbling with his comrades for his own amusement, or while doing any other act not in the line of his duty, would form no basis for a pension. The reason is that it would not be caused by his presence in the line of duty. The same rule applies to wounds, injuries, and diseases; for in the law they stand together in a single class. The result is that neither injury nor disease can authorize the grant of a pension under the acts of congress unless it is caused by the presence of its victim in the line of duty when it was received or contracted.

The provision of the act of congress in question in this case was exhaustively considered and authoritatively construed by Attorney General Cushing in 1855. He concluded his discussion of it with these words: "In fine, the phrase 'line of duty' is an apt one, to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease, producing disability or death." 7 Op. Attys. Gen. 149, 161; 17 Op. Attys. Gen. 172. The fact that after this construction congress has retained this expression for more than 40 years, although it has repeatedly revised and amended the pension laws, amounts to a demonstration that Mr. Cushing and the court below properly interpreted its meaning.

It is assigned as error that the court instructed the jury that a great number of the witnesses for the plaintiff in error testified that they had opportunities of one kind or another to see the plaintiff in error prior to his enlistment, and that they never discovered that he had sore eyes; that the members of his family testified that he did not have any disease of his eyes before he enlisted; that much of this testimony was negative in its character; that the answers of many of the witnesses were, "If he had sore eyes, I didn't know it;" that it was for the jury to consider how much this testimony was worth as against positive testimony; and that, ordinarily, the evidence of a witness who swears positively to a thing, or emphatically says that he saw something, is more valuable than that of witnesses who say they did not see. But there was no error in this part of the charge. It correctly stated the character of the evidence, and the rule of experi-

ence and of law which was applicable to it. *Au v. Railroad Co.*, 29 Fed. 72; *Isaacs v. Strainka*, 95 Mo. 517, 8 S. W. 427.

Another complaint is that, in arguing the cause to the jury, the counsel for the government, over the objection of the plaintiff in error, "commented upon the refusal of the defendant to consent that his family physician, Dr. Cantwell, should detail statements made by the defendant while being treated by him; and the court remarked that under the evidence before the jury in relation to Cantwell's connection with the case certain reference to it was legitimate." But this court cannot say that there was error in this ruling, because the comments which counsel made are not contained in the record, and we cannot presume that they were improper. The burden of proof is on him who asserts an error in the rulings of the trial court admitting evidence or remarks of counsel to show by the record the inadmissibility thereof. If the record does not disclose either the substance or character of the evidence or remarks, the legal presumption that the ruling is right is not overcome, and the judgment stands. *U. S. v. Patrick*, 20 C. C. A. 11, 18, 73 Fed. 800, 806; *Association v. Lyman*, 9 C. C. A. 104, 60 Fed. 498.

It is assigned as error that the court permitted one of the witnesses to answer a certain question, over the objection of counsel for plaintiff in error, but the record shows that he stated no ground of objection, and took no exception. An objection to testimony for which no reasons were assigned at the trial cannot be considered by an appellate court. *U. S. v. Shapleigh*, 12 U. S. App. 26, 46, 4 C. C. A. 237, 249, and 54 Fed. 126, 137; *Ward v. Manufacturing Co.*, 12 U. S. App. 295, 5 C. C. A. 538, and 56 Fed. 437; *Tabor v. Bank*, 27 U. S. App. 111, 10 C. C. A. 429, and 62 Fed. 383.

The only other error assigned is that the court below denied a motion for a new trial, but that motion was addressed to the sound discretion of the court, and the ruling upon it is not reviewable here. *Railroad Co. v. Howard*, 4 U. S. App. 202, 1 C. C. A. 229, and 49 Fed. 206; *McClellan v. Pyeatt*, 4 U. S. App. 319, 1 C. C. A. 613, and 50 Fed. 686; *Village of Alexandria v. Stabler*, 4 U. S. App. 324, 1 C. C. A. 616, and 50 Fed. 689; *Mining Co. v. Fullerton*, 19 U. S. App. 190, 7 C. C. A. 340, and 58 Fed. 521; *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 8 C. C. A. 253, and 59 Fed. 756. Let the judgment below be affirmed, without costs to either party in this court.

PYLE v. CLARK et al.

CLARK et al. v. WRIGHT.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

Nos. 864, 865.

1. NEGLIGENCE—PROXIMATE CAUSE.

One whose negligence is one of the proximate causes of his injury cannot recover damages of another, even though the negligence of the latter also contributed to it, and was the more proximate cause.

2. RAILROADS—CONTRIBUTORY NEGLIGENCE AT CROSSING.

It is the duty of every one who approaches a railroad to look both ways, and to listen before crossing; and, when a diligent use of the senses would have avoided the injury, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court.

3. CONTRIBUTORY NEGLIGENCE—PEREMPTORY INSTRUCTION.

Where contributory negligence is established by the uncontroverted facts, it is the duty of the court to instruct the jury that plaintiff cannot recover.

4. NEGLIGENCE—QUESTION OF LAW.

It is only where the undisputed facts are such that reasonable men can fairly draw but one conclusion from them that the question of negligence is one of law for the court.

5. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where the plaintiff, in driving across a railroad track, was struck by an engine coming from the north, his failure to look to the north for an entire minute before he drove slowly upon the track was so clearly contributory negligence that the court was authorized to direct a verdict for defendant. 75 Fed. 644, affirmed.

6. SAME—IMPUTED NEGLIGENCE.

The negligence of the owner and driver of a vehicle cannot be imputed to one who is riding with him gratuitously, so as to defeat a recovery for an injury caused by the concurring negligence of the driver and a third person. 75 Fed. 644, affirmed.

7. SAME.

One riding gratuitously with the owner and driver of a vehicle which, in crossing a railroad track, was struck by an engine coming from the north, was not so clearly guilty of contributory negligence in failing to watch for the approach of danger from the north before the driver went upon the track as to authorize the court to take that question from the jury, the driver being on the north side of the vehicle, and he on the south side. 75 Fed. 644, affirmed.

In Error to the Circuit Court of the United States for the District of Utah.

These were actions at law, brought, the one by George M. Pyle, and the other by A. E. Wright, against S. H. H. Clark and others, receivers of the Union Pacific Railway Company, to recover damages for personal injuries. The court directed a verdict in favor of defendants in the case of Pyle, who assigns that ruling as error; and the case of Wright having been submitted to the jury, and a verdict returned in his favor, the defendants assign as error the submission of his case to the jury.

David Evans (L. R. Rogers with him on the brief), for plaintiff in error Geo. M. Pyle and defendant in error A. E. Wright.

Parley L. Williams, for S. H. H. Clark and others, receivers.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. At 4 o'clock in the afternoon on a clear, still day in July, 1895, George M. Pyle and A. E. Wright were riding west along Second North street, in Salt Lake City, in a covered wagon, drawn by two horses. They were sitting on the front seat of the wagon, Pyle on the north side, and Wright on the south side, and the cover was turned back, so that they could see everywhere. Pyle owned the horses and wagon, and was driving the team,

and Wright was riding with him. They were strangers in the city, but, when they were about 100 feet east of Second West street, they observed a railroad upon it, which crossed the street on which they were traveling at right angles. When they were 50 feet from the railroad track, Pyle stopped his team, and an engine passed across the street from north to south, and then returned upon a spur track, and stopped at the line of the south sidewalk, and remained there blowing off steam. Pyle then drove his team up to within 10 to 25 feet of the track, and again stopped it. From this point the men had an unobstructed view for a distance of 2,000 feet to the north up the track on which the train that subsequently struck them came. At a point 2,000 feet north, the track on which the train approached curved to the west, and disappeared from view, while a spur track stretched onto the north a distance of a mile and a half. The men did not observe the curve of the main track, but, when they stopped the second time, they looked north along the track, and saw that on which the train subsequently came for 2,000 feet, and the spur track beyond that point for more than a mile, and saw no engine or train approaching from that direction. They then looked south, watched the engine which was standing just south of the street for a minute, and Pyle then drove his team slowly onto the main track of the railroad, without again looking to the north, when a train coming from that direction collided with his wagon, and injured him and Wright. This train was operated by S. H. Clark and others, the receivers of the Union Pacific Railway Company, and Pyle and Wright brought separate actions against these receivers for negligence in causing their injuries. The two cases were tried together. There was the usual conflict of testimony over the ringing of the bell of the engine and the blowing of its whistle before the accident, and there was evidence that the train was running about 15 miles an hour, in violation of an ordinance, which prohibited a speed of more than eight miles an hour at the place of the collision. Upon this state of facts, the court below instructed the jury to return a verdict in favor of the receivers in Pyle's case, and submitted the case of Wright to the jury, who returned a verdict in his favor. Pyle assigns the ruling of the court directing a verdict in his case as error, and the receivers assign the ruling of the court submitting Wright's case to the jury as error.

There was sufficient evidence of the negligence of the receivers in these cases to warrant the submission of that question to the jury, if there had been no evidence of contributory negligence on the part of the men who were injured by the collision, so that the only question presented here is whether the proof of the negligence of the latter was so conclusive that the court should have instructed the jury that they could not recover. One whose negligence is one of the proximate causes of his injury cannot recover damages of another, even though the negligence of the latter also contributed to it. The question in such a case is not whose negligence was the more proximate cause of the injury, but it is, did the negligence of the complainant directly contribute to it? If it did, that negligence is fatal to his recovery, and the negligence of the defendant

does not excuse it. *Railway Co. v. Davis*, 10 U. S. App. 422, 426, 3 C. C. A. 429, 431, and 53 Fed. 61, 63; *Railway Co. v. Moseley*, 12 U. S. App. 601, 604, 608, 6 C. C. A. 641, 643, 646, and 57 Fed. 921-923, 925; *Reynolds v. Railway Co.*, 32 U. S. App. 577, 16 C. C. A. 435, and 69 Fed. 808, 811; *Motey v. Granite Co.*, 36 U. S. App. 682, 20 C. C. A. 366, and 74 Fed. 156; *Schofield v. Railway Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125; *Railroad Co. v. Houston*, 95 U. S. 697, 702; *Hayden v. Railway Co.*, 124 Mo. 566, 573, 28 S. W. 74; *Wilcox v. Railroad Co.*, 39 N. Y. 358. Every railroad is a menace of danger. It is the duty of every one who approaches it to look both ways, and to listen, before crossing its track; and, when a diligent use of the senses would have avoided the injury, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court. Where contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to instruct the jury that the plaintiff cannot recover. See the cases cited supra, and *Railroad Co. v. Whittle*, 40 U. S. App. 23, 20 C. C. A. 196, and 74 Fed. 296, 301; *Donaldson v. Railway Co.*, 21 Minn. 293; *Brown's Adm'x v. Railway Co.*, 22 Minn. 165; *Smith v. Railway Co.*, 26 Minn. 419, 4 N. W. 782; *Lenix v. Railway Co.*, 76 Mo. 86; *Railroad Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Aerkfetz v. Humphreys*, 145 U. S. 418, 420, 12 Sup. Ct. 835; *Powell v. Railway Co.*, 76 Mo. 80; *Dlaui v. Railway Co.*, 105 Mo. 645, 654, 658, 16 S. W. 281. But it is only where the undisputed facts are such that reasonable men can fairly draw but one conclusion from them that the question of negligence is considered one of law for the court. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 451, 3 C. C. A. 433, and 53 Fed. 65; *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Railroad Co. v. Pollard*, 22 Wall. 341.

Pyle was the driver of the team, and he was responsible for its movements. He was sitting on the north side of the wagon, on the side from which the train that collided with his wagon approached. His view of the track on which it came was unobstructed for 2,000 feet. His horses were not afraid of the cars, and they were standing still from 15 to 25 feet from the track. He sat quietly in his wagon for a minute after he looked to the north, and then, without looking north again, he drove slowly upon the track, and the engine coming from that direction caught him. His failure to use his eyes diligently, his failure to look to the north for an entire minute before he drove upon the track, and his act of starting his horses forward upon it, without glancing alternately in each direction, were acts of gross negligence. If he had not been guilty of them, the accident could not have happened. If he had not driven his horses upon the track in front of the approaching engine, there would have been no collision; and, if he had looked to the north immediately before he drove them forward, he would never have done so. Upon this state of facts, there was no escape from the conclusion that the negligence of Pyle was the proximate cause of the collision. On the other hand, Wright was sitting on the south side of the wagon, and he exercised no control over the move-

ments of the team. The wagon and the horses were Pyle's, and he was driving them. It was his act of starting them forward upon the track without looking out for the train that came from his side of the vehicle that was the active, moving cause of the disaster. Wright was not responsible for this act. The negligence of the owner and driver of a vehicle cannot be imputed to one who is riding with him gratuitously, so as to defeat a recovery for an injury caused by the concurring negligence of the driver and the third person. *Railway Co. v. Lapsley*, 4 U. S. App. 542, 2 C. C. A. 149, and 51 Fed. 174, 178, and cases there cited; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391. It may be that a person of ordinary prudence riding with another under such circumstances as existed in this case would put a certain trust in the driver,—would naturally expect that he would watch for the approach of danger from his side of the vehicle, and that he would not drive forward unless he was assured that there was none in that direction; and that in this way one might be lulled into some degree of security, and led to watch for danger from his own side, and be less cautious about its approach from the opposite direction than he would be if he were the driver. The question was whether Wright exercised such care as a person of ordinary prudence would have used under the circumstances of his case. We hesitate to say that the facts in Wright's case were such that all reasonable men, in the exercise of their deliberate judgment, must come to the conclusion that he did not exercise ordinary care. In our opinion, there was sufficient doubt about this question to warrant its submission to the jury. The judgments in these cases must accordingly be affirmed, with costs; and it is so ordered.

FARMERS' LOAN & TRUST CO. v. NESTELLE.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

No. 323.

RAILROADS—PRIORITY OF LIENS—JUDGMENTS FOR PERSONAL INJURIES.

A judgment against a railroad company for damages for an injury caused by its negligence does not take precedence of the lien of a previously existing mortgage. *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 79 Fed. 227, followed.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Crowley & Grosscup and John B. Allen, for appellant.

Carr & Preston and S. H. Piles, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. On January 12, 1890, Mrs. Levinia Nestelle, while a passenger on one of the trains of the Northern Pacific Railroad, sustained an injury. She subsequently died, and her husband, L. W. Nestelle, petitioner herein, thereafter brought

an action against the railroad company for the injuries received by his wife through its negligence, and recovered a judgment for \$500 and costs. On October 30, 1893, the Farmers' Loan & Trust Company, appellant herein, instituted foreclosure proceedings against the Northern Pacific Railroad Company, and receivers were appointed to take possession of, manage, and operate the property of said railroad company. L. W. Nestelle intervened in said foreclosure proceedings, and on April 1, 1896, the circuit court made an order directing the receiver to pay the judgment obtained by Nestelle against the railroad company, with interest and costs. This appeal is taken from that order. The judgment in favor of Nestelle was obtained prior to the appointment of the receiver. Upon the principles announced in Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (No. 319) 79 Fed. 227, and the authorities there cited, the order of the circuit court is hereby reversed, with costs in favor of the appellant.

HILLMON v. MUTUAL LIFE INS. CO. SAME v. NEW YORK LIFE INS. CO. SAME v. CONNECTICUT MUT. LIFE INS. CO.

(Circuit Court, Kansas, First Division. April 12, 1897.)

Nos. 3,147, 3,148, 3,149.

CONTEMPT—OBSTRUCTION OF JUSTICE.

The writing of a letter by a state superintendent of insurance to each of several insurance companies, refusing to issue a license to do business on the ground that the company had not acted fairly in refusing to pay a certain death loss, and in the litigation of same then pending in a federal court, cannot be summarily punished by that court as contempt, not being done in the presence of the court, or so near thereto as to obstruct the administration of justice.

The three insurance companies, defendants in the cases of Sallie E. Hillmon, plaintiff, pending in this court, have filed a complaint:

That Webb McNall, the superintendent of insurance of the state of Kansas, is guilty of contempt of this court, in this: That he is unlawfully impeding and obstructing, and endeavoring to impede and obstruct, the due administration of justice in the trial of said actions; that said McNall, as superintendent of insurance, did on or about the 3d day of March, 1897, send to each of said insurance companies a letter containing the following statement: "I am satisfied that your company has not dealt fairly with the plaintiff, Mrs. Sallie E. Hillmon, in refusing to pay the death loss, and in the litigation of the same, pertaining to her deceased husband. Hence this department refuses to issue * * * a license to do business in this state for the ensuing year." The defendants further allege: That the arbitrary action of said superintendent of insurance is intended to operate as a pressure upon them to compel them to forego their rights as suitors in this court; to prevent them from litigating the claims which they have been defending for nearly 17 years; will operate to drive them out from the protection of this court, and compel them to pay an unlawful claim, based on murder. That the action of said McNall was done knowingly and willfully for the purpose of vexing, injuring, and harassing petitioners; for the purpose, object, and intent of throwing every obstacle possible in the way of their defense; of intimidating and driving them out of this court; of obstructing and impeding them in the assertion of their rights to a trial by jury, and to a fair hearing; to compel them, by threats and force, to abandon

their defense; and to make them pay the said Hillmon claims without regard to their merits. That said action of said McNall was procured to be done by and through, and at the special instance and request of, the attorneys for said Sallie E. Hillmon. That the acts done and performed by said McNall at the request of said attorneys obstruct and impede the administration of justice in this court, place petitioners under great and overwhelming duress, and are an attempt on the part of said plaintiff and her attorneys to compel petitioners to pay a false, fraudulent, and fictitious claim; to compel them to surrender the right to defend their interest, and to protect their policy holders in the courts of justice. Upon this petition an order to show cause was issued and served upon said Webb McNall. Thereupon he entered a special appearance, and challenges the jurisdiction of the court to proceed summarily against him for contempt upon the allegations of said petition, and moves the court to dismiss the proceedings and discharge and vacate the order to show cause heretofore issued.

Geo. J. Barker, J. W. Green, E. F. Ware, and W. R. Smith, for petitioners.

L. C. Boyle and David Martin, for respondent.

FOSTER, District Judge (after stating the facts). This special appearance and plea of respondent practically admits the truth of the allegations in the petition, and the question presented for determination is whether such facts make a case for summary proceedings against the respondent for contempt of this court. There are two sections of the Revised Statutes which have a bearing upon the question at issue. The first is section 725, which reads as follows:

"Sec. 725. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

Section 5399 of the crimes act reads as follows:

"Sec. 5399. Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months or both."

That the power of the courts to punish summarily for contempt is limited to misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, is apparent from the terms of section 725, and the various decisions made thereunder. *Savin*, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699; *Ex parte Robinson*, 19 Wall. 505; *State v. Frew*, 49 Am. Rep. 264; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *Cooley*, Torts, 424; *Kirk v. Manufacturing Co.*, 26 Fed. 501-509; *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43; *Ex parte Buskirk*, 18 C. C. A. 410, 72 Fed. 14. And this rule applies when the act comes under either section of the statute. The act of the respondent in refusing to allow the defendant insurance companies to continue doing business in the

state for the reasons given in his letter cannot be justified on any principle of law or justice, or on any discretionary power vested in him as superintendent of insurance. The insurance companies, in defending these suits of Mrs. Hillmon, are doing what the law permits them to do; and it is for the court having jurisdiction to determine whether they have "dealt fairly with the plaintiff, Mrs. Sallie E. Hillmon, in refusing to pay the death loss, and in the litigation of the same, pertaining to her deceased husband." Indeed, that is the very issue to be tried by the court, and it is an unwarranted assumption of authority for respondent to arrogate to himself the summary determination of these questions; and any attempt, by threats or intimidation or duress, on the part of the respondent, to coerce or deter the companies from making their defense in court, tends to obstruct and impede the due administration of justice, and is a proper matter to be presented to the grand jury. It would, however, be a strained construction to hold that the act was done in the presence of the court, or so near thereto as to obstruct the administration of justice. 131 U. S. 267, 9 Sup. Ct. 699; 19 Wall. 505; *In re Brule*, 71 Fed. 946; *Sharon v. Hill*, 24 Fed. 726. The order to show cause must be dismissed.

In re IASIGI.

(District Court, S. D. New York. March 10, 1897.)

HABEAS CORPUS—STATE EXTRADITION—PROCEEDINGS AGAINST CONSULS—PRELIMINARY PROCEEDINGS BEFORE STATE MAGISTRATES LAWFUL.

The Turkish consul I., being charged with embezzlement in Massachusetts, was committed in New York by a city magistrate for 30 days, to await requisition from the governor of Massachusetts, in pursuance of the New York statute; on habeas corpus, *held*, that even though criminal offenses by consuls may still be exclusively triable in the federal courts under sections 563 and 711 of the Revised Statutes, the exclusion of state authority by section 711 is limited to the exclusion of state courts, and is not applicable to preliminary proceedings in extradition, or to a commitment by magistrates not acting as a court; (2) that the peculiar circumstances attending the repeal of paragraph 8 of section 711 as well as the language of paragraph 8 itself, apparently confined to civil suits, prevents any extension of that repeal by implication.

Coudert Bros., F. R. Coudert, C. F. Adams, and David Keane, for petitioner.

W. M. H. Olcott, Dist. Atty. (John D. Lindsay, of counsel), and Stickney, Spencer & Ordway, opposed.

BROWN, District Judge. This is a proceeding by habeas corpus to procure the release of the prisoner, the Turkish consul general at Boston, from custody, upon a commitment made by a city magistrate on a charge of embezzlement in Massachusetts in violation of the law of that state, but not in violation of any statute of the United States. The commitment was in pursuance of a law of the state of New York, authorizing such a commitment for 30 days to await any requisition from the governor of Massachusetts.

The petition avers that the accused is the consul general of the sultan of Turkey, at Boston, duly recognized as such by the government of the United States; that the embezzlement is charged to have occurred on July 1, 1892; that he was arrested while on a visit here, where access was impossible to his books and papers to vindicate himself; and that no indictment has been found against him; and it is contended that the proceedings before the city magistrate were without authority or jurisdiction, because of the petitioner's consular office. The amended return to the writ shows that the petitioner is a native-born citizen of Massachusetts.

A consul is not entitled, by virtue of his office as consul merely, to the immunities of a foreign minister. On the contrary, according to the rule of international law, he is subject civilly and criminally, like other residents, to the tribunals of the country in which he resides. 1 Kent, Comm. *44; Wheat. Int. Law (Lawrence's Ed.) 423; *The Anne*, 3 Wheat. 435; *Gittings v. Crawford*, Taney, 1, Fed. Cas. No. 5,465; *Coppell v. Hall*, 7 Wall. 542, 553; *In re Baiz*, 135 U. S. 424, 10 Sup. Ct. 854; *Hollander v. Baiz*, 41 Fed. 732.

Under our dual judicial system, state and federal, in the absence of any special provision of law, the petitioner would, therefore, be subject to arrest and prosecution in the local tribunals in the same manner as other persons; so that the question presented is not one of immunity from punishment, but only as to the proper mode of proceeding, and whether his commitment and detention by a city magistrate under a state law for rendition to Massachusetts, where alone the offense can be tried, are unlawful.

The provisions of the constitution, and the acts of congress thereunder, as respects public ministers and consuls, create a limited class of cases which are *sui generis*. By the second section of the third article of the constitution the judicial power of the United States is extended to "all cases affecting ambassadors, other public ministers, and consuls"; and as to this special class of cases the constitution in the same section further declares that "the supreme court shall have jurisdiction." Thus all cases affecting consuls, whether civil or criminal, and whether arising under acts of congress, or under the common law or state statutes, are made cognizable by the supreme court, and thus "cognizable under the authority of the United States," without any further action by congress. *U. S. v. Hudson*, 7 Cranch, 32, 33. Under the general grant of judicial power, congress, however, further provided by the judiciary act of 1789 (1 Stat. 73) that the supreme court should have "original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party" (section 13); that the district courts "shall have, exclusive of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, where the punishment should not exceed six months' imprisonment," etc.; "and shall also have jurisdiction, exclusive of the courts of the several states, of all suits against consuls and vice-consuls, except for offenses above the description aforesaid (section 9); and that the circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States (except where otherwise

provided), and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein."

Under these provisions it remained the accepted law until 1875, that the federal courts had exclusive jurisdiction of offenses by consuls, whether at common law or under state or United States statutes. The ordinary rule that the United States could not punish common law or state offenses, did not apply. *U. S. v. Ravara*, 2 Dall. 297; *Com. v. Kosloff*, 5 Serg. & R. 545; *U. S. v. Ortega*, 11 Wheat. 472, 473, note. And *Tennessee v. Davis*, 100 U. S. 257, and *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, were decided on the same principle.

The provisions of the judiciary act were carried into the United States Revised Statutes (enacted June 22, 1874) without any substantial change, but under a different arrangement. See section 563, pars. 1, 17; section 629, par. 20; section 687; section 711, pars. 1, 8. By this latter paragraph (8) the jurisdiction of the state courts was excluded in all "suits or proceedings" against consuls. The word "proceedings" in that paragraph was new; while the word "offenses," which was in the exception in section 9 of the judiciary act, was omitted in paragraph 8 of section 711.

By the act of February 18, 1875 (18 Stat. 316, c. 80), the eighth paragraph of section 711 was stricken out. The provisions of sections 563 and 629 conferring jurisdiction on the federal courts in all cases against consuls, both of crimes and of suits, were left untouched; and so was the exclusive jurisdiction of crimes and offenses under the first paragraph of section 711.

It is contended that by the repeal of the eighth paragraph of section 711, referring only to "suits or proceedings" against consuls, the jurisdiction of the state courts is opened to the prosecution of consular crimes and offenses against the state laws; whereas it is urged in behalf of the petitioner that this repeal gives no such jurisdiction to the state courts, but leaves consular offenses cognizable as before in the federal courts alone, both by implication, from the nature of the consular relation, which involves the United States with foreign powers, and also by force of paragraph 1 of section 711 which gives the federal courts exclusive jurisdiction over "all crimes and offenses cognizable under the authority of the United States." See *Miller*, Lect. Const. pp. 325, 326; *Cooley*, Lect. Const. p. 53; *U. S. v. Ravara*, supra; per *Story*, J., in *U. S. v. Coolidge*, 1 Gall. 488, Fed. Cas. No. 14,857; per *Tilghman*, C. J., in *Com. v. Kosloff*, 5 Serg. & R. 585.

As respects any actual intention of congress, the repeal of paragraph 8 of section 711, by the act of 1875, affords no light. The explanation of that repeal is difficult, if not impossible. The act is entitled "An act to correct errors and supply omissions" in the Revised Statutes of the United States. It embraces over 70 different subjects; and the first section of the act declares that the amendments therein made are made "for the purpose of correcting errors and supplying omissions" in the Revised Statutes "so as to make the same truly express" the laws in force on December 1, 1873. There is no doubt that on December 1, 1873, the jurisdic-

tion of the federal courts over consular offenses was exclusive. In both houses of congress when the bill was presented, as appears from the Congressional Record, members were induced to withdraw proposed amendments on the positive assurance that this act contained no new legislation and was solely for the purposes above expressed. So far as concerns crimes and offenses, it may have been considered that the first paragraph of section 711 included all offenses committed by consuls; and that the eighth paragraph had no reference to "offenses," as it covered only "suits or proceedings." But no such explanation is possible as regards civil suits against consuls, which were certainly embraced in paragraph 8 of section 711, and nowhere else; and that paragraph probably referred solely to civil suits. But however it came about, the act of 1875 was passed, and paragraph 8 of the Revised Statutes stands repealed. So that, as stated by Mr. Justice Harlan in *Bors v. Preston*, 111 U. S. 261, 4 Sup. Ct. 407, there is now no statutory provision, which, in terms, makes the jurisdiction of the federal courts exclusive in suits (i. e. civil suits) against consuls. But the declared purpose of the act, and the circumstances of its passage, deprive the repeal of paragraph 8 of any effect by implication, beyond the necessary meaning of the repeal itself. *Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39, 15 Sup. Ct. 508.

There is a manifest propriety, amounting sometimes to a practical necessity in order to avoid international complications, that the prosecution, punishment or pardon of consuls which would necessarily materially affect their personal attention to their consular duties, should be within the control of the federal courts and of the federal government to which the consuls are accredited and which alone is responsible to foreign powers for the treatment of their representatives. While imprisonment for debt continued, the same considerations, though in a less degree, applied to civil suits. But since imprisonment for debt has been abolished, the grounds for exclusive federal jurisdiction in civil suits against consuls exist in but small degree, if at all; while in all criminal cases, all the original considerations of policy and propriety remain unchanged.

I do not think it, however, necessary or appropriate at this time to pass upon the question whether the jurisdiction of the federal courts over consular offenses is now concurrent with the state courts, or exclusive of the state courts, either by implication, or under paragraph 1 of section 711. The only question needful for me to determine is whether the petitioner is unlawfully held in custody. The offense with which he was charged is an offense against the state of Massachusetts. He was committed by a committing magistrate under section 829 of the Criminal Code of New York, which undoubtedly covers the case in general terms, making no reference to the official position of the accused. As a consul is amenable to the local law, his arrest and detention are, therefore, lawful, unless they are prohibited by implication or by section 711 of the Revised Statutes of the United States. But that section, even giving to its terms the broadest effect, goes no further than to exclude "the jurisdiction of state courts." This refers to proceed-

ings which are properly in court, or form some part of the action of a court. It does not extend to proceedings out of court. It does not forbid the exercise of the police power of the state, nor the arrest of a consular officer by a policeman when committing a crime, nor his consequent detention for surrender to the proper tribunal for punishment. And so the commitment of a consular offender by a magistrate, merely for the purpose of transmitting him to the state where the crime was committed, and where alone he can be tried, is not a proceeding in court or by any court, (*Robertson v. Baldwin* [Jan. 25, 1897] 17 Sup. Ct. 326,) and therefore not prohibited by section 711. And so whatever implications in favor of exclusive federal jurisdiction in consular cases may be claimed, they are in no way incompatible with a preliminary arrest by a state magistrate for removal to the proper state for trial in which-ever tribunal is appropriate. The object of any such exclusive jurisdiction in the federal courts, if it still exists in fact, is evidently quite foreign to such a preliminary proceeding as this, the purpose of which is the transmission of offenders to the state where the offense is committed, to be there brought to trial in the appropriate court, whether state or federal. All questions under the United States statutes as to the proper tribunal for a trial of the cause can be more appropriately heard and determined there. This course seems the more proper in a case like the present, inasmuch as section 1014 of the Revised Statutes, the only one under which removal could be had through federal proceedings, is limited to cases of "crimes or offenses against the United States"; and this is not such an offense. Either, therefore, the petitioner must be amenable to such proceedings as the present, or else he cannot be arrested or sent back at all. As I cannot find that the arrest and detention of the accused under the law of this state, for the purposes specified, are unlawful, the application must be denied.

In re IASIGI.

(District Court, S. D. New York. March 16, 1897.)

BAIL—HABEAS CORPUS—APPEAL.

A district judge who has denied a writ of habeas corpus to release a foreign consul imprisoned under state authority has no power, under Rev. St. § 765, and Sup. Ct. Rule 34 (6 Sup. ill.) to admit the prisoner to bail pending an appeal from the order denying the writ.

The court heretofore denied an application for a writ of habeas corpus to release the petitioner, Joseph A. Iasigi, Turkish consul general at Boston, from imprisonment under an order of commitment by a magistrate in interstate extradition proceedings. The petitioner, having taken an appeal from the order denying the writ, has now applied to be admitted to bail pending the appeal.

David Keane, for petitioner.

Albert Stickney and John D. Lindsay, opposed.

BROWN, District Judge. Without considering the propriety of admitting the petitioner to bail during his appeal to the supreme court from the order refusing to discharge him on habeas corpus in interstate extradition proceedings, I am of opinion that under rule 34 of the supreme court, and section 765 of the Revised Statutes, I have no authority to act, but that the application must be made to the supreme court.

1. I think the provisions of section 765 are in force in habeas corpus cases, except as to the right and mode of appeal, which are regulated by the act of 1891. In *re Lennon*, 150 U. S. 399, 14 Sup. Ct. 123. The act of 1893 evidently contemplates that section 765 and section 766 remain in force, except as to the right and mode of appeal.

2. Under section 765 after the supreme court has made its regulations and orders as to the "custody of the prisoner" (which includes the taking of bail) I think my authority is limited by the regulations so made.

3. Rule 34 of the supreme court (6 Sup. iii.) provides that the prisoner "may be taken into the custody of the court or judge." I have, therefore, for sufficient cause, so ordered. This rule further provides that the prisoner may be "enlarged upon recognizance, as herein-after provided." This is a limitation to the cases so provided; and the next clause of the rule provides only for such a recognizance where an appeal is taken upon the discharge of the prisoner. Here the prisoner was held; not discharged.

4. Rule 36 (11 Sup. Ct. iv.) gives no additional authority to take bail in habeas corpus cases.

Under the statute and rule 34, I do not seem to have authority to admit to bail.

WEST PUB. CO. v. LAWYERS' CO-OPERATIVE PUB. CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. COPYRIGHT—SYLLABI OF LAW REPORTS—INFRINGEMENT.

A copyrighted syllabus to a legal opinion may be infringed without reproducing its original language. It is the unfair appropriation of the original compiler's labor that constitutes the offense. Identity of language will often prove that the offense was committed, but it is not the sole proof; and, when the offense is proved, relief will be afforded, irrespective of any similarity of language.

2. SAME—INTERNAL EVIDENCE OF INFRINGEMENT—PRESUMPTIONS.

When it is conclusively shown from internal evidence that a subsequent digester has made an unfair use of any part of a syllabus of his predecessor, it is not to be presumed that he availed himself of the prior syllabus only to the extent appearing on the face of his work. Rather, the burden of proof will be upon him to show that there were parts of the syllabus that he did not use.

3. SAME—ADMISSIBILITY OF EVIDENCE—OPINION EVIDENCE.

Testimony of witnesses who have compared copyrighted syllabi of legal opinions and alleged infringing digest paragraphs with the opinions themselves, as to their general conclusions on the question of infringement, cannot be accepted as evidence; but, where they also point out similarities of language and other indicia of infringement, the testimony should not be wholly rejected, as it is of great aid to the court in making the laborious examination required in order to reach a conclusion.

4. SAME—INFRINGEMENT DIGESTS—PRIMA FACIE CASE FROM INTERNAL EVIDENCE—DENIALS.

Defendant's editors digested some 13,300 cases from complainant's pamphlet reporters. These pamphlets were placed in their hands without eliminating or covering up the copyrighted syllabi. A partial comparison of these syllabi with their digest paragraphs showed internal evidence of piracy in some 400 instances. In one volume 10 instances were found in 16 pamphlets, and 7 instances in 1 pamphlet; in another, 4 instances in 9 pamphlets. In another volume piracies were found in half the pamphlets; in another, in 11 out of 12 pamphlets, 8 instances occurring in a single pamphlet; in another, in 7 out of 10 pamphlets; in another, 7 instances in a single pamphlet; in still another, in 11 out of 13 pamphlets; and in one single pamphlet, of less than 100 pages, 14 instances. *Held*, that this evidence, aside from other proofs, indicated a general, systematic, and widespread unfair use of the copyrighted work, coupled with an attempt to disguise such use, and made out a prima facie case, which was not rebutted by a simple denial by all defendant's editors that they had made any use whatever of complainant's syllabi.

5. SAME—REBUTTAL OF PRIMA FACIE CASE.

It appeared, however, that defendant's principal editor had digested some 7,000 of the entire 13,300 cases digested from complainant's pamphlets. Two of these cases were found to contain suggestive verbal identities, but no errors in common with the syllabi. *Held*, that the denial of such editor that he had made any use of the syllabi was sufficient to rebut complainant's prima facie case, so far as concerned his own work.

6. SAME—COMPARATIVE SPEED OF DIGESTERS—WEIGHT OF EVIDENCE—DISCRETION OF COURT.

As tending to show an unfair use of its syllabi, complainant showed that defendant's regular and experienced editors digested from 20 to 40 cases per day, while complainant's own editors, working from the opinions alone, averaged only from 4 to 7 cases a day. An independent witness, the official reporter of the court of appeals of New York, with 21 years' experience, testified that he had not been able to do over 7 cases a day, and that his average was about 4. Thereupon defendant offered to produce some of its editors, who, in the master's presence, with cases of average length to be selected by him, would, under conditions insuring fairness, show their rate of speed in original work. *Held*, that it was in the discretion of the court to reject this offer, on complainant's objection; that the rate of speed attained under such conditions would not fairly represent the average speed for weeks and months continuously, under varying conditions, mental and physical; and that, on the whole, not much weight was to be attached to the argument from the rate of speed, as, to be of much value, the character of the digest paragraphs would have to be carefully investigated.

7. SAME—MINGLING OF PIRATED AND ORIGINAL MATTER—FAILURE TO SEGREGATE—SCOPE OF INJUNCTION AND ACCOUNTING.

Defendant's digest covered 19,000 cases, of which at least 13,300, or about 70 per cent., were digested by its editors from complainant's pamphlet reporters with copyrighted syllabi. Nearly 6,000 of these cases were prepared by editors who repeatedly and systematically made an unfair use of the copyrighted work, in order to save themselves the time and labor of original investigation; endeavoring, sometimes successfully and sometimes not, to conceal the fact of such unfair use. The remaining 7,300 cases were digested by editors who, on the proofs, probably made no unfair use of complainant's work. As a result, complainant's copyrighted work was in part, at least, appropriated by defendant, and so mingled with original matter that no one but the offending editors could segregate the pirated from the original matter; and defendant failed to produce their testimony on this point. *Held*, that the whole work, excepting the paragraphs digested from original sources, should be enjoined, with liberty to defendant, however, to show, by further proofs, which paragraphs were digested by its nonoffending editors, and to move to have them

excluded from the injunction; plaintiff, in that event, to have the privilege of adducing further proofs to show unfair use by these latter editors.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This is an appeal from decrees of the circuit court, Northern district of New York, in favor of complainant, in a suit brought for infringement of copyright. The interlocutory decree (53 Fed. 265) enjoined the further publication of a certain number of specified paragraphs, which the master and the court found to infringe; and the final decree (64 Fed. 360) awarded six cents as profits which accrued to defendant from the sale of books containing such paragraphs, with costs. The defendant did not appeal. The facts will be found fully stated in the opinion.

Frank P. Prichard, for appellant.

William F. Cogswell, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Before considering the merits, a question of evidence presented by the appellee may be disposed of. Having properly reserved an exception to its admission, defendant moved to strike out certain testimony as incompetent. The circuit court denied the motion; stating, however, that the testimony would be ignored, since it was obnoxious to the objection. The testimony complained of is this: Complainant had prepared exhibits displaying, in parallel columns, certain paragraphs of complainant's copyrighted books, which it was asserted were infringed, and corresponding paragraphs from defendant's publication, which were asserted to be such infringements. Witnesses were then called who testified that they had compared these parallel columns with the original court opinions, of which such paragraphs were claimed to be syllabi, and thereupon gave the results of such comparison; in some instances pointing out similarity of language, and other indicia tending to show infringement, and in other cases testifying generally to the opinions they had formed from their examination. This testimony was not, in any true sense, proof of infringement. Whether an examination and comparison of any particular group of contrasted paragraphs with the original sources from which, as it is contended, such paragraphs are derived, does or does not afford internal evidence of literary piracy, is a matter which must be determined by the court or the master. Unfortunately for the court, there is no easy substitute for the laborious work of such comparison. It is the court's judgment, and not that of the witness, which must ultimately determine the question. It does not follow, however, in a case like this, that such evidence should have been rejected altogether. So far as it refers to specific instances, and points out comparisons on which reliance is placed by either side, it is of incalculable value to the court in facilitating such examination. Without the elaborate exhibits in this case, and the comments thereon which point out the specific points contended for, it would have required months of time for the court to have reached any reasonably adequate conception of the merits of the

litigation. Referring to similar testimony in *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136, the court says:

"Though admissible in all such cases, the opinions of experts are nevertheless, in their nature, secondary evidence; but the comparisons made by them * * * have very much facilitated the investigations made by the court. Considerable aid has been derived from that source * * *; but the court has found it necessary to re-examine the comparisons made by the witnesses, and to make others for themselves, in order to come to a satisfactory conclusion. Regarded as a basis to enable the court to compare one book with the other, the results given by the experts * * * have proved of great service to the court in estimating the weight to be given to their respective opinions."

The facts of the case at bar are as follows: Complainant is the publisher of a system of reports, appearing weekly, and containing all the opinions of various courts, with syllabi, statements of facts, etc., prepared by complainant's editors. These are the well-known "Reporters," such as *Atlantic Reporter*, *Southeastern Reporter*, *Federal Reporter*, etc. In connection with this series of reports, complainant published in monthly parts a digest of the cases, prepared from the syllabi, and consolidated at the end of each current year (about September 1st) into an annual volume, known as the "American Digest." Both the reports and the digests were copyrighted. Defendant was the publisher of a rival series of reports, appearing weekly, and containing selected opinions, edited, with syllabi, statements of facts, etc. In connection with this series of reports (known as "Lawyers' Reports Annotated") defendant also published, in semimonthly parts, a digest of all the opinions of various courts, consolidated at the end of the year into an annual, known as the "General Digest." The two systems were in active competition, and the two digests, both as periodical issues and in completed form, were rival publications, each purporting to cover practically the whole field of case law enunciated by all courts of last resort in the United States for the year. Defendant's digest year ended about the same time as complainant's, and this suit is concerned with the publication of the respective parties for the year ending September, 1892; it being contended by complainant that, in preparing the paragraphs which stated the law or facts in cases digested in defendant's publication, its editors had substantially appropriated the labors of complainant's editors (as found in the syllabi of the Reporters, and in the paragraphs of complainant's digest) to such an extent as to infringe complainant's copyrights. The answer denied such use.

Defendant's digest was prepared in part from publications not protected by complainant's copyrights. These publications include the opinions of the United States supreme court, as published in advance sheets by that court, certain English and Canadian reports, reports of certain intermediate appellate courts of Missouri and Illinois, reports of lower courts in Ohio and Pennsylvania, the District of Columbia cases, the court of claims reports, and the interstate commerce commission reports. Inasmuch as none of the syllabi of these reports are covered by complainant's copyrights, this suit is in no way concerned with them. The evidence is not specific as to the number of such cases included in defendant's di-

gest, although it would seem to be an easy matter to count them, but it does appear affirmatively that they aggregate a comparatively small fraction of the whole. The complainant contends that such fraction is about one-tenth. The circuit court finds it to be about 30 per cent. We do not find sufficient evidence to sustain such finding, but it is not now necessary to determine the precise amount. It is easily ascertainable, and for the purposes of this appeal it is sufficiently proved that the great majority of the paragraphs in defendant's digest were prepared by editors who had before them in each case only the opinion of the court as printed in complainant's reports, with complainant's copyrighted syllabi and notes. The total number of cases digested in defendant's publication is about 19,000, distributed into some 38,000 paragraphs.

Upon a motion for a preliminary injunction complainant, as evidence of the unfair use of its work, presented an exhibit of 55 paragraphs taken from different parts of defendant's digest, which it was contended showed on their face that they were taken from plaintiff's syllabi. Subsequently complainant presented an exhibit of 108 additional paragraphs of a similar character. The court referred the matter to a master to report what, if any, portions or paragraphs of defendant's digest infringed plaintiff's copyrights. Before the master, and within a limited time fixed by him, plaintiff presented an exhibit of 548 paragraphs (including the 163 originally produced) which it contended showed upon their face conclusive evidence of piracy, and much oral testimony was taken. The master reported that, of these 548 paragraphs, 303 "appear to have infringed the copyright." It is quite apparent from his report that the testimony given before him, and the extended comparison which he made, satisfied him that a much more comprehensive report might be made, but that he was confined by the order of reference to a consideration of the specific paragraphs "presented to him," and that he was to report only cases "which seem to be, from themselves, in connection with the opinions" (i. e. where internal evidence alone showed them to be) clearly cases of piracy. The court granted a preliminary injunction, confined strictly to "the instances of piracy found by the master." All the evidence taken down to that time, whether by affidavit, deposition, or otherwise, including the exhibits, and some additional testimony, made up the record upon which the case was presented to the circuit court at final hearing. Complainant at such hearing presented, in the form of a supplemental brief, a further exhibit, containing several hundred additional paragraphs alleged to be infringements, and printed in parallel columns, with corresponding copyrighted paragraphs; stating that if the court adhered to its former ruling, that only such paragraphs should be enjoined as showed on their face, and without reference to the general proofs, that they were pirated, counsel would not ask the court to undertake the labor of making comparisons. If, however, the court should undertake to decide whether or not there had been a general unfair use of complainant's work, the supplemental brief was submitted as a convenient guide to additional internal evidence bearing upon that issue. The circuit court adhered to its former ruling, enjoined the 303 paragraphs, and ordered an account-

ing of profits therefrom. It proved, of course, to be impossible to segregate the profits for these specific paragraphs, and complainant obtained a final decree for six cents and costs. Defendant has not appealed from the finding as to the 303 paragraphs, but complainant has appealed, contending that it was entitled to more extensive relief. The opinion of the circuit court will be found in 64 Fed. 360. The following excerpts succinctly state the law governing cases such as this:

"A reporter [of opinions of a court] may acquire a valid copyright for the headnotes, footnotes, tables of cases, indexes, statements of facts, and abstracts of the arguments of counsel, where these are prepared by him and are the result of his labor and research. So he may have a copyright for a digest or synopsis of judicial decisions, and the selection and arrangement of cases relating to a particular branch of the law. The copyright protects only the original work of the reporter. * * * [He] has no monopoly of the opinions, decisions, and syllabi prepared by the courts and judges. * * * These opinions, decisions, and syllabi are free alike to all digesters. But when notes suitable for use in a digest have been prepared from these common sources of information, and properly secured by copyrights, a subsequent compiler in the same field is not permitted to avail himself of this original work, and save time and labor for himself by copying from the property of others. * * * He may take original opinions, and prepare from them his own notes, 'but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another.'"

The circuit court expressed the opinion that "in a work like a digest, which has general characteristics of a directory, an index, or a road book," "each paragraph is separate and distinct from another, and can be removed without in any way destroying the effect of the remaining paragraphs"; that, where pirated portions can be separated from portions not subject to criticism, injunction should go only against the infringing portions; that, where infringement exists, "there are always some indications which disclose the presence of the pirate." It found that the proof showed only 303 instances of piracy, and reached the conclusion that it would be establishing a "dangerous precedent to condemn the entire work, when less than one per cent. is proved to be piratical." The main criticism advanced upon this appeal is that the court erred in treating the case as if complainant had been unable or unwilling to prove more than 303 instances of piracy. It is apparent that the circuit court and the master (who was, of course, constrained to conform to the views of the court) have treated each separate "point" in a syllabus as the subject of a separate copyright, and have acted upon the principle that no alleged infringing paragraph could be shown to be pirated unless it showed upon its face, independently of all other proof, language unmistakably borrowed from a copyrighted paragraph. To such an extent has this segregation been carried that there are several instances where the master has reported that there was no infringement of one paragraph in the headnote of a particular case, although he has found infringement of the other paragraphs of the very same headnote; and the circuit court has so held. In other words, where it has been conclusively shown that a subsequent digester has made an unfair use of the syllabus of his predecessor, and has left the evidences of such use behind him, it is nevertheless held that, to the extent to which he has

not left such evidence behind him, the court will presume that he did not avail of such prior syllabus to save himself time or labor. It is thought, on the contrary, that in such a case, where unfair use of any part of a syllabus is proved, the burden would be upon the unfair user to show, if he can, that nevertheless there were parts of the same syllabus that he did not so use. As a result of this method of examination, there seems to have been no attempt made to deal with the question presented by the pleadings, namely, whether taking each copyrighted work as a whole, and considering the evidence as a whole, the preponderance of proof shows that, in preparing defendant's publication, its editors or any of them have substantially made an unfair use of such copyrighted work. In consequence it has been necessary for this court to make an entirely independent examination of the whole body of proof, instead of the ordinary inquiry upon exceptions to master's findings, where it is usually sufficient to see if there is any evidence to support such findings. Upon the fundamental issue there has been, as yet, no finding at all. This circumstance will account for the inordinate length of this opinion. It is necessary to decide this issue of fact, because it is not the law that a copyrighted syllabus can be infringed only by a reproduction of its original language. It is the unfair appropriation of the labor of the original compiler that constitutes the offense. Identity of language will often prove that the offense was committed, but it is not the sole proof; and, when the offense is proved, relief will be afforded, irrespective of any similarity of language. For example, if, in a case like this, defendant's editors should one and all testify that they made up their digest from complainant's syllabi, so as to save the time and trouble necessarily involved in an independent examination of each opinion, there can be no doubt that such digest would be held to infringe, although the work were so cleverly done that no identity of language could be found in a single paragraph. It is necessary, therefore, to see how far complainant has made out its contention that this was precisely what defendant's editors did. Before discussing the testimony, it may be useful to refer to a few authorities, and to set forth some general principles.

In *Myers v. Callaghan*, 5 Fed. 726, 20 Fed. 441, and *Id.*, 128 U. S. 617, 9 Sup. Ct. 177, complainant was the owner of the *Illinois Reports*, prepared by one Freeman, the copyright covering only the headnotes, statements of facts, etc. Defendants published a series of reports containing the same opinions, and with headnotes, etc., which they claimed were original. The supreme court (page 660, 128 U. S., and page 189, 9 Sup. Ct.) quotes with approval from the opinion of Judge Drummond in the circuit court:

"The defendants Ewell and Denslow, who were employed by the other defendants to annotate these decisions or reports, both state, upon examination, that their work was independent of that of Mr. Freeman; but it appears from the evidence that all the volumes of Mr. Freeman were used in thus editing or annotating, and, although it may have been their intention to make an independent work, it is apparent, from a comparison of the Freeman volumes and those of the defendants, that the former were used throughout by the editors employed by the defendants. It is true that in each volume, perhaps in the majority of cases, there is the appearance of independent labor performed by

them, without regard to the volumes of Mr. Freeman; but yet in every volume it is also apparent that Mr. Freeman's volumes were used, in some instances words and sentences copied without change, in others, changed only in form; and the conclusion is irresistible that, for a large portion of the work performed in behalf of the defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman. Undoubtedly, it was competent for an editor to take the opinions of the supreme court, and possibly from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to sit down, and, with the copyrighted volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the original sources of information, to the decisions of the court, the briefs of counsel, the records on file in the clerk's office, without regard to the regular volumes of reports. Any one who has tried it can easily understand the difference between the headnotes of two persons, equally good lawyers, and equally critical in the examination of an opinion, where they are made up independent of each other; and, bearing in mind this fact, it seems to be beyond controversy that although in many, and perhaps most, instances, there is a very considerable difference between the headnotes of the defendants' volumes and those of the plaintiff, the latter have been freely used in the preparation of the former. * * * Upon comparing the parts of each of the volumes, those of the complainant and of the defendants, one with the other, I think there can be no doubt that in some respects, in each case, the Freeman volume has been used by the defendants in the headnotes, the statements of facts, and the arguments of counsel. That is, there are certain unmistakable indicia that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information, namely, the opinions of the judges, the records, and the arguments of counsel."

And defendants' entire publications in that case were held to infringe.

In *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136, the court says:

"To constitute an invasion of copyright, it is not necessary that the whole of a work should be copied, nor even a large portion of it, in form or substance. If so much is taken that * * * the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient. * * * In the case of a map, guidebook, or directory, or the like, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to do for himself that which was done by the first compiler. He is not entitled to take one word of the information published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information." "Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alteration, to disguise the source from which the material is derived." "Circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially if corroborated by moral coincidences, be sufficient to constitute full and conclusive proof." "When a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with the passages in the original book must be presumed, *prima facie*, to be likewise copied, though no blunders appear in them."

In *Publishing Co. v. Keller*, 30 Fed. 772, the complainant had prepared and copyrighted a directory of the names and addresses of those persons in New York City who were supposed to be people of fashion. It was contended that a directory published by defendant was an infringement, and application was made to the circuit court in the Southern district of New York for a preliminary injunction. The question was whether defendant, in compiling his

directory, had done so by his own original labor, or whether, in order to spare himself time and expense, he had copied the names and addresses in plaintiff's list. It appeared that plaintiff's list contained 6,000 names and addresses of persons residing in New York City out of the 313,000 names which appear in the general city directory. Defendant's directory contained 3,500 names and addresses of persons residing in said city, and of this number 2,800 appeared in plaintiff's list. "The fact," says the court, "that 2,800 of the names and addresses in defendant's book originally appeared in the complainant's book would, standing alone, be quite inconclusive. But when it is shown that 39 errors in complainant's book, consisting of misprints, erroneous addresses, insertion of names of persons who never existed, etc., are reproduced in defendant's book. * * * a strong presumptive case of piracy is made out. * * *

The case for the complainant is such as to call for a full and explicit vindication on the part of defendant." And on the strength of the presumption arising from the 39 errors, publication of the 2,800 names was enjoined, although as to 2,761 of them there was no evidence of piracy at all, aside from such presumption.

In *Chicago Dollar Directory Co. v. Chicago Directory Co.*, 14 C. C. A. 213, 66 Fed. 977, the court of appeals of the Seventh circuit sustained an injunction against the publication of a business directory of 60,000 names, where 67 blunders in complainant's copyrighted directory had been copied.

The evidence mainly relied upon in the case at bar is such as is afforded by a critical comparison of corresponding paragraphs from complainant's and defendant's syllabi with the original opinions which they profess to epitomize. Now, if there be anything of which a court may be supposed to take judicial notice, it is of the fact that compendiums of the facts and law in any particular case may be availed of without quotation. The briefs of counsel are a great aid in the preparation of an opinion. The record can be examined, the salient facts stated, the law discussed, and conclusion expressed in much less time, and with far less labor, when there has been such a preliminary winnowing of the whole case. And in many instances, by reason of the effort to avoid the not impartial presentations of fact and law by either side, the opinion will disclose no verbal evidences of the use of either brief. That a person who undertakes to prepare the syllabus of an opinion can do so with more facility and in less time, if he already has before him a syllabus prepared by some one else, is manifest. If he also, for some reason, wishes to conceal the fact that he has used this other syllabus, it would seem not to be a very difficult task to alter its structure, to substitute synonyms, to revert from the paraphrase of the syllabus to the text of the opinion. The measure of his success in so doing will depend upon the degree of care exercised, upon his facility in the use of language, and the extent of his vocabulary. Therefore, the mere circumstance that the language of a later syllabus differs from that of an earlier one does not prove that the draftsman of the later one constructed his syllabus wholly from the opinion, without making use of the earlier one to lessen

his labor and expedite his work. If, therefore, the proposition above quoted from the opinion of the circuit court, viz. that "there are always some indications which disclose the presence of the pirate," be intended to refer, not to the whole work, but to individual cases, as the context would seem to imply, we are unable to assent to it. Unfair use may be made of another's copyrighted paragraph, and no trace left of such use in the resulting paragraph. We should therefore not feel constrained to the conclusion that infringement can be shown only where the two paragraphs disclose suggestive verbal identities.

The language of the law is largely technical. There are very many words, phrases, and expressions which naturally suggest themselves to the trained lawyer who speaks or writes that language. Moreover, a single sentence of extreme brevity will often be found to fully express the legal concept which may be spread forth over a whole page of some opinion; and the briefer the sentence, or the more familiar the concept, the greater the likelihood that independent editors will express themselves in like terms. The mere circumstance, therefore, that two syllabi of the same opinion are found to be expressed in identical language is not always sufficient proof that the one was borrowed from the other. If, however, we should find instance after instance, where the production is continuous, and in which identity of language is found, not only in mere technical phraseology, but in the use of common speech as well, not only when the "point" is a brief one, but when it covers many lines, such continuous identity would become suggestive.

Complainant's copyrighted Reporters were issued in weekly pamphlets, each containing several cases, and each pamphlet contained the work of several of its editors. When these pamphlets were distributed to defendant's editors, each pamphlet was digested by a single editor. Thus in the headnotes to the opinions in any one of complainant's pamphlets we would expect to find such variances of style as would be produced by the personal equations of the different contributors. In the headnotes to those same cases issued by defendant we would expect to find the uniformity of style to be looked for when all are the work of one writer. If, under such circumstances, repeated instances were found where the style of defendant's syllabi is identical with the style of complainant's, it would be more suggestive than if all the earlier syllabi were also the work of one man.

It is conceded that defendant placed in the hands of its editors the several pamphlet issues of complainant's reporters with no attempt to eliminate the copyrighted headnotes. It would have been easy to expunge them or cover them up, and that is what has been done in preparing the digests published since this suit was brought; but during the period in question defendant chose to take its risk, relying solely upon the good faith of its editors. Of course, it required from each of them a certain amount of work in return for his pay, and from the very outset it exposed each of them to a constant temptation which must have been hard to resist. When-

ever one of them was behindhand with his work, or sickness, or worry, or inconvenient surroundings temporarily dulled his intellect, it was to be expected that the assistance ready to his hand in the copyrighted headnote would present itself most alluringly. There were eight editors (not counting two who only digested 100 cases, and whose evidence was not taken), some permanently attached to defendant's staff, others employed temporarily. It would not be surprising to find that one or more of them yielded sometimes to this temptation, and it would certainly seem that defendant's officers should have contemplated that possibility, and provided against it. When a pamphlet was sent to one of the editors to digest, a record was necessarily made of it, so that the manager or editor in chief might know from whom headnotes were due. From these records it should be easy to ascertain who was the individual who prepared any particular paragraph. And if it should turn out that two or three out of the eight yielded to the temptation, and "conveyed" the complainant's work, so clumsily that the fact remains self-evident upon mere comparison, while the others scrupulously conformed to instructions, examination of these records would show which were the offenders and which not, and also just what part of the whole work was done by them, respectively. These records are not produced, and, of all the many hundred paragraphs complained of, we are informed as to the authorship of but 30.

Defendant insists that it had the right to put complainant's pamphlets in its editor's hands, since the opinions therein were not copyrighted. Undoubtedly it had, but if it failed to take precautions against improper use of them, and in consequence might be unable when challenged with a *prima facie* case of unfair use either to overcome the *prima facie* proof, or to segregate the work of the unfair users from that of the fair users, it would have its own officers to thank for that result. Ordinary intelligence would surely have contemplated the possibility of the very contingency which complainant asserts has happened.

In order not to expand this opinion unduly, much of the testimony relied on is set forth in "Appendix Notes." The first of these is note No. 1, which shows the result of an investigation of pamphlet No. 12 of complainant's Pacific Reporter, vol. 29, comprising pages 844 to 941 of that volume. This court has made an independent comparison of all the digest paragraphs therein, not only with complainant's syllabi, but also with the original opinions as now found in the bound volume of 29 Pac. Rep. This exhibit is persuasive, for the reason that it gives a continuous showing of all the work done, with this pamphlet before him, by the defendant's editor to whom it was assigned. There has been no selecting of the cases helpful to complainant's theory and suppression of the others. Reference to the appendix will show some cases where the language is verbatim, some where slight changes are made, some where the language is dissimilar, and some where errors and oversights of complainant's editor are reproduced in defendant's paragraphs.

It seems unnecessary to further summarize this note. Reference may be had particularly to items 2, 4, 7, 13, 18, 19, 35, 43, and 44. Of this exhibit the master says:

"No fair-minded person can compare the headnotes in pamphlet No. 12, vol. 29, Pacific Reporter (and there are other like cases), with the digest paragraphs made by defendant's editor from the opinions in this number, and published in the General Digest, and doubt for a moment piracy, and particularly when the digester had before him headnotes already prepared, even when his testimony goes to show that no use has been made of the headnotes."

It is true that only a fraction of the 44 cases in the exhibit bear on their face conclusive evidence of piracy, such as the copying of complainant's errors; but none the less it is impossible to escape the conviction that the digester of pamphlet No. 12 has systematically made an unfair use of the headnotes he found therein, unless we are prepared to assume that, through some mysterious and unconscious process of selection, he was so unfortunate as to turn for help to complainant's syllabi only in those cases where existing errors made the use of such syllabi peculiarly dangerous. The record does not show which of defendant's editors digested this pamphlet, but had he appeared and testified that in doing his work he made no use whatever of complainant's syllabi the natural conclusion, in the face of the internal evidence, would be that historical accuracy is not his strong point, and whatever further testimony he might give as to the methods he used when digesting from complainant's pamphlets would necessarily be received with caution.

The next important exhibit (B) is also a triple-column presentation of cases from three pamphlet numbers of the Northeastern Reporter. Its suggestive features are set forth in note No. 2. It covers 169 cases, exclusive of one in which the syllabus is by the court. The experience derived from an exhaustive examination of these two exhibits, embracing together 213 cases, shows the accuracy of the estimate of complainant's editor that to prepare similar exhibits covering the 13,000 or 14,000 cases digested from complainant's Reporters would be a work requiring years of continuous labor. Exhibit B presents all the cases in the three pamphlets, thus giving the opportunity to observe the results of continuous work by one, two, or three digesters. The result is to confirm the conclusions drawn from Exhibit A. There is nothing in the record to show which of defendant's editors digested any one of the syllabi included in these three pamphlets.

The next exhibit, in 2 volumes (C and CC), presents in parallel columns the syllabi of complainant and digest notes of defendant to all the cases in volume 19 of the Southwestern Reporter, about 700 in number. It has been absolutely impossible to make an exhaustive examination of this exhibit. The witness under whose supervision it was prepared testified to the conclusions he drew from it. His statement is the evidence which defendant moved to expunge, and, of course, it is only secondary. We have, however, been able to look into the exhibit sufficiently to reach a conclusion, examining the parallel syllabi with the original opinions in the bound volumes. Several groups of five or ten consecutive cases have been thus ex-

amined. In other parts of the exhibit other groups, consisting of every fifth or every tenth case, have been scrutinized, and again a number of cases which the witness said contained common errors have been carefully studied. Some of these last will be found in Appendix Note No. 3, among them two of the most glaring instances of copying errors (vide items 7 and 10). And there is a large number of cases in which complainant's points are reproduced verbatim, or with trivial changes, where examination of the opinion shows that the peculiar phraseology is not found therein, but was the original work of complainant's editor. We cannot escape the conclusion that some, at least, of defendant's editors who digested the pamphlets comprising this volume, repeatedly, if not habitually, made an unfair use of the copyrighted work of the complainant.

The next important exhibit is the so-called "Supplemental Brief," which contains the 548 paragraphs submitted to the master and several hundred additional ones. It includes some of the cases already covered by the other three exhibits, but in it are also found many hundred new ones. It would unnecessarily expand this opinion to undertake to enumerate the most characteristic of these contrasted paragraphs, even in a footnote. It will be remembered that the master found 303 of the 548 paragraphs to contain internal evidence of piracy, and to his finding defendant has not excepted. This exhibit has been carefully studied, with constant reference to the original opinions, and such examination was made in advance of any reference to the schedule annexed to the master's report, in which he indicated in what paragraphs he found evidence of piracy. The results of such examination were noted and subsequently compared with the master's schedule. Such comparison showed that his work had been most careful and conservative. The 303 paragraphs condemned by him are distributed between 242 cases, and it was found that of these 242 cases all but a score or so had been independently marked by the court as indicating piracy on their face; and that 34 cases, in which he (the master) had given defendant the benefit of the doubt, had been marked by the court as piratical. Of the additional cases not presented to the master, but included in the supplemental brief, 126 were found to show internal evidence of piracy.

The first three exhibits dealt with comparatively few of complainant's copyrighted pamphlets. This last exhibit, however, broadens the field of investigation, and shows most clearly how widespread was the unfair use made of complainant's work. There are cases where internal evidence indicates such unfair use of syllabi in volumes 28, 29, and 30 of the Pacific Reporter, in volumes 23 and 24 of the Atlantic Reporter, in volumes 29, 30, and 31 of the Northeastern Reporter, in volumes 14 and 15 of the Southeastern Reporter, in volumes 10 and 11 of the Southern Reporter, in volumes 18, 19, and 20 of the Southwestern Reporter, and in volumes 49, 50, 51, and 52 of the Northwestern Reporter. In volume 24, Atlantic Reporter, instances of piracy are found in 10 out of the 16 pamphlets comprising it, and 7 such instances in a single pamphlet; in volume 30, Pacific Reporter, like instances are found in 4 out of 9 pamphlets; in volume 29, Northeastern Reporter, in half of the pamphlets; in volume 30, of the same

series, in 11 out of 12 pamphlets, 8 instances being found in a single pamphlet; in volume 31, of the same series, in 7 out of 10 pamphlets. In a single pamphlet of volume 52, Northwestern Reporter, there are 7 instances. In volume 19, Southwestern Reporter, instances of piracy are found in 11 out of 13 pamphlets, and in one single pamphlet, of less than 100 pages, 14 such instances are found.

Complainant supplemented all this proof by testimony of an entirely different character. It appeared that defendant's syllabi were produced at a rate of speed which, it is contended, indicated that they were not prepared direct from the opinions, but with the aid of some earlier syllabus. Two of the defendant's editors, who were temporarily employed, testified that they averaged 8 to 10 cases a day; but the more experienced men, who were regularly employed, reached a much higher rate of speed. One testified that he averaged 20 to 30 cases a day; another that he had digested 30 to 40 cases per day of eight hours; and a third (who did most of the work) that he could (and did) digest over 24 patent cases, or 35 ordinary cases, making 75 to 100 digest paragraphs in a single day. Eight of complainant's editors testified to a rate of speed ranging from 4 to 7 cases a day; the two most experienced of them, engaged in similar work for 10 and 23 years, respectively, testify that the best they could do was 6 or 7 cases a day. Finally Mr. Sickles, for many years reporter of the New York court of appeals, an entirely independent witness, of 21 years' experience in such work, testified that he had not "been able to go over more than 7 cases in one day"; that his average was about 4; but that, if a man had a case with a headnote, and simply changed the form of the headnote, he did not know why he might not pass 20 or 30 cases a day. At the hearing before the master an offer was made on behalf of defendant that two, three, or four of its editors should, in the presence of the master, digest such number of cases of average length and style as he should select, under such conditions as would insure the fact that the opinions had not then been seen by the digester, and with the headnotes obliterated. This was objected to by complainant's counsel, and was not permitted. Whether or not such a test should be made was a matter largely within the discretion of the circuit court; certainly it was not error to exclude it. It contemplated only a few hours' work, to be done under circumstances most conducive to rapidity, it being fully realized by the experimenter that failure to come up to the measure he had set for himself in his oral testimony would probably lead the court to the conclusion that such testimony was untruthful. The rate of speed attained under such a strong stimulus would not fairly represent the rate at which he worked day in and day out, for weeks and months continuously, under no supervision, and under varying conditions, mental and physical. The principal editor of defendant further testified that since the headnotes have been covered up he has not discovered any change in the quantity of cases digested by defendant's editors in any given time, and that he himself now digests more cases a day than he used to, having latterly employed a stenographer. On the whole, we are not inclined to give as much weight to this argument from "rate of speed" as we thought at first it was entitled to. To

make it of any particular value, the character of the digest paragraphs would have to be carefully investigated,—a most laborious process. It is, of course, easy to conceive a man of experience in such work dictating "digest points" to 50 cases in a day; but, when written out, they might not be very useful finger posts to the propositions of law discussed and laid down in the opinion. Irrespective, however, of this proof as to rate of speed, it is apparent from the evidence already discussed that it indicated a general, systematic, and widespread unfair use of complainant's copyrighted work by defendant's editors, or some of them, coupled with an effort to disguise such use. A prima facie case was made out, which defendant was called upon to meet.

Defendant's reply to the case thus made was a denial by all its editors that they had made any use at all of complainant's syllabi in the preparation of their digest points. One or two of them admit that, after their own work was done, they may, from curiosity, have looked at complainant's syllabi; but the whole eight of them positively assert, each for himself, that he obeyed his instructions, and "has in no case used any of the syllabi, headnotes, or digest paragraphs published by plaintiff, * * * but has in each and every instance prepared and composed all paragraphs and propositions directly from the opinion which he digested." As indicated above, there are so many paragraphs in defendant's publication where the internal evidence of piracy is convincing that a mere general denial by the writer of them that he made any use of the copyrighted syllabi would have no weight. It is, of course, conceivable that some of defendant's editors carefully followed their instructions to work independently of syllabi or footnotes, while others did not. Therefore, if the authorship of the manifestly offending paragraphs were shown, the statements of those who wrote the other paragraphs might be sufficient to rebut any presumption arising from mere verbal identities in their work. The record shows quite clearly that the defendant could have shown what work each of its editors did, had it chosen to do so. In the early stages of the case, when motion was made for preliminary injunction, the editor in chief was able to make an affidavit stating the precise number of cases digested by each one of three of the editors whose answering affidavits were temporarily delayed. Another editor swears that he "digested 563 cases * * * of which 434 were digested from advance sheets of [complainant's] Reporters." Another one had no apparent difficulty in picking out from the schedule in evidence cases digested by him, nor in indicating some of the pamphlets from which he digested. At the close of the testimony complainant's counsel asked defendant's counsel to furnish a list showing by whom each one of the pamphlet numbers of the complainant's Reporters referred to in the bill of complaint was digested. To this defendant's counsel objected that it would "involve a very large amount of labor," and no such list, either complete or partial, has ever been presented. As was indicated above, if this failure to discriminate should leave the denial of unfair use by each separate witness handicapped by the manifestly piratical paragraphs, which, for aught that appears, are his own production, defendant cannot com-

plain, since it has failed to disclose which of its editors it was who left such convincing evidence of piracy apparent on the face of his work.

It becomes necessary next to examine the testimony, in order to see what discrimination, if any, can be made on the proof as it stands between the evidence of the different editors, in order to ascertain what weight should be given to their respective denials. It will be remembered that defendant's digest covers 19,000 cases. The circuit court found that about 28 per cent. were digested from sources other than complainant's reporters. Although we are not satisfied that so high a percentage is warranted by the proof, we may accept it for the purposes of this appeal. That would leave 70 per cent. of the whole number or 13,300 cases digested from complainant's copyrighted pamphlets. Defendant's principal editor, Herrick, testified that he digested 10,000 cases in all. This would include 7,000 cases from complainant's pamphlets; and, indeed, the witness testified that the proportion of his work which consisted in digesting cases from the Reporter was 70 to 75 per cent. He examined the list of alleged infringing paragraphs submitted to the master, and testified that it contained only seven which he had prepared, and he pointed them out. The schedule annexed to the master's report shows that as to six of these the master found that there was no internal evidence of piracy, and the independent examination by this court gave the same result. As to the seventh (30 Pac. 20) the master found infringement, and the court's examination confirmed his finding, but the sole internal evidence of piracy is identity of verbiage. Such evidence would be very persuasive were the paragraph one of many, all of which show verbatim reproductions of complainant's syllabi; but when the paragraph is considered by itself, or rather with the other six, as it must be when testing Mr. Herrick's testimony, mere verbal identity in a single instance, without the reproduction of any errors, must be wholly overborne by the positive testimony of the writer that his work was original. Among the additional cases on the supplemental brief there is found another case, digested by the same editor (51 N. W. 363), but, although it displays suggestive verbal identities, it contains no errors. Upon the proof, then, as it now stands, there seems no reason why the evidence of Mr. Herrick should be discredited. As to the 7,000 cases, therefore, which he digested from the copyrighted pamphlets, complainant's prima facie case is sufficiently rebutted.

As to the other seven editors, however, the situation is different. The first of them to give evidence testified that he presumed he digested somewhere near 1,000 cases from complainant's Reporters; that he only found 3 cases digested by him in complainant's list of alleged infringing paragraphs, and he identifies those 3. But it appears that he only examined "somewhere in the neighborhood of 200" of the paragraphs on the list before the master. For aught that appears, the most convincing instances of piracy found among the remaining 348 paragraphs may have been his work. The next witness could not tell how many cases he digested, but the principal editor (Herrick) testified that one-quarter of the whole was

done by him. He said that he had looked over a portion only of complainant's list of alleged infringements, and "found some to be work which he did"; but he does not indicate which they are. Other evidence shows that to this editor are attributable items 4 and 7 in note No. 3, *infra*. The third editor to testify said that he digested "less than 1,000 cases" in all, which would include about 700 cases from the copyrighted pamphlets, and that he found that 21 paragraphs on the list of alleged infringements were his work; but he does not identify those 21 paragraphs, nor is there any evidence to show which they are. The next testified that he digested 563 cases, of which 434 were digested from advance sheets of complainant's publications. He did not examine the list of alleged infringements, and, of course, does not say whether or not it includes any of his work. Other evidence indicates that item 5 in note No. 3 is to be credited to him. The next witness (Farnham) digested less than 400 cases, and, when asked if any of his paragraphs were on the list of alleged infringements replied, "None that I know of." While this is not very positive testimony, we may give it the benefit of the doubt, and group his 400 cases with Herrick's 7,000; but there is nothing to identify them. The next witness testified that he had digested 998 cases, and found only 5 paragraphs which he had prepared on complainant's list; but there is no evidence to identify those 5 paragraphs. The seventh associate editor testified that he digested from 600 to 800 cases; all, so far as he remembers, from complainant's pamphlets. He had not seen the list, and did not undertake to say whether or not it contained any of his work. Other evidence attributes to him five instances where the master and the court both find piracy, and among them are items 8, 9, and 10 in note No. 3.

As indicated above, the mere general denial of any use of complainant's syllabi, where the deniers are themselves the authors of paragraphs which are manifestly piratical, is not sufficiently persuasive to rebut the *prima facie* case made out by the complainant. The situation of the case, then, is as follows: Nearly 6,000 cases published in complainant's pamphlets, with syllabi and footnotes protected by copyright, were digested by persons in the employ of defendant, who repeatedly and systematically made an unfair use of the copyrighted work, in order to save themselves the time and labor of original investigation. These unfair users endeavored, so far as practicable, to conceal the fact that such unfair use had been made; sometimes successfully, sometimes not; and in consequence it is not practicable now to determine, without evidence which they do not offer, in which cases an unfair use had been successfully concealed and in which no unfair use was in fact made. In such a condition of affairs, where by the misconduct of defendant's employes a part of complainant's copyrighted work has been appropriated by defendant, and so mingled with original matter contained in its publication that no one except its own employes who did the wrong can segregate the pirated from the original matter, and they do not make such segregation, the whole work, or so much of it as is tainted by the workmanship of the unfair users, should be en-

joined and accounted for. In the case at bar, therefore, the decree of the circuit court is reversed, with costs, and the case remitted to the circuit court, with instructions to decree in favor of the complainant for an injunction against defendant's Digest for 1892, except so much thereof as contains paragraphs digested from the advance sheets of the United States supreme court, and from the English, Canadian, and other reports referred to in the first part of this opinion, and paragraphs taken from syllabi prepared by the court,—with the privilege, however, to defendant, if it be so advised, to show by competent proof to the court or master which paragraphs in said digest were prepared by its editors Herrick and Farnham; with the further privilege of moving on such proof to except such paragraphs from the operation of the injunction. But, if defendant should avail of this privilege, the case shall then be reopened sufficiently to allow complainant, if it be so advised, to adduce additional proofs tending to show any unfair use of complainant's copyrighted work by said two editors, or either of them. The circuit court is further instructed to decree in favor of complainant for a further accounting in accordance with the conclusions hereinbefore expressed.

APPENDIX NOTES.

NOTE NO. 1.

Triple-column Exhibit A, put in evidence by complainant, contains the syllabi from each case contained in pamphlet 12 of volume 29, Pacific Reporter, covering pages 849-941, except four cases where the syllabi were prepared by the court. Arranged in parallel columns are the corresponding paragraphs from defendant's digest. A third column contains syllabi of the same cases so far as they had been published in the official reports at the time the exhibit was put in evidence. The official reporter presumably worked from the original opinions, records, briefs, etc., without seeing complainant's books or pamphlets. The differences between complainant's syllabi and those in the official reports are most striking. A comparison of complainant's points with those in defendant's publication gives the following results, every case (except the four where syllabi are by the court) being separately considered.

1. *Rimmer v. Blasingame*, 29 Pac. 857, presents no indication of borrowing from complainant's syllabus.
2. *Yost v. Commercial Bank of Santa Ana*, 29 Pac. 858.

Complainant's syllabus states that the court held that a certain certificate to a chattel mortgage was sufficiently signed, "W. K. J., Secretary," where the body of the certificate recited that it [the mortgage] was made to "W. K. J., secretary of * * * the mortgagee in said mortgage named." The opinion nowhere suggests that the certificate recites that the mortgage was made to "W. K. J., secretary." It was in fact made to the bank. The same syllabus begins a second point with the statement, "Where a note and mortgage are pleaded and set out in one paragraph of the answer," etc. Reference to the opinion shows that "paragraph" is a mistake for "defense."

Both of these mistakes appear in defendant's syllabus.

3. *California Southern Hotel v. Callender*, 29 Pac. 859.

Action to recover balance due on a subscription to stock. Query whether it was necessary, in order to prove ownership of shares, to show that a stock certificate had been issued. The court held not, for the reason, as stated in the

opinion, that "the company was not bound to issue certificate until" subscription is fully paid. Complainant states this, in an original and somewhat awkwardly expressed phrase, thus: "it [the certificate] *not being due* until," etc.

Defendant's point uses this same form of expression: "as it [the certificate] *is not due* until," etc.

4. *Wilson v. California Central R. Co.*, 29 Pac. 861.

The court held that a failure of a common carrier to deliver the goods carried on demand, *even after the transit has ceased* and the goods have been stored at place of consignment, is a breach of the carrier's original contract. Complainant's syllabus wholly omitted the statement that the transit had ceased.

Defendant's point, which is a *verbatim* reproduction of complainant's, omits the same statement.

The opinion elsewhere discussed the "negligence or fault" of the carrier, using that phrase repeatedly with the words in the sequence given. In complainant's point covering that part of the opinion the same phrase, "negligence or fault," is used.

In defendant's corresponding point, which contains the substance of complainant's point, with its structure inverted, the phrase used is "fault or negligence." There is no apparent reason why a digester direct from the opinion should thus transpose the words found therein, but, if it were sought to change the language of the point, just such a transposition would be natural.

5. *First Nat. Bank of San Diego v. Falkenhan*, 29 Pac. 866.

Complainant's second point is found verbatim in defendant's digest. It begins with the words, "The expression 'waiver of protest,' when applied," etc. It would have been equally natural to begin, "The phrase 'waiver of protest,'" etc., or "the words 'waiver,'" etc., or "A waiver to protest, when applied." That defendant's editor in this particular instance happens to use the same phrase as complainant does not, of course, prove that he followed the original syllabus, nor does the fact that the rest of the point is verbatim, for the words found in it are the ordinary stock terms of the law of negotiable paper. But, if like identity of language is found occurring repeatedly, it becomes a circumstance proper to be considered in determining the question at issue, and the more frequent the identities the greater the weight to be given to this circumstance. When two men undertake to digest each a hundred opinions, we should not be surprised to find that in one or two or three instances they had each epitomized an opinion in a half dozen lines identical in verbiage. But, if we found twenty or thirty or forty such instances, we should be likely to think it somewhat singular, and, if we found sixty or seventy such instances, would probably incline to the opinion that something else besides chance had been at work.

6. *Fritts v. Camp*, 29 Pac. 867.

The prominent point in this case, with the discussion of which the opinion begins, and which occupies nearly three-fourths of the opinion, is whether the suit (to enjoin defendants from dumping mining debris, etc.) was really an action to quiet title to real estate. Having held that it was, the court, in a dozen lines, refers to the state constitution, which requires all such actions to be brought in the county where the land was situated, and concludes with a direction for dismissal, as the court has no jurisdiction.

Complainant's point gives the provision of the state constitution. So does defendant's, but neither of them have a word to say about the real point in the case. It is, of course, possible that both editors committed the same oversight; but certainly it is highly improbable, where the oversight was failure to appreciate what three-fourths of the opinion was concerned with.

7. *Mastick v. Superior Court*, 29 Pac. 869.

Except for the omission of a statement of the reason of the decision, defendant's first point is almost a verbatim copy of complainant's, the main clauses being transposed. The question in the case was as to the right of the guardian of

a lunatic to recover a will of his ward from the possession of a person to whom she had delivered it. The opinion reads, "Some time after such delivery, Mrs. L. became incompetent." The time when she was *declared insane* was not at all material, and the court does not refer to it; but complainant, in its point, instead of using the accurate phrase, "before she became incompetent," uses the inexact one, "before she was *declared insane*."

And defendant's point contains the *same* inexact phrase, "before she was *declared insane*."

7½. *Widber v. Superior Court of San Joaquin*, 29 Pac. 870.

The first point (except for omission of language of a statute) and the second point in both works are verbatim copies, but the second point is also a verbatim copy from the opinion.

8. *Murray v. Colgan*, 29 Pac. 871.

Whatever similarity there may be is not sufficiently suggestive to be considered.

9. *Los Angeles P. & G. R. Co. v. Rumpff*, 29 Pac. 872.

The opinion states that the judge below found that a certain fence would cost \$100. Both complainant's and defendant's points state this as a finding "that it would cost only \$100." Inasmuch as the evidence showed clearly that it would cost more than \$100, it is not surprising that both editors should have inserted the word "only"; but both of them wholly omit another point raised and decided in the opinion.

10. *Cowden v. Pacific Coast S. S. Co.*, 29 Pac. 873.

Defendant's point (of four lines) is a verbatim copy of complainant's.

11. *San Bernardino Ry. Co. v. Haven*, 29 Pac. 875.

Complainant's second point reads: "Where the land through which a right of way is sought to be taken is adapted to cultivation, the *increased cost of cultivating* it caused by building the road may be considered in assessing damages." Defendant's reads: "The *increased cost of cultivating* land through which a right of way is sought to be taken which is adapted to cultivation, caused by building the road, may be considered in assessing damages." It is difficult to see how any one digesting unhampered from the opinion could have produced a statement so involved and awkward as this. It is apparently a rearrangement of the words of complainant's point in a different sequence. And, strange to say, both editors are again inexact. The "increased cost" was not of *cultivating* but of *irrigating* uncultivated land so as to bring it under cultivation.

12. *McCreery v. Wells*, 29 Pac. 877.

The first eight lines of complainant's first point are found verbatim in defendant's.

13. *Long v. Citizens' Bank*, 29 Pac. 878.

Nearly all of complainant's first point is found verbatim in defendant's. It appears from the opinion that action was brought on a certificate of deposit issued before incorporation, and signed, as cashier, by the person who afterwards became cashier. The defendants were such cashier and the *promoters* of the bank. The court held that neither the bank nor the promoters were liable, but only the person who signed as cashier. It does not appear from the opinion that any of the defendants except the cashier were *officers* of the bank. The complainant's second point, however, states that it was held that "the promoters and *subsequent officers*," other than the cashier, were not liable; and defendant's second point makes the same statement, using the same phrase, "the promoters and *subsequent officers*."

14. *Ellis v. Porter*, 29 Pac. 879.

Except for the omission of its last four lines, complainant's point is found almost verbatim in defendant's digest.

15. *Taylor v. Buford*, 29 Pac. 880.

Complainant's first point is found verbatim (save for the omission of two unessential words) in defendant's. Defendant's second point is verbatim from the opinion.

16. *Godbe Pitts Drug Co. v. Allen*, 29 Pac. 881.

Complainant's first point is reproduced verbatim.

17. *Bonnie v. Earll*, 29 Pac. 882.

A point containing nine lines is reproduced verbatim by defendant, the same words (save in the substitution of "such testimony" for "it") in precisely the same sequence. Moreover, the court, in referring to certain testimony, uses the expression, there is "no evidence that" the witness was actuated by ill will. This is paraphrased in both complainant's and defendant's point: there is "*nothing to show that.*"

18. *Hershfield v. Rocky Mountain Bell Tel. Co.*, 29 Pac. 883.

Complainant's first point is reproduced verbatim in defendant's first point. The opinion quotes from a city charter as follows: "City council shall have power to license, tax, and regulate * * * street railways, * * * telephone companies, gas companies, and all *other branches* of business," etc. Complainant's first point begins: "The grant in a city charter authorizing the council 'to license, tax, and regulate' telephone companies 'and all *their branches* of business,'" etc. Defendant reproduces the error.

19. *McBee v. McBee*, 29 Pac. 887.

A suit for divorce on the ground of habitual drunkenness. Defendant's point is much shorter than complainant's, but contains some expressions characteristic of complainant's and not found in the opinion. The court, epitomizing the evidence, says that defendant "*only drank when he happened to come to town, * * * and then not always to excess.*" Complainant paraphrases thus, "his drinking was *mostly* when he went to town, * * * and then *rarely* to excess," and this clause defendant reproduces verbatim.

20. *Rader v. Barr*, 29 Pac. 889.

Complainant's point reads: "An appeal will not lie from a judgment entered in a justice's court against defendant by consent." Defendant's reads: "An appeal will not lie from a judgment entered by consent against defendant in a justice's court." Both contain unnecessary words; a perusal of the opinion shows that the circumstance that judgment was *in a justice's court* was wholly immaterial.

21. *Sears v. Martin*, 29 Pac. 890.

The similarities are not especially suggestive.

22. *House v. Fowle*, 29 Pac. 890.

Complainant's first two points are reproduced verbatim by defendant. The same is true of the third, except that "deceased husband" appears instead of "decendent." The opinion and statement of facts (which is by the court) set forth that the widow "did not give any intimation that she intended" to claim dower; and again, "at no time gave any intimation that," etc. This is paraphrased in both complainant's and defendant's third point, "did not intimate her intention."

23. *Johnston v. Letson*, 29 Pac. 893.

Except for a statement of the provisions of a statute, defendant's point reproduces complainant's point verbatim.

24. Youree v. Territory, 29 Pac. 894.

There is great similarity between the first points of both parties. In the second point both editors have inserted an unnecessary word not found in the opinion. Inasmuch as one object of both is to make their points as brief as possible, this circumstance is suggestive. The language of the opinion is: "He [defendant] said he was arrested down there for robbing the government, and said *it cost* a good deal of money to get out of it." Both editors paraphrase the latter part of the sentence thus: "*it cost him* a good deal of money to get out of it."

25. Board of Commissioners v. Burns, 29 Pac. 895.

The opinion is a very long one, and there is no especially suggestive similarity between the points.

26. Bohm's Estate v. Hoffer, 29 Pac. 905.

This opinion is very short, and there is no suggestive similarity between the points.

27. Wyatt v. Larimer & W. Irr. Co., 29 Pac. 906.

Defendant's points are manifestly taken direct from the opinion.

28. Colorado Soap Co. v. Burns, 29 Pac. 915.

There is more difference than usual in the language used.

29. Jessup v. Whitehead, 29 Pac. 916.

The resemblances are not especially suggestive.

30. Goard v. Gunn, 29 Pac. 918.

The resemblances are not especially suggestive.

31. Bush v. Koll, 29 Pac. 919.

The opinion is 10 columns long. The two editors produced each but a single point, less than 10 lines long, identical in concept and structure, and nearly verbatim.

32. Smith v. People, 29 Pac. 924.

The opinion quotes a provision of statute that actions to determine interests in land "shall be tried in the county in which the *subject of the action* or some part thereof, is situated." Both editors give this "shall be tried in the county in which *the land* or some part thereof, is situated."

33. Wagner v. Law, 29 Pac. 927.

Motion to modify a judgment was denied, as the court says, "on the ground that the question upon which this court affirmed the decision of the superior court was raised for the first time in this court and was not suggested, raised, or argued in the superior court." Both editors paraphrase this, in identical language, thus: "On the ground that the *ruling* question was not raised in the court below."

34. Brown v. Winehill, 29 Pac. 927.

The question was as to propriety of allowing an item paid for stenographer's minutes, as part of the costs of appeal. Both editors use the expression, "on *reversal* of the judgment on appeal." A perusal of the opinion shows that the circumstance that judgment was *reversed* was immaterial.

35. Fransioli v. Brue, 29 Pac. 928.

Complainant's first point, except its first two lines, is reproduced verbatim; so is greater part of the second point. Referring to the admissibility of a certain written instrument, the opinion says: "There might have been *such*

conditions surrounding the making of the contract * * * as would have justified the admission of such writing in evidence, *even although, when construed alone*, it could only be interpreted as contended for by the appellant." In paraphrasing this, both editors use the same expression, "*even if, looking at the instrument alone*," it would, etc.

36. Tustin v. McFarland, 29 Pac. 929.

The resemblances are not especially suggestive.

37. Lacy v. North Olympia Land Co., 29 Pac. 929.

The resemblances are not especially suggestive.

38. Scoland v. Scoland, 29 Pac. 930.

The opinion says, "Motion for a nonsuit was made *at the close of plaintiff's testimony*." In his fourth point, complainant's editor states that the motion to dismiss was made "*after the close of plaintiff's testimony*." A change of no particular importance, but defendant's fourth point, which reproduces complainant's verbatim, shows the same change

39. White v. Johnson, 29 Pac. 932.

There are no suggestive resemblances in this case. Defendant's points seem to be taken direct from the opinion.

40. Demattos v. New Whatcom, 29 Pac. 933.

There is nothing in defendant's points to indicate any resort to complainant's.

41. Tacoma Lumber Co. v. Wolff, 29 Pac. 936.

Defendant's point is an inversion of complainant's, the same words being used.

42. Chapin v. Bokee, 29 Pac. 936.

Defendant's points seem to be taken direct from the opinion.

43. Stimson Mill Co. v. Board of Harbor, 29 Pac. 938.

Here again both editors, although it is their object to condense, have lugged in an unnecessary word; and that, too, in a sentence which purports to give the provision of a clause of the state constitution. The opinion shows that the question was "as to the jurisdiction of the board to establish harbor lines in navigable waters *in front of a town*, as distinguished from a city" under article 15 of the constitution. No other phrase than "navigable waters in front of" is used in the opinion. But complainant's point states that the constitution provides for "commissioners to establish harbor lines in navigable waters *lying in front of cities*." And defendant uses the same phrase, verbatim.

44. State v. Womack, 29 Pac. 939.

Complainant's first point reads: "An indictment for conspiring to bribe a member of the board of education charged that defendant did 'then and there conspire together to tempt, seduce, bribe, and corrupt said' member, 'by then and there offering to pay' him \$5,000, 'all of which' defendants 'did and performed to unlawfully and corruptly induce, influence, and bribe said' member. *Held*, that * * * the indictment charged the commission of a crime." The indictment, as set forth in the opinion, used the name of the person bribed wherever the words "said member" or "him" are used in the above point.

Defendant's point reads:

"An indictment for an attempt to bribe an executive officer charging that the defendants did 'then and there conspire together to tempt, seduce, bribe and corrupt' said member 'by then and there offering to pay' him \$5,000, 'all of which defendants did and performed to unlawfully and corruptly induce,

influence, and bribe said' member,—sufficiently charges that the money was offered."

Neither the word "officer" nor the word "member" is used in the indictment.

The above seems to sustain complainant's contention as to this point, namely, that defendant's editor, undertaking to paraphrase complainant's point, found, by reference to the bribery statute, which is quoted in the opinion, a designation convenient to use in such paraphrase, viz. "executive officer"; that either because his work was interrupted, or from some other cause, he neglected to stick to this new designation, and has incautiously returned to the complainant's word "member." Thus, the very effort to conceal a resort to complainant's point has made that fact more manifest. It would certainly seem that a person who consulted the opinion alone would have been consistent, and used the same designation throughout the point.

NOTE NO. 2.

The second so-called Triple Column Exhibit B includes all the cases consecutively reported in volume 31 of the Northeastern Reporter, published by the plaintiffs, from page 385 to page 655. It covers Nos. 5, 6, and 7 of the pamphlets in which this Reporter is first issued, and which were used by defendant's editors. Whether the work on all these cases was done by a single one of defendant's editors or not is uncertain. Every one of the cases in this exhibit (except five or six in which the headnote is by the court) have been examined, and the "points" published in defendant's digest compared with the opinion and headnotes first published in the Northeastern Reporter, the book used being the bound volume in the law library. It would unnecessarily expand this note to refer to every such case. Generally speaking, there is about the same proportion of cases where complainant's points are reproduced verbatim in defendant's digest, and about the same proportion of changes in structure of the sentences. Those cases which show something more than mere identity of language are hereinafter noted.

1. McCarthy v. Foster, 31 N. E. 385.

Action against lessor by lessee's employé for injuries caused by the fall of an elevator. Defense, contributory negligence. The complainant's point states that notices had been posted prohibiting all persons "from passing up and down in the elevator"; also, that plaintiff "entered and started it." In both particulars defendant's point conforms closely. The opinion, however, shows that it was not the cage or box elevator into which one enters, but a mere moving platform. The notices forbade passing up or down upon it, and the court, in an opinion one column long, uses the phrase "upon the elevator" ten times. Neither complainant's nor defendant's points refer at all to the equally important point also made in the opinion, that it made no difference, *as against the lessor*, that, owing to the piling of merchandise in the shaft, plaintiff, whose duty it was to start it, could not start it except by going upon it to handle certain ropes.

2. In re Smith, 31 N. E. 387.

Complainant's point contains 24 lines. It indicates that the point decided was that certain stocks and securities, held in trust for a married woman under the will of her father,—such married woman being dead, leaving no issue nor father nor mother, nor nephews nor nieces,—would go to her sole surviving brother, except \$5,000 to her husband, under a statute cited. Defendant's point resembles complainant's very closely, although it is shorter, words and phrases being eliminated. It states the point as does complainant's.

The opinion is quite short,—only one column,—and it states the real point at issue so plainly that it is difficult to see how any one could mistake it. The married woman, daughter of the first decedent, had made a will leaving all her property to her husband; and the court held that she had no power of disposition by her own will over the personal property into which, in conformity with the provisions of his will, the original testator's real estate had been converted. Neither complainant's nor defendant's point gives the slightest in-

timation that the daughter had herself made a will, nor what was the real question decided.

3. *Traders' Ins. Co. v. Race*, 31 N. E. 392.

Complainant's point reads: "A court of equity will not hold a policy void because the premises have become vacant, contrary to a condition in the policy, when the evidence wholly fails to show that *the building would not have been burned precisely as it was if it had been occupied.*" Except for the omission of the word "wholly," defendant reproduces this point verbatim. It is suggestive that both editors should have used the precise form of expression italicized above when paraphrasing the opinion, which says that appellants must prove, not merely that the premises were vacant at the time, "but that such vacancy or unoccupancy *contributed in some degree to the causing of that fire, or the prevention of its extinguishment.*"

4. *Chicago & A. R. R. v. Fisher*, 31 N. E. 406.

Complainant's point reads: "In an action against a railroad company for injuries to a passenger riding on the platform of a car, an instruction that the plaintiff as a passenger was not required to exercise extraordinary care, or *manifest the highest degree of prudence*, is not obnoxious to the objection that it relieves the plaintiff of the duty of exercising care *proportioned to his extra-hazardous position.*" Defendant's point is a verbatim reproduction, except that "proportioned" is changed to "proportional," and the words "to avoid injury" are inserted. The reporter gives a brief statement of facts, not by the court, which is covered by copyright, and which contains the text of the instruction. Evidently defendant's editor took his statement of the instruction from one or other of the copyrighted sources, for the opinion only paraphrases the instruction, and gives it thus: " * * he was not required by law to *exercise extraordinary or the highest degree of care;*" there is nothing in the opinion to suggest the words "manifest" or "prudence," which are found in the points of both sides. Moreover, complainant's editor was inexact in the other italicized passage, which defendant evidently copied, for the phrase the court used was, "care *proportioned to the apparent danger of the situation.*"

5. *Wisconsin Central R. Co. v. Ross*, 31 N. E. 412.

Where the opinion says it is not pretended the trustees were appointed by or "acting under any order of court," complainant's editor writes, "acting under the order of any court"; and defendant's editor does likewise.

6. *Matson v. Alley*, 31 N. E. 419.

Complainant's point reads: "A judgment note of a corporation, executed by its president and secretary, is valid as a note *where no attempt is made to confess judgment on it.*" Defendant's point is nearly verbatim, preserving the italicized clause. But such clause is entirely superfluous, for the opinion expressly says that it is unnecessary to consider that feature of the notes, namely, the power of attorney to confess judgment.

7. *Chicago Attachment Co. v. Davis S. M. Co.*, 31 N. E. 438.

The opinion contains a quotation from the Illinois statute of frauds containing this clause, "unless such contract or some *memorandum or note* thereof, shall be in writing." Undertaking to give the same quotation in his first point, complainant's editor writes, "some *note or memorandum,*" and defendant's editor makes the very same transposition.

8. *City of Buffalo v. Chadeayne*, 31 N. E. 443.

The question in the case was as to defendant's right to erect wooden buildings within certain limits, where license or permission had been given by the common council. Complainant's point contains the expression, "buildings in existence and erected *by* such permission." An inexact and awkward form of expression, the more natural preposition to use being "with" or "under"; but defendant's editor uses the identical expression in his point. The opinion at least a dozen times speak of the building as erected "*with the permission.*"

9. Cudahy v. Rhinehardt, 31 N. E. 444.

The opinion states as one of the grounds of decision that counsel on the argument was advised "that it would be presumed that the reversal was on the law only." There was no reason why this clause should be paraphrased when incorporated in the point, unless it might be condensed thereby. Complainant's editor, however, without effecting any condensation, paraphrases it thus: "that the reversal would be presumed to be on the law only." And defendant's editor paraphrases it in precisely the same words.

10. Read v. Patterson, 31 N. E. 445.

An important question in the case was decided by the circumstance that testator died and his will was probated, before section 1848 of the Code of Civil Procedure "*went into effect*," or "*took effect*," which is the language of the opinion. Complainant's editor says, "*before the Code was enacted*," which is quite a different thing, and defendant's point is inexact in precisely the same way.

11. Campbell v. Forgy, 31 N. E. 454.

The opinion quotes a statute which makes it the duty of the viewers "*to locate and mark* the highway on the best ground." Complainant's point quotes this, "*lay out and mark*," and defendant does likewise.

12. Clark v. Clark, 31 N. E. 461.

The opinion states that under the provisions of a certain statute "the husband, at the death of the wife, takes *one-third in fee* of the land," etc. Complainant's editor paraphrases this, "*one-third of the fee*," and defendant's editor does likewise.

13. Balt. & O. R. R. v. Brant, 31 N. E. 464.

The opinion reads, "Where the person or individual served resides within his county, or, like *conductors on railroads*, is constantly passing through it, the presumption," etc. Complainant got into his point the expression "*conductors of railroads*," which is not only an inexact quotation from the opinion, but incorrect as well, since the persons referred to certainly are not conductors "of railroads." Defendant's point has the very same inaccurate statement.

14. Board of Commissioners v. Newlin, 31 N. E. 465.

The opinion of the court reads: "The court [below] did right in permitting appellees to introduce in evidence the *certificate and estimates* of the engineer." Complainant's editor transposes the italicized words into "*estimates and certificate*," and, where the opinion says "the contract *provided for*" acceptance by the engineer, the headnote reads, "the contract *required*" such acceptance. Defendant's editor makes precisely the same changes.

15. Bright v. Bright, 31 N. E. 470.

The language in the points is very similar. Complainant's point contains the statement that defendant "furnished his son the money with which to purchase the land." The opinion does not warrant such a statement; but defendant's point contains the same statement, in identically the same words.

16. Bier v. Jeffersonville, etc., R. Co., 31 N. E. 471.

Both complainant's and defendant's points omit any reference to the holding of the opinion that complaint was bad on demurrer because it contained no averment that appellant was himself without fault. This was made quite prominent in the opinion, being discussed in a separate paragraph.

17. Weigold v. Prass, 31 N. E. 472.

The opinion says: "When defendant appears and joins issue under which he can make a defense, there is no necessity of the plaintiff making proof of de-

defendant's possession. Such proof is dispensed with by * * * section 1056." Complainant's point gives as the language of the statute, "defendant makes defense." The defendant quotes the statute in the same language.

18. Cross v. State, 31 N. E. 473.

The opinion reads, "The objection that," etc. "* * * is * * * of a technical character, for which we are forbidden by statute to *reverse a judgment*."

Defendant's point is a verbatim reproduction of complainant's, and both begin, "It is no ground for a *new trial*," etc.

19. Abell v. Prairie City Township, 31 N. E. 477.

The opinion reads, "Section 7 requires the claimant to present a written report to the township trustee, showing under oath" the number of sheep killed, etc.

Complainant's editor paraphrases thus, "Provides that the claimant must make a report in writing," etc. Defendant uses precisely the same paraphrase, omitting the word "must."

20. Hollis v. Weston, 31 N. E. 483.

Defendant's point is practically a verbatim reproduction of complainant's, and both contain the words "for another," which are superfluous, and not found in the opinion.

21. People v. Stone, 31 N. E. 502.

The opinion begins, "This was an application for a judgment against certain lands * * * for a delinquent *assessment*," etc.

Complainant's and defendant's editors both state that the judgment was for "delinquent *taxes*."

22. Joseph v. People's Savings Bank, 31 N. E. 524.

The opinion reads, "Plaintiff was entitled to judgment on the note, although it failed to establish *its right to a foreclosure*."

Complainant's editor paraphrases thus, "to establish his rights under such mortgage"; and defendant's editor uses the same paraphrase.

23. Frazier v. Myer, 31 N. E. 536.

A question as to the right to maintain gates. The following quotations are found in the opinion: "—allegations that * * * gates had been *placed* across the way at each terminus thereof"; "—the *facts* pleaded show that the way is to be *closed* by gates to be opened only for the purpose," etc.; "—private way *protected* by gates"; "—a way *closed* by gates conveniently arranged for opening when necessary." There is no intimation anywhere in the opinion that these were swinging gates. Complainant's point reads "—the way with gates *swung* at either end," and defendant's point also uses the words "gates *swung* at either end."

24. Bement v. Claybrook, 31 N. E. 556.

Question as to a contract for the sale of standing timber, and evidence admissible to show understanding of the parties as to the meaning of the words "large trees," such evidence being found in a description of the character of trees already removed under the contract. Both editors omit the important circumstance that the trees were not only cut and removed, but were also paid for and payment accepted, thus showing a meeting of the minds of the parties.

25. Brown v. Trexler, 31 N. E. 572.

Complainant's point contains the words "defects in *the record* and assignment of errors," but no question as to the record was raised in the case. Defendant's point, however, contains the same words.

26. Russell v. Wellington, 31 N. E. 630.

The opinion uses the natural expression, "election may be held," and sometimes, "election may be had."

Complainant's point follows the opinion, using the phrase, "the election may be held." The point consists of eight lines, and defendant's editor has followed it closely in structure and language. He seems, however, to have felt the necessity for changing some of the words, and has done so, with the result that he uses the expression, "the election may be *made*."

27. Pye v. Faxon, 31 N. E. 640.

The opinion reads, "Damages sustained by the plaintiff in consequence of some of her lodgers *leaving her house*."

Complainant uses the extremely awkward paraphrase, "relinquishing their rooms"; and defendant's editor employs the same phrase.

28. Commonwealth v. Sullivan, 31 N. E. 647.

Complainant's point reads: "On a trial for illegally keeping liquor for sale, evidence that while defendant was *standing behind the bar* on his premises some one *in an outer room shouted*, apparently in his hearing, that the officers were coming, and that then defendant seized a bottle of whiskey, took it into the cellar, and destroyed it, is admissible in connection with other evidence showing defendant's guilt."

Defendant's point reads: "On a trial for illegally keeping intoxicating liquors for sale, evidence that while defendant *was behind his bar* some one *in an outer room shouted*, apparently in his hearing, that the officers were coming, and that defendant then seized a bottle of whisky, took it out of the room and destroyed it, is admissible in connection with other evidence tending to show defendant's guilt."

Neither complainant's nor defendant's editor got these dramatic incidents of standing "behind the bar" and of "some one shouting from another room" from the opinion; for all the opinion says on that point is, "While defendant is not bound by what was said by a stranger found on the premises, a remark made, apparently in his hearing, in reference to the approach of the officers, and his conduct in immediately grabbing a bottle of whisky and carrying it from the barroom and breaking it, may be considered," etc.

NOTE NO. 3.

Double Column Exhibit C and OC (two volumes), volume 19, Southwestern Reporter. A few illustrative cases are here given:

1. Woodruff v. Eureka Springs, 19 S. W. 15.

Complainant's syllabus reads: "Land which adjoins a city, and has little value for *rural uses*, but has great value for prospective *urban purposes*, may be properly annexed to such city." Defendant's point adopts the original expressions, "rural purposes" and "urban purposes," where the opinion in several places reads "country uses," "city uses," but does not contain either of the words "rural" or "urban."

2. House v. Phelan, 19 S. W. 140.

Complainant's point states the substance of a section of the constitution which is nowhere found in the opinion, but which is found in a copyrighted footnote of the defendant. Defendant copies this statement, and both editors err in stating the point decided by the court.

3. O'Connor v. Smith, 19 S. W. 168.

Complainant's point refers to a delay caused by the company in failing to have a *survey* made for work, defendant paraphrasing this as "a delay caused by the failure of the company's engineer to have the necessary *surveys* made." There is nothing in the opinion about any surveys. The delayed matter is three times designated as "cross-sectioning."

4. Richardson v. Pavell, 19 S. W. 262.

Both editors, in stating the ground upon which the court found an estoppel, omit the statement that the deed of defendant through which plaintiff claimed title was one "with a general covenant of warranty," which was the sole ground of the decision.

5. McFadden v. Schill, 19 S. W. 368.

Both editors omit the material statement that one of the two defendants sued in trespass was not only to "do the grading," but also "procure right of way."

6. Hudgins v. Leggett, 19 S. W. 387.

Both editors state that the appeal was from an order. It was, in fact, from a decree.

7. Gunter v. City of Fayetteville, 19 S. W. 577.

Complainant's point reads: "No part of a specified territory can be annexed to a city without a public notice of the hearing, as prescribed, etc., even though a majority of the property holders of such territory voluntarily appear at the hearing and *consent* to the annexation." Defendant's point paraphrases: "Although a majority of the property holders in the territory to be annexed appear on the date fixed for a hearing and *consent* to the annexation."

It appears from the opinion that the fact was that a majority of the property holders appeared and "*contested*" the application for the annexation.

8. Bowman v. Branson, 19 S. W. 634.

Both editors fall into a common error in stating that certain notes would "not be due at the *time of the trial*," where the opinion reads that the notes "would not have become due when *the suit was instituted*."

9. State v. Ulrich, 19 S. W. 656.

Complainant's point reads, "On a trial for bigamy, the person whom the indictment charges to be defendant's lawful wife is incompetent, *without defendant's consent*, to testify against him." Defendant's point is nearly verbatim, and copies the phrase "without his consent," although it appears from the opinion that it was not a matter of consent at all, but that the rule was one based upon public policy, and nowhere intimates that defendant's consent would have made the wife a competent witness.

10. Michon v. Ayalla, 19 S. W. 878.

Complainant's point reads: "A deed conveying the grantor's right, title, and interest to an undivided part of certain land conveys her entire interest in such land." The defendant's point reads: "The deed of all the grantor's right, title, and interest to an undivided half of a tract conveys the grantor's entire interest in the tract."

It is perhaps needless to say that no such absurd proposition is found in the opinion.

DADIRRIAN v. GULLIAN et al.

(Circuit Court, D. New Jersey. March 8, 1897.)

1. TRADE-MARKS—EFFECT OF INJUNCTION.

An injunction forbidding the members of a partnership, charged with infringing a trade-mark, from preparing, putting up, selling, or offering for sale the article in question under the trade-mark in question, makes it a contempt for them to do these acts, not only in their own behalf, but as agents or servants of others, who attempt to carry on the infringing business.

2. INJUNCTION—AGENTS AND SERVANTS OF DEFENDANTS.

An injunction forbidding the defendants and their "agents, servants," etc., from doing specified acts, binds the agents only while acting as such for the defendants, and not in their personal capacity after they have ceased to be defendants' agents or servants, or have become agents or servants of some one else.

Frederic H. Betts and Wm. B. Whitney, for complainant.

Louis C. Raegener, for Senekerim.

Samuel A. Besson, for Otto D. Heisenbittel.

Albert Gullian, pro se.

John J. Hoppin, for Eva and Reuben Gullian.

KIRKPATRICK, District Judge. This suit was brought for the infringement of the complainant's trade-mark "Matzoon," and was begun in June, 1894, against Mugerditch Gullian, Albert Gullian, and Otto Heisenbittel, doing business as M. Gullian & Co., in this district, and such proceedings were had that on October 11, 1895, a perpetual injunction was issued out of this court and duly served upon the said defendants. The writ was in the usual form, commanding the said defendants, their and every of their "attorneys, agents, clerks, and servants, to desist from preparing, putting up, selling, offering or advertising for sale, any medicinal beverage made from fermented milk or any similar article under the name of 'Matzoon.'" It appears that after the service of the above injunction the sale of fermented milk by the defendants under the name of "Matzoon" was discontinued, but for a while the same article was put upon the market as "Lebben." Various changes took place in the ownership of the business, so that in December, 1896, Senekerim Gullian, the son of Mugerditch, who it is alleged was at the time of the granting of the injunction in this suit an agent of M. Gullian & Co. in California, began the manufacture and sale of fermented milk under the prohibited name of "Matzoon." In this manufacture and sale it is alleged he was assisted and encouraged by Mugerditch Gullian, Albert Gullian, and Otto Heisenbittel, the defendants in the suit, as well as by Reuben Gullian, Lazarus Gullian, his brothers (who were also servants of M. Gullian & Co.), and by Taquhy, his wife, and Beatrice Gullian, his infant sister. The petition now filed asks that an attachment for contempt issue against all the persons above named for disobedience of the injunction order of October 11, 1895.

It will be observed that these persons may be separated into two distinct classes, viz. those who were parties to the suit, and those who were merely the servants, agents, or employés of the parties. There can be no question that those who were parties to the suit were not only bound by the injunction order to desist from preparing, putting up, selling, offering or advertising for sale, any medicinal beverage made from fermented milk under the name of "Matzoon," but also from in any way, as servants or agents of others, aiding, assisting, or encouraging them to do the forbidden acts. For failure to obey the court's order in either respect they render themselves liable to the penalties of contempt. *Stahl v. Ertel*, 62 Fed. 920. So that as to Mugerditch Gullian, Albert Gullian, and Otto Heisenbittel there is presented for the consideration of the court merely a question of fact,

—did they or either of them do the forbidden act, or aid, assist, or encourage another to do so?

1. As to Mugerditch Gullian. It appears from the verified petition and affidavit annexed, and it is not denied in the answering affidavit of Mugerditch Gullian, that he has aided, assisted, and encouraged Senekerim Gullian in the manufacture and preparation for sale of "Matzoon." He has assisted by packing in boxes bottles labeled "Matzoon," and in loading them when packed in a delivery wagon. These acts are in contravention of the order of the court, and for them he must be adjudged guilty of a contempt. Having made this conclusion upon the facts, it is unnecessary for the court to determine the questions raised as to his liability for the acts of his infant daughter Beatrice.

2. As to Albert Gullian. I am satisfied, after reading the affidavits annexed to the petition and that of Albert Gullian, that he, too, aided, assisted, and encouraged Senekerim Gullian in the sale of "Matzoon," and thereby violated the letter and spirit of the court's order. His duty as a defendant in the suit was clear, and his service, though, as he says, without compensation, in assisting to pack bottles, load them upon the wagon, driving the wagon about with the sign "Matzoon" painted upon its side, and so advertising the sale of the prohibited article, renders him guilty of disobedience to the court's order, and liable to punishment for contempt.

3. As to Otto Heisenbittel. The evidence presented by the petition and annexed affidavits, tending to show aid or assistance rendered by this defendant to Senekerim Gullian in the conduct of his business, is vague and uncertain. He is said to have called several times at the Gullian house, to have followed petitioner's witness upon the street, and to have accosted her, but the affidavits do not disclose any overt act. Coupled with his denial of all interest in the business of Senekerim, and his explanation of the cause of his visits to the Gullian family, the court is unable to conclude that he has in any way violated the order of the court. As to him the rule should be discharged.

I come now to the consideration of the case as against Senekerim Gullian, Reuben Gullian, and Lazarus Gullian, who were the servants or agents of M. Gullian & Co., the defendants in the suit. I am clearly of the opinion that the only persons who can be attached for contempt in disobeying an injunction order are the parties to the suit in which the order is granted, and those who, being their servants, agents, or employes, with knowledge of the injunction, aid and assist the defendants in disobeying its commands. The writ is directed specifically to the defendants in the suit, and then generally, without naming them, to their servants, agents, and employes. The object of this generalization is to prevent the defendants from doing by others that which the court has forbidden them to do personally; from accomplishing indirectly a result prohibited by the court. The full effect of the order is that the defendant shall not do the unlawful act himself, neither shall his agent, servant, or employe do it for him, nor shall the defendant do it as the agent, servant, or employe of another. *Potter v. Muller*, 1 Bond, 601, Fed. Cas. No. 11,333. There

is no restraint laid upon the agent, servant, or employé personally, but merely as the agent, servant, or employe of the enjoined defendant. *Slater v. Merritt*, 75 N. Y. 268; *Wellesley v. Mornington*, 11 Beav. 181. Notwithstanding the injunction and notice of it, he, upon ceasing to be the agent, servant, or employé of the defendant, is free to act for himself in the protection of his own rights and the prosecution of his own interests, even though it involve his doing the very thing prohibited his former master. *Mexican Ore Co. v. Mexican Guadalupe Mining Co.*, 47 Fed. 356. He may avoid obedience to a mandatory injunction by actually ceasing to be an employé of the company (*Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 743); and he may enter the service of another master a stranger to the suit, and be as free as he from obligation to obey the court's decree (*People v. Randall*, 73 N. Y. 416; *Slater v. Merritt*, 75 N. Y. 268). The bottles with the prohibited trade-mark "Matzoon" bear upon their labels the name of "S. Gullian" as proprietor, and the answering affidavit of Senekerim Gullian sets out that he is the sole owner of the business of manufacturing and selling "Matzoon," and that he carries it on for his own benefit alone. That but little capital is required, and that Senekerim has heretofore conducted a similar business in California, give credit to his assertion. The facts set out in the petition, and not denied, that Senekerim is living in the same house with his father, and that he is assisted by his brothers, and that the place of business (his home) is the same as that heretofore used by his father for the same purpose, are suspicious circumstances, but not sufficient to warrant the court in coming to the conclusion that the business of preparing, putting up, and selling "Matzoon" is being conducted for the benefit of any of the defendants in this suit, or for any other person than the ostensible owner, Senekerim Gullian. With these views of the rights and duties of servants, agents, and employés who may be included in any injunction order, and the want of proof that "Matzoon" is being manufactured and sold for any of the defendants in this suit, I am of the opinion that the rule to show cause why Senekerim Gullian, Reuben Gullian, Lazarus Gullian, Taquhy Gullian, and Beatrice Gullian should not be attached for contempt must be discharged.

WHITTALL v. LOWELL MANUF'G CO.

(Circuit Court, D. Massachusetts. March 31, 1897.)

1. DESIGN PATENTS—INTERPRETATION OF CLAIM—DRAWINGS AND DESCRIPTION.
A claim reading, "In a design for a carpet, the body, A, substantially as shown," refers to the description as well as the drawing.

2. SAME—INTERPRETATION OF DRAWINGS—SHADES.

Black and white drawings illustrating the designs in a design patent are to be considered as forms, into which may be filled a great variety of arrangements or effects of color or shades, without affecting the patented design.

3. SAME—DRAWINGS OF DESIGNS.

The essentials of a design are what cannot be changed without destroying its characteristic appearance; and, where shading shown in the drawings may be reversed or removed without such effect, it must be considered as

but one of many permissible ways of treating the design, and therefore as an unnecessary addition to the conventional black and white outline drawing, which neither restricts nor enlarges the scope of the design.

4. SAME—INFRINGEMENT.

A design which imitates the figures of a patented design in their characteristic and important features, and produces the same general appearance, infringes, though the imitative figures are much smaller than those of the patent.

5. SAME—DESIGNS FOR CARPETS.

The Neil patent, No. 24,021, for a design for a carpet body, construed, and held infringed.

This was a suit in equity by Matthew J. Whittall against the Lowell Manufacturing Company for alleged infringement of a patent for a design for carpets.

Louis W. Southgate, for complainant.

Witter & Kenyon, for defendant.

BROWN, District Judge. This suit in equity is for infringement of design patent No. 24,021, to John B. Neil, dated February 12, 1895, for a design for carpets. It involves only the first claim, for a carpet body, and prays for an injunction and accounting and other relief incident to patent cases. The defense is noninfringement.

It is apparent from the evidence as to the origin of defendant's design, as well as from the exhibits and testimony relative thereto, that the designer of the defendant corporation, having before him a sample of carpet embodying substantially the complainant's patented design, undertook to produce a design closely resembling the complainant's, and that the defendant has produced and sold carpets substantially similar in appearance to those manufactured by complainant under the Neil patent. The defendant's witnesses admit imitation in respect to color and arrangement of shades, which is otherwise well proven; but the defendant claims that it has confined its imitation within lawful limits, and has adopted a configuration essentially different in detail and in general appearance from the Neil design, and that its carpets display not the complainant's design, but a design made under the protection of design patent No. 24,730, dated October 1, 1895, granted to E. G. Sauer, subsequent to the date of the Neil patent. The complainant contends that the Neil design primarily embodies a carpet of three shades: First, a plain background or groundwork of one shade; second, sharp division lines outlining the connected scrolls and ornamental work; third, a different shade forming the body or filling of the connected scrolls and ornamental work; and that it is "broadly new to design a carpet with a series of sharply outlined connected scrolls having sharply outlined ornamental work surrounding the same, said outlined scrolls and ornamental work having a third shade in the body thereof, and being arranged on a plain ground." It is difficult to avoid the conclusion that the argument that infringement is indicated by the adoption of three shades in defendant's carpets is based rather upon the special features of the manufactured carpets of the complainant and defendant than

upon the design patent. The claim in suit is, "In a design for a carpet, the body, A, substantially as shown." A claim in this form refers to the description as well as to the drawing. *Dobson v. Carpet Co.*, 114 U. S. 439, 446, 5 Sup. Ct. 945. The description is, "The body, A, is decorated with a series of connected scrolls, surrounded by floral and ornamental work." The omission from the description of any reference to shades requires us to find in the drawing alone the three shades which complainant insists upon as a primary feature of his design. Upon examination of the drawing, I find no sufficient warrant for complainant's claim that it displays, as a characteristic or necessary feature of the design, scroll work of a shade distinct from the background and from the lines which outline the scroll. A portion of the scroll work is in solid black, without sharp division lines, though having a sharply defined outline; a portion is represented by the unprinted paper, which represents the background; a portion only displays a shade intermediate between the white background and the black scroll work and black dividing lines. If complainant may, without departing from the design shown in the drawing, use a single shade throughout the scroll work, as he has done in the manufactured carpets, he may equally well use either one of the three shades of the filling of the scrolls shown in the drawing; either the solid black of a portion of the scroll work, or the white of another portion, when the design will appear in two shades; or he may use the intermediate shade throughout, in which case only will three shades appear in the design. If shades are material and essential parts of the design, they must be the shades shown in the drawing; and both complainant's and defendant's carpets differ from the drawing in displaying scroll work of one shade of filling instead of three as shown in the drawing. But I think this departure immaterial, and also that adopting for the filling of the scrolls either the white of the background or the black of the outline would leave the design substantially unaffected, and therefore that three shades are accidental features of the drawing, and not primary features of the design. In order to sustain his contention that three shades are essential features, complainant is obliged to accept the consequences of this claim, and to hold that a black and white outline drawing like the drawing of the Sauer patent "illustrates a design embodying two shades simply, to wit, a background which is left plain or blank, and a tracery which outlines scroll and ornamental work of the same shade as the background." This seems a novel and extraordinary interpretation to put upon a drawing in black and white. Such drawings as illustrative of designs have acquired a conventional meaning entirely opposed to such view. It is implied in the Sauer drawing, as well as in other black and white drawings, that what is there displayed may be presented in a great variety of colors or shades. I think it very clear that, had all shades been omitted from the scroll work of the Neil patent, and had the drawing been made in black lines on white as in the Sauer design, the drawing would be properly interpreted as displaying a design which would be unaffected by shading either the back-

ground or the scroll work. A black and white drawing for a design is, so to speak, a blank form, into which may be filled a great variety of arrangements or effects of color or shades, without affecting the patented design. It is true that the complainant's drawing displays shading on a part of the scroll work. What does this shading signify? Without it, the design would imply or allow not only the treatment shown in the drawing, but also its reverse; i. e. shading the background instead of the scroll, or the addition of any number of shades, or any other treatment which did not change the configuration as shown. By adding one shade, and thus making the drawing show three shades, does complainant make that an essential part of his design? The complainant concedes that the exact shading shown in the drawing is not material, and claims that it may be reversed so that the filling of the scrolls shall be white, while the background is shaded. According to this interpretation the drawing requires merely a difference in shade between scroll and background, not the precise difference shown. I am of the opinion that a still wider interpretation is permissible, and that not only the variation suggested by complainant, but also a variation by the entire omission of shading, is contemplated, since the latter variation, as well as that produced by reversing the shading, leaves the configuration unchanged. The essentials of the design are what cannot be changed without destroying the characteristic appearance of the design; and, as the shading may be reversed or removed without such effect, we must conclude that the shading shown in the scroll work is but one of many permissible ways of treating the design, and therefore not an essential feature, but an accidental treatment by the draftsman; and that the shading is mere surplusage, an unnecessary addition to the conventional black and white outline drawing, which neither restricts nor enlarges the scope of the design. To hold differently would be perilous to complainant's claim of infringement, since the arrangement of shades set forth in the drawing has been adopted by neither complainant nor defendant.

Complainant's expert defines the shading of a design as the contrasts between the several parts thereof, or the contrasts presented to the eye between the high lights thereof and the shadow work, and says that colors may or may not be used to produce this effect, and that shading is to be distinguished from color, and that shading is often the most essential part of a design, and is so of this design. As no pictorial representation is without shading, using the term in this sense, and as such differences are the basis of all ocular appearances, we may safely assume that no design can exist without contrasts of some perceptible degree. The questions in this case are, however, whether it is useful or practicable to attempt a count of shades, and whether a design—the design covered by the patent—is completed by the black and white outline drawing, irrespective of the filling of the scroll, and irrespective of what is termed the "third shade." An attempt to count the contrasts between high lights and shadows involves many difficulties.

A contrast between the filling of the scroll and the background is created by the black lines outlining the scroll; the proximity of these lines produces this difference without the intermediate marks of shading, which serve merely to accent it. Eliminate from the Neil drawing the intermediate marks constituting the filling, and the scroll work is still to a perceptible extent shaded. Place side by side at arm's length the Sauer drawing of clear black lines on white and the Neil drawing, and substantially the same effect of scrolls with shaded filling appears in each. The difficulties of an attempt to institute a comparison between designs by a count of shades employed in each, and of an argument based upon a supposed discovery of the same number of shades in two black and white design drawings is further illustrated when we consider the matter of color. It is generally conceded that colors of any character may be employed to render the design, without affecting its essential character. If changes of shade can be effected through change of color, then a design which is understood to permit of rendering in various colors is equally well understood to permit of rendering in many shades, since colors vary greatly in their absorption of light, and changes of color therefore produce differences in shading. If shade is material, then, upon complainant's theory, a given shade shown in a drawing should exclude the use in that part of the design of any color not possessing the same shade, or having a similar power of absorption of light. I think complainant's contention on this point of three shades entirely unsound; that his drawing shows not a design of three shades, but a design that can be rendered in two, three, or more shades; and that the attempt to discover in the Neil patent drawing features corresponding in this respect to features of the manufactured carpets has served to obscure the real issues in the case; and that in the present case comparisons should not be sought within the broad field of resemblance in shades, but should be restricted to such features as are plainly and undoubtedly disclosed by the drawing and description of the Neil patent. I think that no more can fairly be said upon this point, made by the complainant the prominent feature of his brief, than that the configuration shown, though admitting of treatment in two or more shades, is one apparently well adapted for treatment in three shades of the same color; and that the general intent of the defendant to imitate complainant's carpet, as distinguished from his design, is apparent from the selection of the same treatment in respect to shades of color. The question of infringement, therefore, must be determined irrespective of resemblance in number of shades, and, upon a comparison of configuration and of general effect, to determine whether the obvious and proven similarity in appearance is due in any degree to imitation of features covered by the patent.

We find in the patent drawing and in defendant's carpet alike, a series of scrolls, projecting from or surrounding which are extending branches or ornamental work, the scrolls and ornamental work having sharp outlines. A prominent feature of the Neil design is a number of large grotesque scrolls with what have been not inaptly termed "spider-leg formations." These large scrolls

are so disposed as to give to the design, as a prominent feature, large diagonal squares. The detail of the intermediate ornamental or scroll work is comparatively inconspicuous, and therefore tends to make prominent the larger scrolls, which, in their diagonal arrangement, form an important feature of the design. In the defendant's carpets we find also the larger scrolls, with projecting arms or branches, which simulate the projecting ends of the spider-leg formation to a sufficient degree to give the defendant's large scrolls an appearance similar to the complainant's. Though not so conspicuous as in complainant's design, they yet appear as a characteristic and important feature of defendant's carpets, and are so arranged as to afford the appearance of large diagonal squares, which is a characteristic feature of the Neil design. I think the testimony of complainant's carpet designer (Brown) that, although the arrangement of the large scrolls is slightly different, it yet gives substantially the same effect, is substantiated by the exhibits. The defendant's carpets resemble, therefore, complainant's carpets in important points shown in the drawing of the complainant, and these are points to which the characteristic general effect of complainant's carpet is largely due.

The defendant lays much stress upon the fact that the figure, repetitions of which compose its carpet, is much smaller than the complete figure of complainant's pattern, and contends that the figure or pattern of complainant's carpet is about twice the height and three times the breadth of defendant's figure; that its entire size is about six times that of defendant's figure, and that it contains four large scrolls, with a large confused mass of small spirals and ornamental work, whereas the defendant's figure is composed of one large scroll and three smaller scrolls running out of it. Admitting this, the question then arises, does this smaller figure, when repeated in the carpet a given number of times, give the general appearance resulting from fewer repetitions of complainant's figure? This question must be answered in the affirmative. In the carpet of defendant, as in the drawing of complainant, the large spirals recur in substantially the same arrangement as in complainant's drawing, and the defendant's smaller annexed scrolls perform the function of the intermediate scroll and ornamental work of complainant. Upon the evidence of witnesses and examination of exhibits I am led to the conclusion that defendant's designer, having before him a sample of carpet embodying complainant's design, and also having before him the scroll work of the Bracebridge Hall book-cover exhibit, with a general purpose of producing a carpet closely resembling that of complainant through an adaptation of the Bracebridge Hall scroll, took from complainant's carpet the diagonal arrangement of the scrolls, which is not suggested by the Bracebridge Hall design, and modified the size and appearance of certain of the Bracebridge Hall scrolls, to secure the feature of prominent large scrolls, and to accent this feature by surrounding the large scrolls with ornamental work of comparatively inconspicuous detail. In my opinion, therefore, the defendant has not restricted its imitation of complainant's carpets to the adoption of

the same colors, the same shades of color disposed in the same relations, the same general proportions of background and scroll work, and approximately the same size of scroll work, but has gone further, and has imitated the complainant's carpet in essential features covered by the design patent; and I am satisfied from the testimony that the complainant has fully established a case of infringement within the doctrine of *Gorham Co. v. White*, 14 Wall. 511. I am further of the opinion that the subsequent Sauer patent affords the defendant no protection. A decree will therefore be entered for an injunction and accounting, with costs.

NORTON et al. v. SAN JOSE FRUIT-PACKING CO.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 313.

RES JUDICATA—PARTIES AND PRIVIES—PATENT-INFRINGEMENT SUITS.

In a suit against a manufacturer of a machine for infringing a patent, a judgment for defendant, on the merits, on the question of infringement, is conclusive in a suit by the same complainants against a purchaser of the identical machine from said manufacturer.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a suit in equity by Edwin Norton and Oliver W. Norton against the San José Fruit-Packing Company for alleged infringement of a patent relating to can-heading machines. The circuit court dismissed the bill, with costs to the defendant, and the complainants have appealed.

Munday, Evarts & Adcock and John H. Miller, for appellants.

Wheaton, Kalloch & Kierce, for appellee.

Before ROSS, Circuit Judge, and HAWLEY and MORROW, District Judges.

ROSS, Circuit Judge. This was a suit brought to recover damages for an alleged infringement of letters patent, No. 267,014, of date November 7, 1882, issued to Edwin Norton, for an improvement in machines for heading cans. It was tried in the court below upon an agreed statement of facts, from which it appears that the defendant has never made or sold any can-heading machine which infringes the patent sued on; that the defendant has used one, and only one, can-heading machine, and that one was made and sold to the defendant by Milton A. Wheaton, and was constructed under and in accordance with letters patent No. 477,584, granted to the said Wheaton on June 21, 1892; that the can-heading machine so used by the defendant was sold by Wheaton to him, and was used by the defendant prior to and at the time of the commencement of the suit, and is the one claimed and alleged by the complainants to be an infringement of the patent sued on, and that it was solely by reason of and on account of the use

of that machine by the defendant that the suit was instituted; that on or about August 16, 1892, the same complainants, Edwin Norton and Oliver W. Norton, commenced an action in the United States circuit court for the Northern district of California against the said Milton A. Wheaton, to obtain relief for the alleged infringement of the complainants' patent No. 267,014, sued on in this suit, in which action Wheaton appeared and answered, and that such proceedings were had therein that on July 22, 1893, the court made and entered an interlocutory decree against Wheaton, holding and adjudging that the machines which Wheaton had made and sold were covered by the claims of the complainants' patent No. 267,014, and that the making and selling of such machines by Wheaton constituted an infringement of the complainants' patent; that Wheaton duly prosecuted an appeal from that interlocutory decree to this court, and, after full consideration of the appeal, this court, on October 31, 1895, duly made and rendered its judgment, whereby it adjudged and decreed that the machines so made and sold by Wheaton were not covered by the complainants' patent No. 267,014, and that the making and selling of those machines by Wheaton did not constitute any infringement of the complainants' patent, and reversed the interlocutory decree of the circuit court for the Northern district of California, and ordered that court to dismiss the action against Wheaton; that on or about March 19, 1896, the mandate from this court in the case against Wheaton was filed in the circuit court, and on the same day the circuit court, in pursuance of the mandate, and in accordance therewith, dismissed the action of the complainants against Wheaton, and a judgment and decree was thereupon entered in favor of Wheaton, and against the complainants, for costs; that the can-heading machine used by the defendant in the present suit was the identical can-heading machine that was involved in the case of the complainants, Edwin Norton and Oliver W. Norton, against the said Milton A. Wheaton, and for the selling of which Wheaton was sued by the complainants, as above stated.

Upon this agreed statement of facts, we think it perfectly clear that the judgment of the court below dismissing the bill, with costs to the defendant, was right. The decision of this court in the case of *Wheaton v. Norton*, 17 C. C. A. 447, 70 Fed. 833, was upon the merits; and it was there adjudged that the same machine, the use of which constitutes the alleged infringement by the defendant in the present suit, was not an infringement of the patent sued on by the complainants; and the judgment of the trial court, entered in pursuance of the mandate of this court, was an adjudication conclusively binding, not only upon the parties to that suit, but upon their privies. *Johnson Steel Street Rail Co. v. William Wharton, Jr., & Co.*, 152 U. S. 252, 14 Sup. Ct. 608; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 Sup. Ct. 733; *Railroad Co. v. National Bank*, 102 U. S. 14; *Stout v. Lye*, 103 U. S. 66. The judgment is affirmed.

CONSOLIDATED FASTENER CO. v. COLUMBIAN FASTENER CO. et al

(Circuit Court, N. D. New York. April 13, 1897.)

1. PATENTS—CONSTRUCTION OF CLAIMS.

Where two interpretations of the language used in a patent are possible, that one should be chosen which upholds and realizes the patent, especially when the court is convinced that the patentee has made a valuable invention.

2. SAME.

Where an invention is valuable, and the claims are clear, the patent should not be overthrown because of a presumption based upon the tentative debates, as shown by the file wrapper, between the patentee's attorneys and the patent-office examiners.

3. SAME—IMPROVEMENTS IN BUTTONS.

The Raymond patent, No. 405,179, for an improvement in buttons, which covers, in claims 1 and 3, a spring stud having three elements,—a compressed dome, an engaging spring, and an eyelet,—construed, and held not anticipated, valid, and infringed.

The patent was before the court on a motion for a preliminary injunction. 73 Fed. 828. The question of jurisdiction then decided is not again argued. The claims involved are there set out. There is also a quotation from the specification. These need not be repeated.

John R. Bennett and W. B. H. Dowse, for complainant.
William A. Jenner, for defendants.

COXE, District Judge. Is the Raymond patent void for lack of invention? Is it infringed? These are the two questions to be answered. The claims in controversy, the first and third, relate to a spring stud intended to be used as one member of a snap fastener, the other member being a receiving socket, with which the spring stud engages. The patentee describes in the specification the fastening devices in two prior patents granted to him and points out the objections to them. To obviate these difficulties he produced the construction in controversy. The stud of the patent is composed of three parts. First, a depressed dome which forms a fundamental supporting part so rigid as to admit of an eyelet being riveted over against it. Second, an eyelet having a wide flange and a shank small enough to be inserted from beneath the fabric up into the dome-piece where it meets the depending convexity on the lower side of the dome and is thereby riveted over so that it cannot be withdrawn. Third, the spring cap thus held firmly in position upon the fabric. The combinations of the claims, so far as they relate to the spring stud, contain these three elements—the dome, the engaging spring and the eyelet. The third claim differs from the first in requiring that the flange of the dome shall extend beyond the spring, and does not include the socket as a member of the combination. The valuable feature of this stud is passing the eyelet through the underside of the fabric into the depressed dome where it is upset and securely riveted, the fabric being held firmly between the flanges of the eyelet and dome. This form of riveting upon the upper side of the fabric seems to be new

with Raymond. That it is simple, durable, strong, inexpensive and popular is abundantly proved by the record. The promoters of the defendant company recognized the value of the stud and the validity of the patent by buying the patented studs. They continue to assert the value of the principle which underlies the patent by making and using a stud which unquestionably contains the feature of locking the parts together above the fabric by upsetting the eyelet by the depression inside the dome. A stud constructed in this way remains fastened to the fabric. The studs of the prior art pulled through the fabric. This one does not. One of the witnesses says that it is "universally adopted, in all foreign countries as well as the United States." Though this may perhaps be a somewhat optimistic view of the situation, there can be no doubt that the patented fastener has been adopted by a large number of trades having occasion to use buttons; that the yearly sales have been enormous and that they are constantly increasing. The patent has been respected by the trade, acquiescence being substantially unbroken and complete. The defendants' brief states their position as follows:

"The defendants severally defend against the bill on the ground that they have not infringed; that if the patent is construed so as to cover defendant company's device, it is invalid and void for want of novelty; that the patent is void because the claimed invention thereof is a mere aggregation of elements separately old and well-known in the art and having no new unitary or co-operating result, and the individual defendant, Mr. Lucius N. Littauer, by his separate answer denies participation in the alleged infringing acts. The principal question to be discussed and decided is, whether the defendants' device infringes when the patent is construed in such manner as, in view of the state of the art, to maintain its validity."

The court understands this to mean, that if the claims do not cover an aggregation, they may, if strictly construed, be upheld as covering a meritorious invention, but if given a construction broad enough to include defendants' button, they are anticipated and rendered void by the structures of the prior art. There can be no doubt that the claims are for combinations. The combination of the first claim consists of a receiving socket attached to one part of a fabric and a spring stud attached to the opposite part, the stud being composed of the elements above stated. The socket and the stud, when united, form a complete clasp or fastener. Each of these parts is dependent upon all the others. Remove one and the device is useless. If the result be limited to the buttoning together of two opposite parts of a fabric, then no new result is produced, but, even with this narrow construction, the old result is unquestionably produced in a better way and by the co-operative action of parts never assembled before. It matters not that the stud is on one part of the fabric and the socket on another; the combination is formed when the two are united and form the completed fastener. Buttons of this general class were old, but they were all made up of parts which formed a combination, not an aggregation. Raymond's combination was new, because he introduced into his stud parts which combined to attach the stud to the fabric in a novel way and in a better way than anything which

preceded it. There is no distinction between the first and third claim so far as the question of aggregation is concerned. It is thought that these views are sustained by the following authorities: Heating Co. v. Burtis, 121 U. S. 286, 7 Sup. Ct. 1034; Pickering v. McCullough, 104 U. S. 310; Packing Co. Cases, 105 U. S. 566; Beecher Manuf'g Co. v. Atwater Manuf'g Co., 114 U. S. 523, 5 Sup. Ct. 1007; Clough v. Barker, 106 U. S. 166, 1 Sup. Ct. 188; Lake Shore & M. S. Ry. Co. v. National Car Brake Shoe Co., 110 U. S. 229, 4 Sup. Ct. 33; Fountain Co. v. Green, 75 Fed. 680; Forbush v. Cook, 2 Fish. Pat. Cas. 668, Fed. Cas. No. 4,931; Ballard v. McCluskey, 58 Fed. 880; Walk. Pat. §§ 32, 33.

The defendants' main effort is to obtain a construction of the claims so narrow as to enable them to escape the charge of infringement. The drawings show a stud with an unusually, and, apparently, an unnecessarily long neck, the outside of the dome and the inside of the radial spring fingers being in contact. It is argued that because the description and claims refer to the dome as a supporting part, a stud which does not have the supporting feature alluded to, namely, the sides of the spring cap supported by the sides of the dome, does not infringe. The issue upon this branch of the case cannot be more clearly and fairly stated, than in the brief of the defendants, as follows:

"As already stated, two views are taken of the interior dome piece, viz.: (1) The dome piece holds the spring cap (by means of the clamping ring) for attachment to the fabric, and at the same time affords an anvil surface for clinching the attaching eyelet. That is the view taken by complainant, and (2) The dome piece not only acts as stated in (1), but it also serves to support the radial spring arms against collapse by virtue of the side contact of the radial spring arms with the vertical walls of the dome piece. This is the view taken by defendant."

That the patent is susceptible of the latter construction must be admitted. Many plausible reasons can be advanced to sustain such a construction. On the other hand, an equally cogent argument can be advanced, in favor of the former construction. Confining the discussion to the language of the patent, it is manifest that where two interpretations are possible, that one should be chosen which upholds the patent. If the defendants' contention be upheld, the patent ceases to be a protection. The essential feature is strangled by a useless and nonessential feature. The side support by the dome of the vertical walls of the cap is wholly useless in the short-necked commercial fastener. It would be difficult to construct such a stud having this support. The claims might as well be held void in limine as to be construed so that it requires almost an exercise of the inventive faculty to construct a commercial device that will infringe. The language of the specification relating to this subject is as follows:

"The dome forms a fundamental supporting part so rigid as to admit of an eyelet being riveted over against it and affording a seat for the external spring by which the stud is made to engage with the embracing button or socket."

This does not refer—surely it does not necessarily refer—to a side-supporting function of the dome. The spring is seated on the dome, the latter furnishes a foundation or support for the former

and sustains it when attached to the fabric, but it is by no means necessary that it should furnish the side support referred to. There is nothing in the specification which compels this restricted meaning of the words "support" and "supporting," and, but for the vertical contact shown in the drawings, in all probability it would not have been thought of. There is considerable plausibility in the theory that this was a mistake of the draftsman, for it appears that the sample stud from which the drawings were made, had no lateral support and that none has ever been made since, having this feature. The new mode of fastening above described is the essence and gist of the invention. It is perfectly obvious that this is what Raymond intended to cover by the claims in question. No one can be deceived or misled upon this point. Where the court is convinced that the patentee has made a valuable invention, it should extend scant sympathy to interpretations, however plausible, which deprive him of the fruits of his ingenuity. It is not material that he has employed equivocal words and indeterminate expressions if the invention be described with reasonable certainty. If the claims are susceptible of two interpretations that one should be chosen which upholds and vitalizes the patent. *Ingels v. Mast*, 6 Fish. Pat. Cas. 415, Fed. Cas. No. 7,033; *Machinery Co. v. Sharp*, 54 Fed. 712. It is hardly necessary to invoke this rule in the present instance, for the reason that the specification is not ambiguous. Read as a whole it points to the conclusion that the patentee intended to use the word "support" in the sense of a foundation rather than a buttress. These considerations dispose of what is said of the file wrapper.

There is not in the file any direct allusion to lateral support furnished by the vertical wall of the dome, but it is said, that if the proceedings are considered as a whole, this function must be inferred. It is not necessary to decide whether this be so or not. Where an invention is valuable and the claims are clear, the patent should not be overthrown because of a presumption based upon the tentative debates between urgent and vociferous attorneys and reluctant and laconic examiners. *Vulcanite Co. v. Davis*, 102 U. S. 222; *Sugar Apparatus Manuf'g Co. v. Yaryan Manuf'g Co.*, 43 Fed. 140.

But it is argued further that the state of the art compels a narrow construction. This inquiry will be confined within exceedingly narrow limits if the novel feature of the patent be kept in mind. If the fastening mechanism is not novel the patent falls, if it be novel the patent must be sustained for this feature, without reference to the antiquity of the other features, which are not involved. That each of the separate elements of the combination was old, is of course, of no importance. This is usually true in claims for combinations. A patent is never defeated for this reason. *Bates v. Coe*, 98 U. S. 31, 48; *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970; *Kent v. Simons*, 39 Fed. 606. The question is not whether the elements were known before, but, were they combined before? These considerations eliminate a number of prior patents. It is freely admitted that, considered broadly, each of the elements of

the combinations was known to the prior art. That is, three-part studs were known; so were spring caps, domes, eyelets and receiving sockets. But nowhere, even as a separate element, does a depressed dome appear, and nowhere is there a combination where the dome is used as a clinching anvil to fasten the three parts to the fabric. The proof adds little to the statements of the patent itself. The nearest approach to the invention is found in the two prior patents to the inventor. The present button is intended as an improvement upon Raymond's 1886 and 1887 buttons, and to remedy the defects found to exist therein. This is plainly stated in the specification. Domes are shown in these earlier buttons, it is true, but they are not the depressed dome of the patent, and are introduced for a wholly different purpose. They do not operate in any degree to attach the spring to the fabric. Similarity ends with the name.

Considerable attention was given at the argument and in the brief of defendants, to the English patent to Huddart, No. 1,898, sealed January 24, 1895. The improvement there described relates to ordinary buttons intended to co-operate with ordinary button-holes. The object is to insure the expansion of the shank under moderate pressure so that the button will be securely attached to the fabric in such a manner that the tendency to tear will be avoided. The Huddart button is provided with a disk of soft metal having a countersunk hole. A hole is made in the fabric through which the pin of a stud, hollow at the end, is passed into the countersunk hole on the underside of the button. Pressure is then applied, and the end of the pin is spread by the flaring surface which it encounters and thus rivets the two parts together. Pressure is substituted for sewing as a means of attaching buttons to garments. Instead of being sewed on they are riveted on by expanding the end of a rivet in a countersunk hole in the button head. It is argued that Huddart's interior disk might be used in connection with his eyelet, or pin, to support a spring cap and attach it to the fabric, which would be a double use merely, not involving invention. The argument in support of this theory is one of unusual ability, but, after giving it the most careful consideration, the court has reached the conclusion that invention is not negatived by the Huddart patent. It is thought that the skilled workman, with the Huddart cloth button before him, would not have produced the Raymond fastener. He might have produced the construction shown in the defendants' illustrative drawing where a spring cap is raised upon the Huddart disk. It requires no expert learning to perceive that such a device would be useless as one member of a spring fastener. The outer periphery of the disk does not contact at all with the fabric, and the flange of the rivet is so narrow that in all probability the stud would tip and wobble in every direction, if, indeed, it did not tear out after a few attempts to use it. The device seems to be inoperative for all practical and commercial purposes. It would operate in all respects as if a spring cap were mounted on an ordinary button which is attached to the fabric by needle and thread. To overcome all the difficulties suggested

by such a clumsy and inconvenient structure and produce the perfect stud of the patent required something more than mechanical skill. The Huddart patent and the prior Raymond patents are unquestionably the best references, and render it unnecessary to consider the other patents offered by the defendants. They add nothing to the discussion. They show nothing which is not shown in the three patents referred to. If these do not anticipate or fatally narrow the claims, the others do not; whether considered singly or together. It is perfectly apparent that the combination of the patent is nowhere found in the prior art, and it is thought that to produce this combination required a use of the inventive faculties. It is not a great invention, but it is much more important than many which have been sustained by the courts. Having in mind the conceded novelty of the complainant's stud, its simplicity and durability, the tribute paid to it by the entire art, including the defendants, the enormous sales and the uniform acquiescence of the public, it is plain that it is the duty of the court to sustain the patent, and that every reasonable doubt should be resolved in its favor. *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71; *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719; *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194; *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. 598; *Rose v. Hirsh*, 23 C. C. A. 246, 77 Fed. 469; *Kent v. Simons*, *supra*; *Maitland v. Archer & Pancoast Co.*, 72 Fed. 660.

The question of infringement remains to be considered. Two forms of alleged infringing buttons have been introduced. The first form was made and sold before the bill was filed. It was made in substantial compliance with the patent granted to W. B. Murphy, No. 545,906, September 10, 1895. Some time after the filing of the bill the first form was discontinued, and the second, or "hat" form, was substituted. The second form is not within the issues presented by the pleadings, and, for reasons which it is unnecessary to enlarge upon at this time, it is thought that the decision should be confined to the questions actually involved. *Cleveland Faucet Co. v. Syracuse Faucet Co.*, 77 Fed. 210. The first form of stud will therefore be the only one considered. The function of lateral support being removed from the claims, there can be little doubt of infringement. The defendants' stud is composed of three parts,—the spring cap, the dome and the eyelet. The flange of the dome furnishes a seat for the spring, and the eyelet, entering from below the fabric, passes up into the dome where it meets the annular depression and is riveted over against it. The parts are held together precisely as are the parts of the complainant's stud. In function, the two are identical. In form, there is a slight difference in the shape of the domes. The central part of defendants' dome is punched out, and it is so constructed that the edge of the eyelet instead of being flared outwardly is compressed and turned inwardly. These differences do not go to the heart of the invention and are wholly immaterial.

The bill describes the defendant Lucius N. Littauer as a director and the treasurer of the defendant company. The court is unable to find any legal proof that Mr. Littauer was connected in any way with the infringement proved. As to him the bill must be dismissed. *Howard v. Plow Works*, 35 Fed. 743; *Boston Woven-Hose Co. v. Star Rubber Co.*, 40 Fed. 167.

It follows that the complainant is entitled to the usual decree against the defendant, the Columbian Fastener Company.

JACKSON et al. v. BIRMINGHAM BRASS CO.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. PATENTS—CONSTRUCTION—DISCLAIMERS.

When a process patent contains an express declaration that there is some other process to which it does not apply, and in clear language gives the earmarks by which that process is to be distinguished from the process of the patent, the patentee is bound thereby, whatever may have been the transactions between him and the patent office before its issuance.

2. SAME—INFRINGEMENT.

A patent covering a process for converting smooth, seamless sheet-metal tubing into spheroidal bodies, by swaging and upsetting them by endwise compression between dies, is not infringed by a process of forming spheres from corrugated tubes by compressing them endwise in dies, where the changes of shape are made solely by the folding and unfolding, or, in some cases, by the buckling or doubling in of some of the corrugations, without any upsetting of the metal. 72 Fed. 269, affirmed.

3. SAME—PROCESS OF FORMING HOLLOW SPHEROIDAL BODIES.

The Burkhardt patent, No. 378,412, for a "method of forming hollow spheroidal bodies from sheet-metal tubes," construed, and held not infringed, as to claim 1. 72 Fed. 269, affirmed.

This is an appeal from a decree of the circuit court, district of Connecticut, dismissing the complainants' bill. The suit was brought for alleged infringement of United States patent No. 378,412, granted February 21, 1888, to John Burkhardt, assignor to complainants, for a "method of forming hollow spheroidal bodies from sheet-metal tubes."

Robert N. Kenyon and W. H. Kenyon, for appellants.

G. A. Fay and C. E. Mitchell, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The specification sets forth that the patentee has "discovered a new and useful process for converting seamless metal tubing into concavo-convex oblate spheroidal figures, and impressing thereon ornamental figures or designs." The ornamentation of the spheroidal figures involves a process which defendant concededly does not use. It is covered by the second claim, which is not in controversy here. After stating that in the production of ornamental metal work, such as railings, balusters, fenders, and similar articles, it "has heretofore been the practice to make use of metal balls, either cast or spun of thin metal, to adorn such work," the specification proceeds:

"The object of my invention is to produce spheroidal concavo-convex ornaments from sections of tubing. I make use of dies of the desired forms and

sizes, in which a section of tubing of the proper length to form the hollow spheroidal body is placed to receive the action of a press. The dies may be made in two equal or unequal parts, and the upper one may be attached to the slide or plunger of a press, and the lower one may rest upon the platen or seat of the press. To produce these hollow spheroidal bodies of a shape and surface configuration, resembling such objects as the pineapple, the acorn, and other analogous forms, the shape and size of the two dies for forming these objects will be different. * * * The section of tubing to be used must be of large bore or orifice, as compared with the thickness of the metal which forms it, and will be placed in the lower die directly under the upper die that is attached to the side of the press, and the compressing will begin simultaneously at both ends thereof, and cause the metal to curve inwardly all around; and the dies will meet if the piece of tubing is of the proper length to form a globe, the dies of course being hemispherical for that purpose; but if the dies are of different forms or sizes, as would be necessary to form a body of the shape of the pineapple, the tube or blank will be proportionately longer, and the dies will meet at the line of the greatest diameter of the article produced.

"In forming these spheroidal bodies, a raised central girdle will be made around the article, by stopping the action of the dies before they have reached the line of the greatest diameter of the article. To form an aperture at the extremities of these ornamental hollow metal bodies, a stop at the base of the concavity of the dies may be used to limit the swaging, upsetting, and turning in of the metal at the ends of the section of tubing, whereby an aperture will be provided through or into which a rod, wire, or baluster may be inserted."

After a description of the drawings, the existing state of the art is thus referred to:

"Having described my improved process of forming hollow spheroidal bodies, I would state that I am aware that very small articles, like beads, have heretofore been shaped by compressing the ends only of tubular sections into a rounded form, without shaping the periphery thereof, the tube being comparatively thick in relation to size of the article to be formed, so that sufficient body is provided in the tube to prevent crimping or doubling; and I am aware that larger hollow articles have been swaged into more or less rounded form from comparatively thin tubular metal by first casting a thick temporary lining of soft metal into the tube to give body thereto, and then shaping in one or more sets of rounded dies; but my invention differs from the former in making bodies of any desired size, without using tubing of a thickness increased as the diameter is enlarged, and also in not only swaging and upsetting the ends of the tube into a smaller diameter, but also enlarging the diameter of the middle part thereof; and it differs from the latter most essentially in not employing lining of soft metal or any other material, and it differs from both in that, whereas in those cases there is only a changing of the shape of the tube, there is no upsetting of the metal, making it thinner in some parts, and in others thicker. My process does thus greatly change the thickness of the metal in different places, and, so far as I am aware, I am the first to discover that comparatively thin tubes of large diameter can be swaged and upset into spheroidal form by dies, and that the metal can thereby be upset without crimping to receive the desired forms."

The claim relied upon is the first:

"(1) The process herein described, of forming hollow spheroidal bodies from thin sheet metal, oblate at their extremities, which consists in first forming the metal into a tube, then placing a short section of said tube between two dies having the form of the body to be made, and compressing the tube in the said dies."

This metal tubing may be either plain or corrugated. Corrugated tubing was well known long prior to 1886. All the drawings which accompany the specification exhibit plain tubing only, and the words "tube" or "tubing," wherever used in the patent, are unqualified by either adjective, "plain" or "corrugated." The process

by which defendant's articles are made has been set forth in a stipulation. It is substantially the process of the patent, defendant, however, using corrugated tubing only, with such resulting changes as the use of such tubing imports. The judge who heard the cause at circuit found that there was no infringement, and upon this appeal it will not be necessary to discuss any of the other questions presented on the record.

When a piece of plain, seamless tubing is corrugated, the metal composing it is bent inward and outward alternately, into a succession of what may be called incipient folds and creases. In the ordinary use of language, it may be said to be crimped. Under pressure tending to collapse it, such collapse will be effected by a folding in on one or more of these incipient creases. When pressure is applied, as in defendant's process and in the process of the patent, viz. by placing the section of tubing upright between two concave dies, and compressing axially, the collapsing pressure of the walls of the cavity into which the end is forced is uniform on the entire circumference of the tube, thus folding in the metal equally on every crease; and, as it is continued, the tube is crimped more and more, until every fold is laid down close upon its neighbor. If the middle portion of the tube before axial compression is of slightly less diameter than the concavity of the dies, or if the tube is so long that the dies are not brought into contact, such middle portion will expand by reducing the depth of the creases or crimps in that portion from what it was after corrugation. Examination of the exhibits of defendant's manufacture reveals another fact. In almost all the exhibits apertures are left at both ends. This has been effected by having in the bottom of each die a stud pin or projection of such diameter that it will check further folding in of the end of the tube, when the diameter of that end has been reduced to or a little short of the diameter left when the crimps have been folded together as close as possible. In one case, however, the stud or projection of one die has been of smaller diameter than that of the tube with all its crimps folded closely in. The tag giving exhibit number is misplaced, but it is a copper-colored girdled exhibit which has been cut open. It appears from this exhibit that, when the contracting tube end is not stopped by the stud or pin at the moment when the limit of contraction obtainable by folding in the crimps closely upon each other has been reached, further contraction simply forces some of the crimps bodily out of place, into the interior of the tube, producing a distortion which is quite noticeable even from the outside of the spheroids.

It will be remembered that in the specification reference is made to an upsetting of the metal as a distinguishing feature of the patented process. Among metal workers, "upsetting" is the term employed to describe a process of shortening and thickening. Thus, a bolt is headed by upsetting; the end portion being made shorter without removal of any portion of the metal, which therefore spreads out laterally. If a plain metal ring is reduced in diameter by upsetting, the ring will become thicker, there being apparently an inter-molecular rearrangement of the particles of the metal. One of the questions in dispute upon the record in this case is

whether in defendant's products there has been any such upsetting of the metal. Complainants' expert testified:

"If the section of tubing is corrugated, the degree of upsetting and thickening will not be so much, for the reason that the corrugations at the extremities will naturally be folded together before the upsetting would begin there. If, however, the tube is of sufficient length to be capable of filling up the central or middle portion of the dies, then, in my opinion, the swaging or upsetting of the ends would be produced to some extent. If a section of corrugated tubing, too short to completely fill the dies when finished, be used, the corrugations at the ends would be folded so as to approach each other, probably, without otherwise thickening the body of the article at the extremities. In the three exhibits representing defendant's production, to wit, complainants' Exhibits 1, 2, and 3, the reduction of the diameter at the extremities seems to have been mainly caused by folding the corrugations; but at the very outset there may have been some slight degree of upsetting. * * * During the first part of the process the axial compression of the tube would in some degree cause the metal to be upset while swaging it and turning it in, so as to be stopped by the pin from further closing of the opening; and, when so stopped, any additional compression in the dies which would occur if the tube is of sufficient length would increase the thickening or swaging of the metal around the opening retained by the pin. But if, however, the dies close together at the center of the article at the precise time that the ends of the tube are closed around the pin, no further compression could be effected, and consequently no additional upsetting or thickening of the metal at the ends would occur."

Subsequently, on rebuttal, referring again to the same exhibits, which are hollow spheroids exposing the thickness of the metal only at their apertures, and not susceptible of comparative measurement, he testified:

"The metal near the ends is upset and turned in, which necessarily thickens them at that locality, and near the central diameter the metal appears to be slightly thinned in Exhibits 2 and 3, and still more thinning is accomplished, as appears in Exhibit 1, which is encircled with a girdle, and shows distinctly that each one of the projecting corrugations has been stretched and thinned by the operation of forming."

Upon cross-examination he explains this statement as follows:

"It was entirely evident that the section of tube used for these three exhibits had been made as corrugated tube, the ridges and projections of which are uniform in projection and depth from end to end of such a tube. The shape and figure or thickness of this tube shows that its compression resulted in changing the uniformity of the corrugations, and also shows that the metal is greatly condensed and crowded together, and in some degree upset, which latter condition is apparent from the appearance of the openings at its ends; and it also shows a spreading out of the tube around its central portion, by opening or spreading the spaces between the projections of the corrugations; and this result is very distinctly shown in the Exhibit 1, referred to, which shows the corrugations have been converted or modified in their form by the stretching and thinning of the metal, as I explained in the answers to the questions referred to. * * * The thickening and thinning appear in each exhibit clearly, in my opinion."

These exhibits undoubtedly show plainly that in the equatorial portions there has been a spreading out of the tube, by opening or spreading the spaces between the projections of the corrugations; that the uniformity of the corrugations has been changed, being shallower at the equator, and growing deeper towards the poles; that at the poles the metal is in one sense condensed; certainly it is crowded together, the corrugations being pressed flat, and folded down upon each other, but to the unaided vision, and without opportunity for measurement, these exhibits do not show any up-

setting of the metal. The testimony of this witness is evidently largely theoretical. The patentee testified that, "when spheroidal metal ornaments are made from corrugated tubing by his process, the metal is thickened in parts, and thinned in parts"; that when pins are used at the base of the concavity of the dies—

"They resist the flow of the metal towards the center of the die, and, the more the compression is carried on, the stronger must be the resistance of the pins; and, where there are no pins, the metal will flow towards the center of the die until the compression has been compensated for by the metal having flown to where there was room for it in the die. Q. What effect has this on the thickening of the metal, when pins are used? A. To thicken or upset the metal."

No exhibits are produced nor experiments described, and it is uncertain how much of this testimony is fact, and how much theory. The clear weight of proof is against the proposition that there is any upsetting of the metal in defendant's products. Exhibits are produced, which have been cut open, and measured with a metal gauge. The witnesses who have conducted these experiments testify positively to the fact that the process of manufacture by axial compression from a section of corrugated tubing into a hollow spheroidal ball has not altered the thickness of the metal. The copper-colored exhibit above referred to controverts complainants' theory that, when the limit of contraction by folding down the corrugations has been reached, further contractions will be obtained by upsetting the metal. On the contrary, such further contraction seems to be effected by buckling, distortion, and crowding out of place of the crimps or corrugations themselves, not by any rearrangement of the molecules of the metal. The proof shows that corrugated seamless tubing is transformed into spheroidal hollow bodies by the process of axial compression, without any upsetting of the metal, and by first crimping the metal regularly, by folding together the corrugations, and, if carried on long enough, by crimping the metal irregularly; that is, by buckling or distortion. It is undoubtedly true that the tube is thickened at the poles, the measure of thickness of a corrugated tube being the difference between its exterior and its interior diameter. The process of crimping and folding down the crimps necessarily deepens the corrugations, and increases this difference at the ends, while the spreading out of the corrugations at the equator reduces it. Complainants contend that this is an equivalent of the "upsetting of the metal, making it thinner in some parts, and in others thicker," which is set forth in the patent. This contention calls for a construction of the patent.

The original application was for the article made, and not for the process of making. This claim was rejected, upon references to five patents. Thereupon a new specification was filed, claiming the process, instead of the article. The second specification, as filed, contained the following:

"Having described my improvement in the method of forming spheroidal ornamental bodies, I would state, for the purpose of defining the scope of my invention, that I am aware that metal beads have been finished by compressing the corners thereof by the use of dies; also, that the folding together of

the ends of sections of corrugated tubing for ornamental purposes is not new. But my invention relates to the conversion of seamless plain sections of tubing into ornamental hollow bodies, ready for use, to adorn metal work of artistic manufacture."

The first claim was amended to read:

"(1) And I claim as my invention the process described for converting sections of seamless plain tubing into concavo-convex oblate spheroidal bodies, by compression with dies for the purpose specified."

The patent office notified the applicant that claim 1 was anticipated by two patents, and that claim 3 was objectionable for reasons stated. Six months later he amended, by substituting, for the passage above quoted from the second specification, the longer, more-detailed, and elaborate statement as to the prior art which is found in the patent as issued, and amended the claim to its present form. Patent was thereupon allowed to issue. Complainants insist that the effect of these changes was to remove from the patent any limitation to sections of plain tubing, to extend it so as to cover any form of tubing; and that his action in this regard is conclusive, both as to his intention in taking the patent and as to the intention of the patent office in granting it, and so is controlling as to the scope that should be given to the claim as it now stands. Reference is made to *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627. In that case the applicant had originally claimed "a bundle of toilet paper * * * in a band * * * of oblong or oval shape," etc. The claim was rejected as indefinite and anticipated. The patentee amended the claim, by striking out the limitation that the band must be oblong or oval in shape, thereby broadening its terms so as to include a band of any shape. In a subsequent suit against an alleged infringer, he endeavored to save this claim as allowed, by insisting that, looking at the specification and drawing, it was obvious that the claim should be so limited to a band "of oblong or oval shape." The supreme court held that the "patentee having once presented his claim in that form, and the patent office having rejected it, and he having acquiesced in such rejection, he is now estopped to claim the benefit of his rejected claim, or such a construction of his present claim as would be equivalent thereto." Manifestly, that is not the point presented here.

On the other hand, the defendant contends that the change in the form of the claim is of no importance, because the practical disclaimer, which set forth the state of art in the patent as finally allowed, was so much more full, clear, and specific that it would have been superfluous to say that he did not claim folding together the ends of corrugated tubing; that it was unnecessary to make any reference in terms to a process which involved no swaging and no upsetting, but simply consisted in folding down corrugations produced by suitable corrugating dies, which are neither mentioned, suggested, nor implied in any part of his specifications or drawings or claims. Whatever may have been the transactions between the applicant and the patent office, and whatever light may be thrown upon obscurities in the patent by the file wrapper and contents, it is the patent as issued by which the patentee's

right to a monopoly must be tested. When it expressly declares that there is some other process to which it does not apply, and in plain and unambiguous language gives the earmarks by which that other process is to be distinguished from the process of the patent, the public has the right to insist that the patentee shall abide by the disclaimer he has made and proclaimed.

Turning now to the patent, we find that the patentee refers to two other processes. The one is the manufacture of very small articles, like beads, by compressing the ends only of tubular sections into rounded form, the tube being comparatively thick in relation to the size of the article to be formed. The other is the swaging of larger hollow articles into more or less rounded form from comparatively thin tubular metal, by first casting a thick temporary lining of soft metal into the tube, to give it body. Neither of these processes is the one used by the defendant, viz. the folding down of the projections of a section of corrugated tube at the ends of such section, and the flattening out of such projections in the middle of the section. Such a process would be impossible with a lined tube, and the very thick tube used in bead making is too thick to fold or crimp. But, in differentiating his process from both of these, the patentee has defined it so clearly, so specifically, so exactly, that there can be no room for doubt as to what the process was which he actually did give to the world in exchange for the monopoly to practice it, whatever doubt there may be as to what he meant to give or the patent office meant to take. The patent proceeds:

"My invention differs from the former [the bead process] in making the bodies of any desired size, without using the tubing of a thickness increased as the diameter is enlarged; and also in not only swaging and upsetting the ends of the tube into a smaller diameter, but also enlarging the diameter of the middle part thereof."

So far there is no differentiation from defendant's process, for it will be remembered that the ends of the tube (as distinguished from the metal) are swaged or upset into a smaller diameter, and the diameter of the middle portion is enlarged. The patent proceeds:

"[My invention] differs from the latter [process above described] most essentially in not employing lining of soft metal or any other material, and it differs from both in that, whereas in those cases there is only a changing in the shape of the tube, there is no upsetting of the metal, making it thinner in some parts, and in others thicker, my process does thus [by upsetting] greatly change the thickness of the metal in different places; and, so far as I am aware, I am the first to discover that comparatively thin tubes of large diameter can be swaged and upset into spheroidal form of dies, and that the metal can thereby be upset without crimping to receive the desired forms."

If there is any force in words, the process of the patent is to be differentiated from one, earlier or later in time, where comparatively thin tubes of large diameter are swaged into spheroidal form of dies, thus receiving the desired forms, by folding down corrugations in such tubes upon each other without changing the thickness of the metal in any part. Despite the change in the form of his first claim, we are strongly of the opinion that the patentee all along supposed that what he had discovered was a property of

metals whereby, when compressed axially in suitable dies, there would be molecular rearrangement; that this would take place only in the tubes where there was nothing to hinder the molecular flow; that when a tube had been corrugated, and incipient creases thus formed, the projections would double in on each other, and fold down in the creases, thus reducing the diameter before molecular rearrangement could take place. He also probably thought, and evidently still thinks, that, if the diameter were further reduced, there would be molecular rearrangement without crimping. The evidence in this record, however, indicates that upon that point he is mistaken. But, whatever he thought, the language of his patent is plain, and will not apply to a process where the diameter of the end of a tube is reduced, and the metal composing it is closed in, not by molecular rearrangement, but by merely folding down and bringing together a series of crimps or corrugations, without any change in the thickness of the metal. Such a construction of this patent for changing sections of tubing into hollow balls or spheroidal bodies would, moreover, seem to be required by the state of the art.

In 1867 a patent (No. 71,042) was granted to D. T. Munger, for an improved machine for making ball chain; that is to say, chain formed from hollow balls, the several balls being united so as to form a flexible chain. The invention consists "in swaging the balls so as to close around the neck of a double-headed rivet, then a second ball around the same rivet, and so on. * * * A piece of metal of the proper size, as in Fig. 6, is bent in cylindrical form, as in Fig. 7, and the two edges united. I prefer to use corrugated metal, but this is not essential. * * * Then the cylinder is placed in proper dies, and its two ends contracted so as to close around the neck of the rivet." The specification shows that these "proper dies" compress the cylindrical form axially. The lower die is single; the upper die in two parts, which can be laterally separated, so as to allow the balls, after they have been linked together, to be removed vertically. But these two parts are brought together before pressure is applied to the cylindrical form, so that the axial compression is in fact between two concave dies; the result being that "the form of the combined dies will contract the blank, and close one end around the rivet." In what way a corrugated cylindrical form is "contracted," and its "end closed around" a rivet or pin when it is compressed axially between two concave dies, the evidence in this case abundantly discloses. The complainants contend that the cylindrical form is not a tube, properly speaking,—that is, not a seamless tube,—but is a cylindrical blank, with a longitudinal slit or opening, and that the effect of the compression would be to overlap the metal at the ends. That this would be the effect, we very much doubt. It is difficult to see how corrugated metal would be thus lapped over itself, twice or three times, as it must be to secure a diameter small enough to hold the rivet. But, even if it would, the patent does not indicate that the cylindrical form is slit open. Complainants' experts refer to the drawings, showing four balls of the completed chain, and the same in section, as supporting their contention, insisting

that certain lines on these drawings represent the corrugations, and indicate that, when completed, there is an elliptical opening on the side of the ball. This is very unsatisfactory evidence, especially as the markings on all four balls of Fig. 8 are not alike; and, if on one or two of them they might seem to indicate an opening on the others, they quite as plainly indicate a metal corrugation at the same place. Moreover, the lines on Fig. 9, which shows the balls in section, would, by the same reasoning, be taken to indicate that there was an opening on the other side as well, which is absurd. Moreover, the drawings most certainly do not indicate any overlapping at the ends, but, on the contrary, a folding together of the corrugations. In the face of the express statement of the Munger patent that "a piece of metal of the proper size is bent into cylindrical form [thus giving a cylindrical blank], and the two edges united," we are unable to assent to the proposition that Munger's process is to be limited to a section of tube slit open longitudinally.

In view of all these facts, we concur with the circuit court in the conclusion that defendant's process, which produces the spheroidal bodies from corrugated tubing solely by folding and unfolding the corrugations, or, if extreme contraction of diameter is required, by buckling or doubling in some of the corrugations, and which does not upset the metal, nor make it thicker in some parts and thinner in others, is not an infringement of complainants' patent. The decree of the circuit court is affirmed, with costs.

THE MARACAIBO.

HEALEY v. THE MARACAIBO.

(District Court, S. D. New York. November 5, 1896.)

SEAMEN'S WAGES—OFFSET—ALLEGED SMUGGLING—FINE—SETTLEMENT BEFORE CONSUL.

Upon a seaman's discharge before the consul at Maracaibo and a settlement of his wages with a month's extra wages included in a written order given to the seaman upon the owners in New York for the payment of the balance due and on suit by the seaman for the nonpayment, a claim to an offset was interposed for an alleged fine of \$300, imposed upon the ship for the seaman's alleged smuggling; but the facts, whatever they were, being known to the master prior to the settlement before the consul, and the order for the extra wages being unqualified, and the proofs as to the fine or any payment thereof being doubtful; *held* that the offset should not be allowed.

(Syllabus by the Court.)

Cowen, Wing, Putnam & Burlingham, for libelant.
Coudert Bros., for claimant.

BROWN, District Judge. The settlement made by the master and the agents of the steamship with the libelant at Maracaibo, as regards the wages then due him, the discharge of the libelant by the consul at that port as a part of that settlement, the allowance of a month's extra wages, and the delivery to the seaman of a written order for the amount due him, including the extra wages, and the consul's assurance to the libelant, as testified to,

that the order was as good as gold, seem to me incompatible with the claim which the respondents now put forward, to offset against this order the fine which it is claimed was imposed on the vessel and paid, as it is said, on account of the libelant's smuggling. All the facts in the case relating to the smuggling, it is evident, were known to the master, and to the ship's agents before the settlement referred to. Moreover, there are no entries in the log, such as the Revised Statutes require, to authorize the offset of the fine alleged to have been paid on account of the alleged smuggling; and the omission to make the entry in the log, and to read it to the libelant, was evidently intentional, because inconsistent with the settlement made with the libelant. Nor is there any proof of the payment of any specific sum for the alleged fine. Two depositions were taken at Maracaibo in regard to that subject in behalf of the respondent on direct and cross interrogatories, and the extremely meager answers to the inquiries, the omission of any particulars in regard to the amount paid, and the failure to take or produce any receipt or voucher, are significant omissions. The record of the judicial proceedings in regard to the smuggling shows that the articles smuggled were condemned and confiscated, and sentence passed against the libelant; but I cannot make out that any fine was imposed upon the ship, or the owners; or that anything was to be paid by anybody above what might be realized from the articles condemned to be sold. Under such a state of proofs, it is impossible for me to deny to the seaman a decree for the wages which were due to him, and for which, upon a settlement made with full knowledge of the facts, a written order was given to him that did not intimate on its face any such qualification, or reservations, as would be inconsistent with the consular action at that port.

Decree for the libelant, with costs.

DISNEY v. FURNESS, WITHEY & CO., Limited.

(District Court, D. Maryland. March 24, 1897.)

1. SHIPPING—SUITS IN MASTER'S NAME.

The master, by his general agency for the owners in relation to the ship, is authorized to sue in his own name, in their behalf, to recover damages for breach of a contract of affreightment.

2. AFFREIGHTMENT—READINESS TO RECEIVE CARGO—SUNDAYS.

A provision in a contract of affreightment that the shippers may cancel the contract if the steamer "be not ready for cargo on or before March 15, 1896," gives the steamer the whole of that day, though it falls upon Sunday, and she is not required to be ready on the preceding Saturday.

3. SAME—STATE OF READINESS—SHIFTING BOARDS FOR GRAIN CARGO.

Failure of the ship to have up the top board of the shifting boards, where the board and the slots for receiving it are fitted and prepared, is not a want of readiness to receive grain cargo, such as would authorize the cancellation of the contract of affreightment. Nor is cancellation authorized by failure to have up the shifting boards in the hatch combings, as these, if used at all, are better put in when the cargo is partly loaded.

4. SAME.

A practice peculiar to the port of lading, which requires battening of the seams even when not needed, and merely out of abundant caution, cannot, without previous notice, authorize the shipper to cancel the contract for want of such unnecessary battening.

5. SAME—CLEANLINESS OF HOLD.

A provision giving the shippers the right to cancel the contract for shipment of a cargo of grain if the ship be not ready on a given date requires a practical and substantial readiness to receive the cargo such as would insure the underwriters' inspector's approval, and obtain his pass, and would gratify the usual and reasonable requirements for avoiding injury to the commercial value of the grain.

This libel was filed March 19, 1896, on behalf of Messrs. Rickinson, Son & Co., of West Hartlepool, England, owners of the British steamship "Aries," to recover the damages caused by the refusal of the respondents to load the steamship when tendered to them, on March 15, 1896, at Newport News, Va., in violation, as the libellants allege, of a contract of affreightment.

The contract stipulated that the shippers should have the right to cancel the contract if the steamer was not ready for cargo on or before March 15, 1896. The steamer arrived at Newport News about 10 o'clock in the evening of March 15, 1896. She was entered immediately at the customhouse, and procured the underwriters' surveyor's pass to load grain in all her holds, and at 10 minutes before 12 o'clock p. m. was tendered by the master to the respondents, as ready to receive cargo. The respondents' agent refused to accept the steamer, stating, as the reason for the refusal, that the shifting boards were not fitted in her hatch combings, and notified the master that the respondents elected to cancel the contract. The controversy hinges upon whether the steamer was ready before midnight on March 15th to receive cargo according to the requirements of the contract.

The contract is as follows:

"Berth Terms Contract between Furness, Withy & Co., Ltd., and Patterson, Ramsay & Co., Acting as Agents for Owners of the S. S. Aries, by Cable Authority of Jackson Bros. & Cory, dated London, 16th Jany., 1896.

"Engaged from Furness, Withy & Co., Ltd., for shipment in the S. S. Aries, classified 100 A 1, in British Lloyds: Twenty thousand quarters (20,000 qrs.) of grain, 10%, more or less, at steamer's option, to a direct port in the United Kingdom, or to Rotterdam, Amsterdam, or Antwerp, one port only, as ordered on signing bills of lading, at two shillings and ten pence halfpenny (2-10½) per quarter of 480 lbs. The vessel to load Newport News and/or Norfolk, Va., employing shippers, stevedore at customary rates. The cargo to be ready when called for, not earlier than the 15th February, 1896. Shippers having the right of canceling the contract if the steamer be not ready for cargo on or before March 15th, 1896. Cargo to be loaded as fast as the vessel can take it, and to be discharged in like manner with all dispatch. Shippers have the right of shipping cargo other than grain (being lawful merchandise) not exceeding two thousand (2,000) tons, they paying all additional expense above what grain cargo would cost, and total freight to be equivalent to full cargo of grain at two shillings and ten pence halfpenny (2-10½) per quarter, as above. This engagement to be subject to all the conditions of the 'Berth Bill of Lading' to any United Kingdom port, to Rotterdam, to Amsterdam, or to Antwerp, in customary use at Newport News and/or Norfolk, Va. Full cargo insurance to apply in vessel's favor, if required. The steamer is to be consigned to the agents of Furness, Withy & Co., Ltd., at port or ports of loading and port of discharge on customary terms. One and a quarter per cent. freight brokerage is to be paid to Furness, Withy & Co., Ltd., at port of loading, as usual, and the commission of one and a quarter per cent. (1¼%) to Patterson, Ramsay & Co. It is mutually agreed that this contract is subject to all the terms and provisions of and all the exemption from liability contained in the act of congress of the United States approved on the 13th day of February, 1893, and entitled 'An Act relating to navigation of vessels,' &c.

"H. O. Haughton,

Patterson, Ramsay & Co., Agts.,

"Witness.

"O. L. Williamson,

Per pro. Furness, Withy & Co., Ltd.,

"Witness.

C. W. Browley.

"Dated Baltimore, January 18, 1896."

By a subsequent agreement, the shipper's privilege of shipping not exceeding 2,000 tons of other cargo than grain was increased to 3,000 tons. The steamer was a new steel ship, built under special survey, and held the highest rating in Lloyds' Register. She had no between decks, and was fitted out when built with a complete equipment of shifting boards constructed to be placed in the iron stanchions which supported her deck, and fitted with iron braces or shores. She had left England on her first voyage in September previous, and had carried a cargo of coal to the East Indies, and brought a full cargo of dry Java sugar, in baskets, to the United States, consigned to the respondents. Under that contract she was to report to the respondents at the Delaware Breakwater for orders directing where to deliver the sugar, and the respondents ordered her to Boston. She had had head winds and a long voyage from Gibraltar, and had been obliged to stop at Bermuda for coal. She arrived at the Delaware Breakwater on February 26, 1896, and, getting orders to go to Boston, she was obliged to go first to Philadelphia for coal. She arrived in Boston March 9th, finished discharging the sugar on the 13th, and left Boston for Newport News at noon of that day.

It was on his arrival at the Delaware Breakwater, on February 26th, that the master of the Aries first learned of the contract of January 18, 1896; and it was quite apparent from the time of the steamship's arrival in Boston, on March 9th, that it would be all she could do to be in readiness to receive cargo in Newport News on the 15th. Freight had fallen considerably between January 18th, the date of the contract, and the middle of March, so that on the freight of this large ship, capable of carrying 21,000 quarters of grain, it made a difference of about \$5,000 whether the ship was loaded at the contract rate or at the current market rate. With this large sum at stake, it is easy to understand that the master and agents of the ship were anxious to have her in readiness to perform the contract, if possible, and that the agents of the respondents were anxious to refuse to load her if they could find any ground of objection which would release them. The difference and conflict between the witnesses as to what constituted a fair standard of readiness to receive a cargo of grain may be explained in part, at least, by the side of this controversy on which they became enlisted, and was complicated somewhat, I think, by the fact that at Newport News the respondents largely controlled the shipping of grain by foreign steamers, and afforded employment to the persons connected with that business there.

Wishing to learn as early as possible for what cargo the Aries was required to be ready, her agents applied from time to time to the agents of the respondents in Baltimore to be informed if they desired her fitted for a full cargo of grain, or for a general cargo including grain, and were told that a definite answer could not yet be given. On the 15th, at Newport News, Mr. Chase, acting for the libelants, made the same inquiry, and was answered that it was intended to load her with a full cargo of grain. The steamer arrived at Newport News at 10 o'clock on Sunday night, March 15th. Mr. Chase, representing the owners, Mr. Haughton, the underwriters' surveyor, Mr. Berner, representing the shippers, Capt. Smith, the shipper's marine superintendent at Newport News, together with a carpenter and a ship chandler, went aboard. The master at once went ashore, and entered the vessel at the customhouse, and, returning, gave notice about 11 o'clock that the ship was ready to receive her cargo. The shipper's agent replied that the notice could not be accepted unless accompanied by a surveyor's pass. The master then obtained from Mr. Haughton, the surveyor of the board of underwriters of New York, who had come aboard on her arrival to inspect her, a certificate that the steamer was passed to load grain in all her holds, the holds having been prepared in accordance with the rules of the board of underwriters of New York; with the indorsement that the shifting boards were up to deck fore and aft, but not in the hatch combings. At 11:50 the master renewed the tender of the ship in writing, accompanied with the surveyor's pass, certifying to her readiness to receive cargo. The shipper's agent at once replied in writing that the surveyor's pass was not in accordance with the regulations, as the shifting boards were not fitted in the hatch combings, and declined to accept the ship, and notified the master that the contract of January 18th was canceled. The carpenter's men at once went to work to fit the shifting boards into the hatch combings, and they also, without, it would appear, distinct orders from any

one, proceeded to nail battens over the seams of the bottom of the ship, and, by 7 o'clock on Monday morning, had finished all they undertook to do. About 10 o'clock Monday morning, by request of respondents' agent, another underwriters' surveyor, Mr. Lauder, from Norfolk, who was called as a witness by the respondents, together with Mr. Smith, the respondents' marine superintendent, and Mr. Tyler, superintendent of the grain elevators, and some others, came aboard, and proceeded to make a very searching examination of the ship. Mr. Lauder found the shifting boards all up to the top of the hatches. He considered the battens unnecessary if the bottom of the ship was tight without them. So, in order to see if there were open seams under the battens, he had them ripped off, and, upon a careful search, he found 18 feet of the limber seams open three-sixteenths of an inch, and about 36 feet of the ceiling not over the limbers, but over the water ballast tank, open about one-fourth of an inch. These 53 feet in all, he thought, might let some kinds of grain through, and should be battened. But he was unwilling to state that they were sufficient to have required Mr. Haughton to refuse her a pass to load, or that he himself would have refused a pass if he had been called upon to inspect her for a grain cargo. As to the cleanliness of the holds, he noticed nothing out of the way, except some sloppiness under the hatches, which he said might have come from rain during the night of the 15th. Mr. Smith, the marine superintendent of the respondents, was present at this inspection, on Monday morning, and went into the holds with Capt. Lauder; and he testified that Nos. 1 and 2 holds were very dirty; that the remains of the sugar cargo had covered parts of the flooring and the sides of the ship with a dirty paste. Mr. Vaughan, the carpenter, testified to the same. Mr. Tyler, grain inspector at the Newport News elevators, who was sent for by the respondents' agent to examine the vessel, testified that Nos. 1 and 2 holds were gummed up with sugar and molasses, and that he required all her holds to be cleaned and limed, and her beams scraped and limed, and her boards cleaned and limed, before he would accept the ship for a cargo of grain.

On the afternoon of Monday, March 16th, the respondents, by letter, confirmed their rejection of the ship, because she had not been ready for a full cargo of grain on March 15th, and offered to load her at a reduction of 10½ pence per quarter on the contract rate of freight. The respondents persisting in their refusal to load the ship, a new charter was signed on the 20th, at the proposed reduction, without prejudice to any claims for damage under the contract of January 18th. Under the new charter, the respondents loaded the *Aries* with a mixed cargo, consisting of oats in bulk in No. 2 hold, and flour in bags and other cargo in the other holds. Nothing was done to these holds except that they were limed on Monday, the 16th, and in No. 2 a few battens were nailed down. It is proven that she carried and delivered this cargo without damage of any sort. With respect to the condition of the ship after unloading her cargo of sugar in Boston, all the stevedores and other persons concerned in it were examined on behalf of the libelants. They appear to have been an intelligent and fair-minded set of men, some of them employed by the respondents, and none of them in the employ of the libelants, and they all testified that dry Java sugar in baskets is a clean cargo, which does not run to molasses; that the baskets are frequently broken in hoisting them out of the holds, but that the unloading in Boston was during the coldest weather of that winter, and the sugar ran like dry sand, and did not cake or gum up the holds; that mats had been used for dunnage, to keep the baskets of sugar from the sides of the ship; that the holds were carefully cleaned up, so as to get out every pound of sugar, and were left clean enough for any cargo to be put in. The testimony is also that, on the voyage from Boston to Newport News, the master, assuming that he might be required to be in readiness for a cargo of grain, had the crew engaged all the voyage in putting up the shifting boards, and in cleaning the holds again, and liming them, to make sure that they were clean and without smell. The Boston pilot, who brought the ship around, testified to the same effect. The customhouse inspector at Newport News, whose duty required him to remain on board the steamer during the time she was in the port, and who for three years had been on duty on similar vessels, waiting to load grain, testified that the holds appeared to him very clean on Monday, and as fit for grain as any vessel he had seen; that all

that he noticed done afterwards before the ship was loaded under the new charter was that some lime was spread about in some places in the holds.

Brown & Brune, for libelants.

John H. Thomas, for respondents.

MORRIS, District Judge. It was objected in argument that this suit was improperly brought in the name of Disney, the master of the *Aries*, on behalf of himself and the owners, but should have been brought in the names of the owners themselves. This objection was not taken in the answer, which admits that Disney is the master and bailee of the ship.

In Benedict's Admiralty (3d Ed. § 384) the rule is thus stated:

"The master's general agency for the owner in relation to the ship and his special property in her and her cargo and freight authorizes him to bring in his own name actions which the owners have in relation to the ship, her cargo or freight."

This is the generally received rule. In Commander-in-Chief, 1 Wall. 43-51, it is recognized as proper practice, and it is suggested that objection for want of proper parties should be seasonably made, so that they may be added by supplemental libel or petition or amendment.

Another defense suggested in argument is that, as March 15th was Sunday, the import of the contract was that the ship must be ready for cargo on Saturday, the 14th. The rule with regard to the payment of commercial paper is cited in support of the contention. The contract was negotiated and signed by the Baltimore agents of both the parties to it, and their mutual understanding of what the contract meant is shown by their actions under it. All their actions appear to have been based upon the mutual assumption that the contract intended the 15th as the day of readiness. The answer is framed upon this assumption. The objection that Saturday, the 14th, was the last day for tendering the vessel, is first suggested now in argument. The payment of promissory notes on Saturday when the due day falls on Sunday is established by general commercial usage; but this usage is not applicable to contracts which fix a day for the performance of a stipulated act, other than the payment of commercial paper; the rule in such case appears rather to be that a performance on Monday is a compliance. 2 Chit. Cont. (11th Ed.) 1066, note n; Stebbins v. Leowolf, 3 Cush. 137-144. In *The Harbinger*, 50 Fed. 941, affirmed in 3 U. S. App. 333, 3 C. C. A. 573, and 53 Fed. 394, it was held where, in a charter party, the canceling day on which the vessel should be at Philadelphia, "ready for cargo," fell on Sunday, it was a compliance if the vessel arrived in port on that day ready for cargo, although, by reason of its being Sunday, she could neither be entered at the customhouse, nor procure a pass to load from the underwriters' surveyor. In the case in hand, the respondents having agreed that the shipowners should have the whole of the 15th to get ready, I think it was a compliance if the vessel was in readiness on that day.

The real controversy in this case hinges upon the right of the respondents to cancel the contract upon the ground that the ship was not ready for a cargo of grain on Sunday, March 15th. The objections which the respondents raised were to the shifting boards, to the absence of battens over the seams of the floors and limbers, and to the unfit condition of the holds for a cargo of grain, by reason of the remains of the sugar.

The contract stipulated that the ship, on the 15th of March, should be in her equipment and condition reasonably ready for a grain cargo, if the respondents so required, although there is no proof that the respondents had a grain cargo at Newport News ready for her, and although, a few days later, under the new charter, they loaded her with a very different cargo. But the readiness required was a reasonable readiness, and not a special readiness to gratify particular requirements established by the respondents. This vessel was a new one, not six months old. She had been, when built, fitted out with the shifting boards required for grain cargoes. She did not need the special fittings put by carpenters into vessels not so built. Her shifting boards were all on board, and only required to be dropped into the slots in her iron stanchions, and the iron braces or shores put in place. The defects relied upon, that in two holds the top board had not been put up, was not really a want of readiness. The boards were there, and the slots to hold them. It was a matter of a few minutes to put them in place, and they were put in place before midnight. It is often a convenience in loading not to put the top board up until the grain is partly in. The bulk grain is not allowed in vessels of the Aries type to come higher than $5\frac{1}{2}$ feet from the deck, the remaining space, for greater safety, being required to be filled with grain in bags. And so, with regard to shifting boards in the hatch combings, they are not usually required or desirable, and, if used at all, are better put in when the cargo is partly loaded. Neither of these alleged omissions is, in the absence of a specific notice that they are required, a defect in readiness, authorizing the canceling of the contract.

With regard to the battens, the testimony of those employed in fitting vessels for grain at Newport News, and of the grain inspector of the elevators there, tends to show that they require all the seams of the limbers and the floors of the holds to be battened, whether the cracks are such as to let grain through or not. But the testimony of the underwriters' inspectors, who issue the surveyor's pass, is that only such seams as are sufficiently open to admit grain, which might choke the pumps, are required to be battened. Obviously, a practice peculiar to the port, requiring battening when not needed, and merely out of abundant caution, could not, without previous notice, give ground for canceling the contract. The carpenters, apparently without distinct orders, but because it was their practice to do so, went to work on Sunday night, and battened all the seams; and by Monday morning, and before the vessel could be actually used, she gratified every supposed requirement in that respect. But I think the preponderance

of proof is that in this new ship the very few seams which were in the least degree open were not sufficient to excite apprehension of any risk, either to the ship or the cargo. It is quite apparent that neither of the underwriters' surveyors thought so (and they represent the interests most hurt by such defects), and that, except for the great desire to escape from the contract, objection would not have been seriously made by any one.

The other objection now most earnestly insisted upon is that the remains of the sugar cargo left the holds unfit to receive grain. It is in evidence that the dry Java sugar in baskets was a clean cargo; that it was discharged in very cold weather; that it was so dry that it could be readily swept up; that the sides of the vessel were protected by mats; that, with a knowledge that the vessel would be required to be ready on her arrival for a grain cargo, her master prepared her specially for it. Her holds were considered clean by the persons who discharged her in Boston, under the employment of the respondents, as appears from the statement of Mr. Smith, that they had heard through respondents' agents that the ship had been thoroughly cleaned, and all the dirt got rid of, before she left Boston. It is probable that her coal cargo had discolored the floorings, and may have left some coal dust in the crevices, and may have given the impression that she was dirty. One set of respondents' witnesses testify that the seams of the flooring and limbers were open, and another set that they were gummed up with molasses. One would suppose that the gummy substance would have calked the seams, and at least have concealed the openings. Very likely it was possible, by diligent searching, to find places and crevices in which there were remains of the sugar cargo, and there may have been some stickiness on the rungs of the ladders, and on the edges of the shifting boards, and the discoloration from the coal may have given everything a dirty look; but it does not appear that these trifling matters made her unfit for a grain cargo. She was a perfectly tight ship, of the best modern construction. It is shown that the respondents loaded her with oats, and with flour in bags, a much more sensitive cargo than grain, without anything having been done to her except the scattering of some lime in her holds, which was done early Monday morning, and the putting down of a few battens, and without any further inspection.

It is said that charter parties (and this contract is even less formal than a charter party) should have a liberal construction, such as mercantile instruments usually receive, in furtherance of the real intention of the parties and the usage of trade. *Raymond v. Tyson*, 17 How. 53-59. In this case the readiness for cargo contemplated was a practical and substantial readiness, such as would insure the underwriters' inspector's approval, and obtain his pass, and would gratify the usual and reasonable requirements for avoiding injury to the commercial value of the grain. It did not contemplate a nice criticism of matters not essential and not usually insisted upon, and which could not affect any purpose the shippers could have had in contracting to freight the ship, and which did not in fact injure them at all. I think the owners of the steamship should recover such damages as they may be able to prove.

PARKER et al. v. OGDENSBURGH & L. C. R. CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. REVIEW ON ERROR—TRIAL BY REFEREE—PROCEEDINGS ON REPORT.

A judgment of the circuit court entered upon the report of a referee to hear, try, and determine may be reviewed on writ of error in respect to rulings and decisions in matter of law after the filing of the referee's report, including the action of the court upon a motion to strike out a notice of termination of the reference, which it had reserved until the filing of the report.

2. REFERENCES IN FEDERAL COURTS—STATE PROCEDURE—REFEREE'S REPORT.

Under Rev. St. § 914, a reference to hear, try, and determine may be ordered, upon consent of parties, in accordance with the provisions of the New York Code of Civil Procedure; and, upon the failure of a referee so appointed to file his report within 60 days after the final submission of the case to him, the reference may be terminated as provided in section 1019 of said Code, and thereafter the referee has no jurisdiction to make a report, nor can any judgment be entered upon one if made.

In Error to the Circuit Court of the United States for the Northern District of New York.

This case comes here on writ of error to review a judgment of the circuit court, Northern district of New York, entered September 10, 1896, against plaintiffs in error, who were defendants below, for \$13,952.20, in favor of defendant in error.

Harvey D. Goulder, for plaintiffs in error.

Louis Hasbrouck, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The action was at law for damages on breach of contract. On January 16, 1890, the parties stipulated that "a jury trial be and is waived herein, and the whole issues referred" to a counsel named therein, "as sole referee to hear, try, and determine," with the usual clause required by the rule, that judgment should not be entered until 10 days after notice of the filing of the report. An order of reference was entered on this stipulation January 18, 1890. The testimony having been taken, argument was had, briefs filed, and the case finally submitted for the consideration of the referee September 21, 1891. No report having been made by the referee, defendants on April 20, 1893, served notice on plaintiff that they elected to terminate the reference. The New York Code of Civil Procedure (section 1019) provides that, upon the trial by a referee of an issue of fact or an issue of law, "the referee's written report must be either filed with the clerk, or delivered to the attorney for one of the parties, within sixty days from the time when the cause or matter is finally submitted, otherwise either party may before it is filed or delivered, serve a notice upon the attorney for the adverse party, that he elects to end the reference. In such a case the action must thenceforth proceed as if the reference had not been directed, and the referee is not entitled to any fees." Two years afterwards, on May 16, 1895, plaintiff moved to strike out defendants' notice ending the reference, which motion came on for argument June 4, 1895. The circuit court on June 11, 1895, expressed the opinion that such motion

should not be decided at that time, but that, should the referee decide in favor of the plaintiff, the question could be raised upon the motion to confirm the referee's report, and intimated that the referee would probably decide the cause soon. Nothing further being heard from the referee, the court on October 21, 1895, made an order directing the clerk to enter an order vacating the reference on November 7, 1895, unless in the meantime the referee should file his report. The referee filed a report in favor of the plaintiff on November 5, 1895. Defendants thereupon moved to vacate, set aside, and strike the report from the files, on the ground that it was null and void, since the termination of the reference had left the referee without jurisdiction to proceed. This motion was denied December 3, 1895, and judgment was entered September 10, 1896, in favor of the plaintiff, upon recitals that all the issues had been duly referred to the referee, and that "the said referee had duly made his report." Writ of error was sued out to review this judgment.

The only question it is necessary to consider is as to the effect of the notice terminating the reference. Plaintiff's counsel contends that such question cannot be examined upon this appeal, for the reason that the orders of the court below in relation to striking out the report of the referee were not final, and that the judgment cannot be reviewed in this court; it having been entered upon the report of a referee to hear, try, and determine. There is no force in this objection. The cases cited on the brief go only to the extent of holding that the findings of a referee or arbitrator as to the facts, and his rulings as to the admission or exclusion of evidence, cannot be thus reviewed. Such cases expressly hold that, "in actions duly referred by rule of court to an arbitrator, only rulings and decisions in the matter of law after the return of the award are reviewable." *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296. The decision of the circuit court upon the referee's report and the notice of termination, which it had expressly reserved until the report was filed, may be considered a "ruling and decision in a matter of law arising after the return of the award." The judgment entered thereon was final, and is, of course, reviewable in this court. It would be an absurd proposition to hold that such a judgment could not be reviewed if it appeared that there had never been any reference at all, or that the referee had never reported. And that is precisely the position of plaintiffs in error, who contend that after April 20, 1893, there was no referee or arbitrator, and that, therefore, there was before the circuit court no report or award "duly made." The act of 1872 (now section 914, Rev. St.) provided that:

"The practice pleadings and forms, and mode of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts must conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held."

Inasmuch as this statute does not provide for like conformity in proceedings to review judgments of those courts, great embarrassment results to the defeated party where a referee appointed by consent, in conformity to the state code of procedure, has made his re-

port, and the court has entered judgment thereon; nor has the existing difficulty been substantially overcome by the rule adopted by the three federal districts of this state providing for motion for a new trial. In view of the decisions, it is rather surprising that parties to common-law actions in the circuit court consent to such references. But none of the authorities intimate that under section 914 a reference in conformity with the state practice may not be had when they do consent. It cannot be said that a reference would (in the language of the supreme court when discussing a state statute prescribing the manner in which a jury should be charged) "unwisely incur the administration of the law, or tend to defeat the ends of justice." *Railroad v. Horst*, 93 U. S. 301; *Newcomb v. Wood*, 97 U. S. 583; *Lamaster v. Keeler*, 123 U. S. 390, 8 Sup. Ct. 197; *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530. And, if a reference in conformity to the practice prescribed by state statute may be entered upon as such practice prescribes, there is no reason why it may not also be terminated in conformity with such practice. The New York Code provides for a reference upon consent of parties, manifested by a written stipulation filed with the clerk, whereupon he must enter an order referring the issues for trial to the person agreed upon. The section above quoted from, providing for termination of the reference, is positive and unambiguous. It has been construed by the court of appeals of the state, which held that where 60 days have elapsed from the final submission of the cause to the referee, and no report has been delivered or filed at the time of the service of notice, the power of the referee thereafter to make or deliver a report was terminated by such notice, and the subsequent delivery of the report by him was without authority of law, and void. "It is insisted," says that court, "that the denial of the motion to set aside the report should be sustained upon the ground that in such denial the court, in the exercise of its discretion, came to the conclusion that it was a proper case to enlarge the time for the referee to deliver his report. This position cannot be sustained. After the jurisdiction of the referee has ceased, by the service of the notice, the order referring, and all subsequent proceedings, are a mere nullity, the same as though not existing. The court has no power to render them valid by an order enlarging the time for delivering the report, or otherwise. The statute is that thereupon the action shall proceed as though no reference had been ordered. Had the court power in any way to prevent the action from so proceeding, it would, when exercised, effect a repeal of the statute. The court has no such power." *Gregory v. Cryder*, 10 Abb. Prac. (N. S.) 295. In view of the explicit language of the section, it is difficult to see how the state court could have reached any other conclusion. Certainly this provision for terminating references when a reasonable time has elapsed without decision is not a "subordinate provision," nor do we see how it can be said to "incur the administration of the law, or tend to defeat the ends of justice." It may be availed of equally by either party. It gives to neither an unfair advantage over the other. It tends to secure a speedy end of litigation. Moreover, it was eminently proper that the state should make some provision on the subject. It is

well-settled law that an agreement to submit to arbitration is, in general, revocable by either party at any time before an award has been made; but, where parties to an action have consented to a rule of court submitting the action to arbitrators to be mutually chosen, neither party can rescind the rule. 1 Am. & Eng. Enc. Law, p. 664. When the state, therefore, provided for the submission of issues in court to an arbitrator or referee by consent of parties, it was but fair that it should provide safeguards against the referee holding the case indefinitely,—for years, perhaps, as in this case,—while a party aggrieved thereby was powerless to compel a decision. We are of the opinion, therefore, that when judgment was entered in the circuit court on September 10, 1896, there was on file in that court no report of any referee duly made; and since it appears from the recitals in said judgment that there has been no default of defendants, and no trial of the issues, either by a jury or by the court without the intervention of a jury, the circuit court committed error of law in entering such judgment. The judgment of the circuit court is reversed and the cause remitted.

WESTERN WHEEL-SCRAPER CO. v. DRINNEN et al.

(Circuit Court, N. D. Illinois. April 5, 1897.)

EFFECT OF APPEAL—JURISDICTION OF TRIAL COURT—AMENDMENT OF PLEADINGS—PATENTS.

Pending an appeal from a decree restraining the infringement of a patent, the trial court has no jurisdiction to allow the answer to be amended and the case opened for further proof. *Smith v. Iron Works*, 17 Sup. Ct. 407, followed.

In Equity. On motion. Suit by the Western Wheel-Scraper Company against one Drinnen and others to restrain the infringement of a patent.

Bond, Adams, Pickard & Jackson, for complainants.

R. C. Taylor, for defendants.

GROSSCUP, District Judge (orally). The motion is to amend the answer, and open up the case for further proof. The case is one arising under the patent laws of the United States, and was heard in the circuit court at a previous term (77 Fed. 194), resulting in a decree in favor of the complainants, sustaining the validity of certain claims of their patents, finding the defendants guilty of infringement, and entering the customary injunction order. From this decree an appeal was perfected to the circuit court of appeals, where the case is now pending. The question preliminary to all others, raised by this motion and, in the view I have taken, decisive of the motion, is: Has the circuit court jurisdiction, during the pendency of an appeal in the circuit court of appeals, to open up the original cause upon any question relating to the merit of the decree appealed from? Upon this question I hold that the appeal takes from the circuit court jurisdiction of the cause to the extent that the cause is bound up in the

appeal. The only questions still open in this court, pending appeal, are those that do not relate to the decree appealed from. The purpose of the motion, however, is to open up and change the decree appealed from, and therefore deals with questions in the case that are now within the sole jurisdiction of the circuit court of appeals. This ruling is sustained in *Smith v. Iron Works* (recently handed down by the supreme court) 17 Sup. Ct. 407, and applies to patent cases the same rules that govern chancery cases generally. The motion is overruled.

SCHEEL v. ALHAMBRA MIN. CO.

(Circuit Court, D. Nevada. April 5, 1897.)

No. 596.

MINES AND MINING—CONVEYANCE OF TUNNEL RIGHT—APPURTENANCES.

The grant of a tunnel right through a specific piece of ground, "together with all and singular the appurtenances thereto belonging," carries with it by implication every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right.

This is a bill in equity to quiet title to the Metropolitan mine and mining claims, owned by the plaintiff. The suit was commenced in the state court, and thereafter removed to this court, on motion of defendant, upon the ground of diversity of citizenship of the parties.

The bill, as reformed in this court, charges that defendant, in running a tunnel through and near plaintiff's mine, wrongfully and unlawfully, without plaintiff's consent, dumped and deposited waste rock and earth from said tunnel upon plaintiff's claim; that defendant claims an estate and interest in the Metropolitan mine adversely to plaintiff, viz. an easement and servitude therein, and the right to dump waste rock thereon; that said claim is false and invalid, and casts a cloud upon plaintiff's title thereto. The defendant, in its answer, "alleges that whatever right, title, or interest plaintiff may have in said Metropolitan claim is subject to the right of defendant to run, maintain, and work said tunnel, and to the right of defendant to dump waste rock on said Metropolitan claim." It bases its right to use the land owned by plaintiff at the mouth of the tunnel, upon the ground that it is, and ever since 1873 has been, the owner of, in possession of, and entitled to the possession of the mining claim and premises known as the "Alhambra Mining Claim," together with the tunnel mentioned in the complaint, "with the right to dump ore and waste rock upon the surface of the Metropolitan mining claim"; that said tunnel, when commenced, at the mouth thereof, was upon vacant and unoccupied public mineral land; that on April 6, 1887, its predecessor in interest and grantor located a tunnel right and location under the provisions of section 2323 of the Revised Statutes, commencing at the mouth of the tunnel, described in the complaint, and running through the Metropolitan claim into, along, and upon the ground of the Alhambra claim; that said location was made with the knowledge of said plaintiff and his grantor; that defendant and its predecessor in interest ran said tunnel upon said tunnel right and location, and fully complied with the mining laws in regard thereto; that long prior to the commencement of this suit the plaintiff and his grantor, for a valuable consideration, sold and conveyed to the defendant the land through which the tunnel runs. The evidence shows that on June 30, 1874, Herman J. T. Scheel (plaintiff's father) obtained a patent to the Metropolitan lode claim; that on February 23, 1887, he conveyed his title to said lode claim to his son, Herman B. J. Scheel, the plaintiff herein; that plaintiff holds the legal title to said lode claim, except as to such portions of the surface ground which, on

April 4, 1888, were conveyed by deed to the defendant. The land conveyed is described in the deed as follows: "That piece or strip of land twenty (20) feet wide, commencing at the mouth of the tunnel location of John O. Strauch, and running thence west 184 feet, more or less, to the east line of the Alhambra Mining Company's land, and situated on the ground of the Metropolitan Mining Company; * * * the same being the land through the center of which said tunnel of John O. Strauch has been run. Nevertheless, I hereby reserve to myself (ourselves) the right to use said tunnel to work our own mines. * * * We also bargain and sell, convey and confirm, to said second party, its successors and assigns, forever, a right of way twenty (20) feet wide over the said lands of said Metropolitan Mining Company from the mouth of the said tunnel location of John O. Strauch to the county road; the said right of way being over the road now used by them in going to and returning from said tunnel. It is further hereby agreed that the party of the second part does not claim any ore in the ground hereby conveyed, and the conveyance hereby made only conveys the surface ground and the tunnel." On February 6, 1874, the defendant obtained from the United States a patent to the Alhambra lode, situate west of and adjoining the ground of the Metropolitan lode, for 2,000 feet in length. Four hundred and fifty feet of this ground on the Alhambra lode was afterwards conveyed to H. J. T. Scheel, and designated as the "Segregated Alhambra." On February 6, 1887, John O. Strauch, who is, and for the past 15 years has been, the president of the defendant, located a tunnel right running through the ground of the Metropolitan Mining Company, claiming "all veins or lodes within 3,000 feet from the face of said tunnel on the line thereof, not previously known to exist, which are or may be discovered in said tunnel." This tunnel right and location was, on April 4, 1888, conveyed by Strauch to the defendant. The tunnel passes through the ground of the Metropolitan Company into the ground of the Alhambra Company. It was run a distance of about 1,012 feet before the location of the Alhambra lode, and has since been extended a distance of nearly 500 feet. Drifts have been run from the tunnel a distance of between 700 and 800 feet. The waste rock and earth from these drifts were dumped on the Metropolitan ground at the mouth of the tunnel. The dump is about 200 feet long, 80 feet wide, and 30 feet deep. At the close of the testimony, the defendant, by leave of the court, amended its answer so as to conform to the proofs, by adding the following averments: "Defendant alleges that the tunnel mentioned in said bill of complaint was commenced by said defendant prior to the year 1873, under the direction and supervision of Herman J. T. Scheel, the predecessor in interest and grantor of the plaintiff in this action, to the Metropolitan mining claim described in said bill of complaint, and was continued and constructed under said plaintiff's predecessor in interest and grantor until he conveyed said Metropolitan claim to said plaintiff; and after such conveyance said tunnel was continued and constructed by said defendant under the supervision and direction of said plaintiff for said defendant until the year 1894; and that from the year 1873 to the year 1894 said defendant expended in the construction of said tunnel the sum of over ten thousand dollars, and during the whole of said time said defendant, under the direction of said plaintiff and his said grantor, dumped the waste rock from said tunnel upon said Metropolitan claim. Defendant further alleges that by reason of the premises said plaintiff is estopped from denying defendant's right to run said tunnel and dump waste rock therefrom upon said Metropolitan mining claim." The evidence given at the trial fully sustains the averment of facts set out in this answer. It shows that the plaintiff never made any objection to the use of the dump by the defendant until 1894, when a dispute arose between the parties about a claim presented by the plaintiff for services which the defendant refused to pay. This suit was commenced June 6, 1894.

Robert M. Clarke, for plaintiff.

W. E. F. Deal, for defendant.

HAWLEY, District Judge (orally). Did the right to use the surface ground at the mouth of the tunnel as a dump pass by the con-

veyance from the plaintiff to the defendant of the tunnel right as an incident or appurtenant to the land conveyed? The deed was a bargain and sale deed. It granted, bargained, sold, and conveyed the premises described in the statement of facts, "together with all and singular the * * * appurtenances thereto belonging." The conveyance of the land through which the tunnel runs would be of but little, if any, value without the use of the surface ground at the mouth thereof as a dump. In fact, the tunnel could not be successfully run for the purposes for which it was located and constructed without such right or privilege. A deed in general terms passes everything which is a constituent part of the land granted. Was the right to dump the waste rock on the plaintiff's land an incident or appurtenant to the use and occupancy of the tunnel? The word "appurtenances," in common parlance and legal acceptation, is used to signify something belonging to another thing as principal, and which passes as incident to the principal thing. 1 Bouv. Law Dict. "A right annexed to land is appurtenant where the connection has arisen either by grant or by prescription from long adverse enjoyment. In such a case the appurtenant thing passes with the thing to which it is annexed whenever a conveyance or transmission of the latter takes place." 1 Rap. & L. Law Dict. An easement is defined to be "a liberty, privilege, or advantage which one man may have in the lands of another, without profit. It may arise by deed or prescription." 1 Bouv. Law. Dict. In construing the deed in question, it is the duty of the court to take into consideration the situation of the land, the circumstances attendant upon the location of the tunnel right, the object and purpose for which it was acquired, how used, the particular situation of the parties, their knowledge of the character of work to be done in the tunnel, the necessities which existed, if any, of having a right to store the waste rock and earth upon the adjacent land at the mouth of the tunnel, and the acts and conduct of all the parties in relation thereto, in order to arrive at the intent of the parties in conveying the land through which the tunnel runs. The plaintiff reserved the right to use the tunnel for the purpose of working the Metropolitan mine. In the working of the mines in question either by the plaintiff or the defendant, in extracting and removing the pay ore therefrom through the tunnel, there would naturally arise a necessity of making some disposition of the waste rock and earth that had to be removed in the prosecution of the work. The result was that the surface ground at the mouth of the tunnel was used as a dump for that purpose. At the time the conveyance was executed, and for many years prior thereto, Herman J. T. Scheel (the father) was engaged in running the tunnel for the defendant, and under his direction the waste rock and earth were deposited at the mouth of the tunnel on land to which, at the time he held the legal title. The same condition of affairs existed afterwards, continuously, either under the direction of the father or Herman B. J. Scheel, the son, until 1894. From the beginning of the first work in the tunnel up to the time this case was tried the ground in question was used as appurtenant to the tunnel, and its use was necessarily incident to the full enjoyment of the tunnel for the purposes for which it was constructed and used. There are many things

which pass by a conveyance of land as appurtenant or incident thereto although not expressly named in the deed. If the description in the deed does not mention the things claimed as appurtenant, the same will be held to pass by the deed, if it clearly appears from all the transactions between the parties, and the circumstances and conditions of the property and of the use and enjoyment of the same, that the things not so mentioned are necessarily incident thereto.

In *Bank v. Miller*, 6 Fed. 545, 551, Judge Deady said:

"That a sale of any real property carries with it any easement or privilege which is necessary to its enjoyment, and at the time is in use thereon and therewith, as an appurtenance in fact, although not technically so at law; and this upon the presumption, more or less cogent, according to the circumstances, that it was the intention of the parties to the agreement of sale that it should pass with the property to which it was then apparently subservient."

In *Insurance Co. v. Patterson*, 103 Ind. 582, 586, 2 N. E. 188, 191, the court said:

"Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made."

In *U. S. v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463, the court held that, where a house or store is conveyed by the owner thereof, everything passes which belongs to, and is in use for, the house or store, as an incident or appurtenance. Mr. Justice Story, in his opinion, said that this rule "is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession, but it is strictly a question what passes by the grant."

In *Voorhees v. Burchard*, 55 N. Y. 98, 102, the land conveyed was designated as "being the mill property of the said Ransom Rathbone in the village of Rathboneville," then giving metes and bounds, embracing 7.9 acres of land, with appurtenances. It was shown by the evidence that in front of the mills was an open space, extending to the highway, containing 62 rods of land, which was the locus in quo in the action of trespass brought by the plaintiff, and was not included within the boundaries of the deed, but had been used as a mill yard for the deposit of logs and lumber sawed at the mill for 25 years by Ransom Rathbone prior to his conveyance. The trespass complained of was the deposit of saw logs on the open space in front of the mills. It was shown that the entire use of this mill yard was necessary to the beneficial enjoyment of the mills. The court held that, upon the facts, an easement in the locus in quo for a way and for a mill yard was carried with the principal thing conveyed, and, among other things, said:

"But the controlling thing is this: How much and what was necessary for the mill? the actual use by the successive owners being evidence of this. * * * It is the necessity of the mill for its full and free enjoyment which controls in indicating what and how much shall pass as an incident appurtenant to that in terms conveyed."

A tunnel right through a specific piece of ground is a right to enter upon and occupy the ground for the purpose of prosecuting work in the tunnel, and to extract therefrom waste rock or earth necessary to complete the running of the tunnel, and making such use thereof, after completion, as may be necessary to work the mining ground or lode owned by the party running the tunnel. By implication the grant of such a right carries with it every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right, such right or easement being necessary for the full and free enjoyment of the tunnel right.

The views herein expressed, and conclusions reached, are sustained by the following additional authorities: *Sparks v. Hess*, 15 Cal. 187, 196; *Cave v. Crafts*, 53 Cal. 135, 138; *Farmer v. Water Co.*, 56 Cal. 11, 13; *Smith v. Cooley*, 65 Cal. 46, 48, 2 Pac. 880; *Jackson v. Trullinger*, 9 Or. 393, 398; *Scott v. Michael*, 129 Ind. 250, 254, 28 N. E. 546; *Coolidge v. Hager*, 43 Vt. 9, 14; *New-Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190; *Lampman v. Milks*, 21 N. Y. 505; *Ward v. Warren*, 82 N. Y. 265, 268; *Holloway v. Southmayd*, 139 N. Y. 390, 402, 34 N. E. 1047, 1052; *Witte v. Quinn*, 38 Mo. App. 682, 692; *Bowling v. Burton*, 101 N. C. 176, 180, 7 S. E. 701; *Gurney v. Ford*, 2 Allen, 576; *Ammidown v. Ball*, 8 Allen, 293. It is therefore unnecessary to consider any of the questions upon the other points raised by the pleadings, and especially upon the point as to whether or not an estoppel was properly pleaded or proved. The evidence which was objected to, as to its insufficiency to establish an estoppel, was properly admitted in evidence as tending to show the situation of the land, and the conduct of the parties, and as bearing upon the question of their intentions at the time the conveyance of the tunnel right was executed; and it matters not whether it was sufficient for the purpose of establishing an estoppel, as the points discussed are absolutely conclusive as to the rights of the parties. The plaintiff has the legal title to the land covered by the dump at the mouth of the tunnel, which is the locus in quo in controversy; but he holds such title subject to an easement and right of way of the defendant to use said land, and so much thereof, and no more, as may be necessary for a dump, with the right to deposit any and all waste rock and earth conveyed through the tunnel owned by the defendant. A decree will be entered in accordance with the views expressed in this opinion.

HILL et al. v. HITE et ux.

(Circuit Court, E. D. Arkansas, W. D. April 10, 1897.)

1. MORTGAGE OF HOMESTEAD.

Under the Arkansas homestead law, a deed purporting to mortgage the homestead of a married man is a nullity if his wife fails to join in the deed as grantor and acknowledge it as such. And if she signs under duress, and that fact is known to the mortgagees, she does not "join in the execution" of the deed, in the meaning of the act.

2. SAME—DESCRIPTION.

A description of land in a mortgage as the north part of a quarter section is void for indefiniteness.

3. SAME—SUNDAY.

Under the Arkansas statutes, a mortgage executed on Sunday is void.

4. SUNDAY—FEDERAL COURTS.

The construction of a state Sunday law by a state court is followed by the federal courts.

5. SAME.

A contract executed on Sunday being void, a ratification of it on a week day, in order to impart validity to it, must be by express agreement, and not by mere acquiescence.

6. SAME—INNOCENT PURCHASERS.

As the mortgagees of a homestead, through their trustee and agent, knew that the mortgage had been executed on Sunday, and that the wife had signed under duress, they are not innocent purchasers, and the parties to the mortgage may contradict the certificate of the officer.

7. SAME.

Persons holding under an instrument to secure an antecedent debt are not bona fide purchasers for value.

This was a suit in equity brought by Hill, Fontaine & Co. against Henry and Laura Hite to enforce a mortgage on land.

Harvey & Hill and E. W. Kimball, for plaintiffs.

T. H. Crenshaw and S. R. Cockrill, for defendants.

WILLIAMS, District Judge. A vast preponderance of the testimony establishes that: (1) The mortgage and notes sued on were signed and delivered on Sunday. These facts were known at the time of the execution of the mortgage to the trustee named therein, who was also the agent of Hill, Fontaine & Co. (2) Laura Hite, the wife of Henry Hite, executed and acknowledged the mortgage under duress. That fact was known to the agent and trustee before mentioned. (3) Neither Henry nor Laura Hite entered into any subsequent contract ratifying the mortgage. (4) The W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ section 1, and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ section 12, described in said mortgage, comprised the homestead of Henry Hite at the time the mortgage was executed. Henry Hite was at that time a married man, head of a family, and a citizen of the state of Arkansas. (5) One of the subdivisions of land admitted to be conveyed by the mortgage is described in the following manner only, to wit: "North part southwest quarter section 12, T. 19 N., R. 2 E." The law upon the foregoing facts is as follows:

The act of March 18, 1887, provides "that no conveyance, mortgage or other instrument affecting the homestead of any married man

shall be of any validity unless his wife joins in the execution of such instrument, and acknowledges the same." Under this act, a deed purporting to convey or mortgage the homestead of a married man is a nullity if his wife fails to join in the deed as a grantor and acknowledge it as such. *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433; *Bank v. Gibson*, 60 Ark. 269, 30 S. W. 39. One who signs a deed under duress cannot be said to "join in the execution" of the instrument. The wife in this case not having joined in the execution of the instrument, and that fact being known to the mortgagees, the mortgage is void as to the homestead.

The only other piece of land covered by the mortgage is that described as "north part" of the S. W. $\frac{1}{4}$ section 12, etc., referred to above. A description as the north part of a quarter section is not definite enough to permit of the location of any part, and the description is therefore void. It follows that no part of the mortgage can be enforced.

2. The mortgage, having been executed on Sunday, is rendered void by the statutes of Arkansas. *Tucker v. West*, 29 Ark. 386. There could be no subsequent ratification of the mortgage by Laura Hite, the wife of Henry Hite, because, the property being that of the husband, the wife could relinquish her interest in it only by joining in the conveyance, and acknowledging the instrument separate and apart from her husband, as provided by the statutes of Arkansas. It would follow, therefore, that, even if the evidence showed that there was a subsequent ratification of the execution of the mortgage by Henry Hite, it would amount to no more than an execution of the mortgage by him alone; but a mortgage upon a homestead by the husband alone is a nullity, and, even if Henry Hite had ratified the mortgage, it would be inoperative, because the husband has no power to mortgage his homestead unless his wife joins with him in the deed. But Henry Hite has not, in fact, ratified the mortgage. A mere acquiescence in its existence is not a ratification, under the statutes of Arkansas. A contract executed upon a Sunday is void, and is not the subject of ratification. The parties may upon a week day adopt the terms of a previously invalid contract, and so make it valid from the time of the adoption, but it requires an express agreement between the parties to effect that result. *Tucker v. West*, 29 Ark. 386, 406. The construction by the state court of the Sunday law is followed by the federal courts. *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974. The foregoing construction of the Arkansas statutes is that commonly given to other statutes of like character in other states. In *Day v. McAllister*, 15 Gray, 433, the syllabus is as follows:

"A contract made in violation of the Lord's day is absolutely void, and no subsequent ratification will sustain an action upon it."

Bish. Cont. § 542, says:

"The void Sunday contract is sometimes spoken of by the courts as susceptible of 'ratification' on a subsequent week day. But the better expression is that as it is void, and not voidable, there can be no technical ratification of it; yet a new contract, express or implied, may be made on the same subject, as though nothing had been done on Sunday."

Bishop on Contracts and the Massachusetts case above cited are referred to by the supreme court of Arkansas, in *McKinney v. Demby*, 44 Ark. 74, 78, to sustain the announcement here made; and in *Tucker v. West*, 29 Ark., supra, Judge English said the ratification or adoption of the terms of the old contract could be made by express contract only. In *1 Jones, Mortg.* § 623, the law is stated as follows:

"The statutes forbidding the transaction of business on Sunday have the effect to render void all contracts executed on that day. It is sometimes said that such contracts, being immoral and illegal only as to the time they are entered into, may be affirmed upon a subsequent day, and thus made valid. But it seems incorrect to say that a mere ratification can impart legal efficacy to a contract which has no legal existence. The logical theory would seem to be that nothing but an express promise, subsequently made, founded upon the consideration emanating from the illegal contract, will avail to support an action having that consideration as a basis."

There has been no adoption by either Henry Hite or his wife, Laura, of the terms of the void Sunday contract. It remains void, therefore, under the statutes of Arkansas, as construed by its supreme court, and this court cannot enforce the mortgage. The mortgagees in this case, through their trustee and agent, knew that the mortgage had been executed upon a Sunday, and that the wife had been forced to sign the same against her will. They are not in position, therefore, of innocent purchasers, and the parties to the mortgage were at perfect liberty to contradict the certificate of the officer. *Donahue v. Mills*, 41 Ark. 421-426; *Holt v. Moore*, 37 Ark. 145-148. Indeed, if the mortgagees had not had actual notice through their agent, the rule would be the same, because the doctrine that a bona fide holder for value of negotiable paper transferred as security for an antecedent debt is unaffected by equities or defenses between prior parties of which he had no notice does not apply to instruments conveying real or personal property as security in consideration of a pre-existing debt. *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679. The only object of the execution of the mortgage in this case was to secure the past-due debt, and, within the rule of the case last cited, the mortgagees would not be protected against the equities of either Henry or Laura Hite. As the mortgage and notes are void, the bill must be dismissed.

HATCH v. JOHNSON LOAN & TRUST CO. et al.

(Circuit Court, D. Kansas. March 5, 1895.)

1. BANK RECEIVERS—NEGOTIABLE PAPER.

A receiver of a national bank holds its negotiable notes subject to the same defenses that applied to the bank itself.

2. SAME—DEFENSES TO NEGOTIABLE PAPER.

A bank which, through its cashier and managing officer, procures a note to be illegally made by a corporation to secure a debt due the bank from one of the corporation's stockholders, and which, after negotiating it to a bona fide holder, receives it back again, does not thereby become entitled to the protection of a bona fide holder.

3. CORPORATIONS—IRREGULAR ELECTIONS—EXECUTION OF NOTE AND MORTGAGE.

The acts of some of the directors who are the principal stockholders in electing officers, and through them executing a note and mortgage with-

out the notices required by the by-laws and in defiance of their provisions, are void as to other owners and bona fide pledgees of stock.

4. SAME—ATTACHMENT—MORTGAGES.

The levy of an attachment on corporate property in an action on a debt against the principal stockholder can give no rights as against any mortgages, based upon a valid consideration as to such stockholder, which were executed prior to the levy of the writ.

5. SAME.

Where a stockholder caused a note and mortgage on the corporate property to be illegally executed in part as security for his own debt and in part for a debt due from the corporation, *held*, that the mortgage should stand as an equitable charge against the property of the corporation to the extent of its own debt.

6. BANKS AND BANKING—CHECKS OF CORPORATION—MISAPPLICATION OF PROCEEDS.

A bank cashier or teller may pay out a check drawn in the name of a corporation in the usual course of business, and when there are no circumstances of suspicion to put him on inquiry, without any investigation as to the destination of the money drawn; and the bank is not to be held liable if the money is misappropriated.

Peters & Nicholson, for Hatch, receiver.

Throop & Brown, for F. J. Hess and Highland Hall Co.

John A. Eaton and John C. Pollock, for First Nat. Bank.

WILLIAMS, District Judge. **H. F. Hatch**, as receiver of the American National Bank of Arkansas City, Kan., on the 20th day of September, 1892, filed in this court his bill in chancery against the defendants to enforce a lien he claimed upon the property of the Highland Hall Company, consisting of certain real estate at Arkansas City, Kan. His lien, he alleged, accrued to him in a suit at law in this court against one Frank J. Hess, wherein a writ of attachment had issued and had been levied upon the property of said Hess, also upon property standing in the name of the Highland Hall Company, to secure and satisfy the claim which the said Hatch set up against said Hess. It was averred that the said claim, amounting to \$10,994.63, went to judgment, and that the grounds of said attachment were sustained, and that the judgment still remains unsatisfied. The bill then sets forth the execution of a mortgage in the name of said Highland Hall Company to the Johnson Loan & Trust Company on the 24th day of December, 1890, purporting to convey the real estate owned by that company to the said loan and trust company to secure a note for \$20,000 of that date to the said Johnson Loan & Trust Company, payable July 1, 1891, at the office of said loan and trust company, bearing interest at the rate of 10 per cent. per annum from maturity. It was averred that the note and mortgage were fraudulent, because the said Highland Hall Company did not owe anything to said Johnson Loan & Trust Company at the date of execution thereof or subsequently; that they were executed for the purpose of defrauding complainant, and were the result of a conspiracy entered into between said Frank J. Hess and the officers of the Johnson Loan & Trust Company and the First National Bank of Arkansas City; that no consideration passed for said note or mortgage from said First National Bank or from the National Bank of Commerce to either said Highland Hall Company or Frank J. Hess; that, if any

consideration had ever passed, it had wholly failed; that the note and mortgage were void, because they were executed without authority from the board of directors of said Highland Hall Company, and by a person who had at the time no authority to act as president of the said Highland Hall Company; that the person who pretended to execute the same as president, R. U. Hess, was not a director in said company; and that at said time one A. B. Johnson was the president of said company. And it further averred that the said pretended mortgage was obtained through the connivance, collusion, and fraud of H. P. Farrar, who was at that time, and also at the date of the filing of the bill, cashier of the said First National Bank, and that the said Johnson Loan & Trust Company, about the date of the execution of the note and mortgage, delivered the same to the said First National Bank, which transferred the same to the National Bank of Commerce of Kansas City, which was holding the note and mortgage for said First National Bank in conformity with a conspiracy between the said three last named corporations. The bill prays that the mortgage be canceled, and for such other relief in the premises as the nature of the case shall require.

The National Bank of Commerce of Kansas City has not been served with process, and has not entered any appearance in the suit. Indeed, there is nothing to show service upon any of the defendants to the bill. The bill has not been answered. But George W. Robinson, receiver of the First National Bank of Arkansas City, waived service of a subpoena under said bill, and filed a cross bill and a supplemental cross bill, and these were answered by the Highland Hall Company and Frank J. Hess. Nothing among the papers in the cause shows service of process on the cross bill upon H. F. Hatch, receiver of the American National Bank of Arkansas City. The cross bill of George W. Robinson, as receiver, etc., recites that the First National Bank of Arkansas City has become insolvent; that Robinson has been appointed receiver thereof, to take charge of and collect its assets, by the comptroller of the currency; and that, in order that all matters touching the complaint and all controversies may be fully adjudicated, and that final decree may be made herein regarding and touching the real estate in controversy, and the alleged lien of the complainant and the lien of the First National Bank of Arkansas City, Robinson asks leave to withdraw his demurrer to the bill, and files this his cross bill. It alleges, among other things, that the American National Bank has become insolvent, and H. F. Hatch has been appointed receiver thereof; that the Johnson Loan & Trust Company, First National Bank of Arkansas City, the Highland Hall Company, and the National Bank of Commerce of Kansas City are all corporations. It admits the allegations of the bill so far as relates to the issuance of attachment and recovery of judgment. It states that the Highland Hall Company was a corporation organized under and pursuant to the laws of the state of Kansas, and having its chief office and place of business at Arkansas City, Kan., and that as such it was, by and under its charter, engaged in the business of buying, improving, selling, and renting real estate; that Frank J. Hess was a large stockholder in the said Highland Hall Company,

and a director therein. It questions the existence of any lien by virtue of complainant's attachment on the property of the Highland Hall Company. It states that the said Highland Hall Company at all times had a duly elected and qualified board of directors, and that said board of directors had full charge and control of the business of said corporation, and that all of the corporate powers and business of said corporation were exercised and transacted by and through such board of directors and the officers of said corporation, consisting of a president, vice president, secretary, and treasurer. It is then alleged that on the 24th day of December, 1890, the Highland Hall Company, to secure an indebtedness it owed to the Johnson Loan & Trust Company, through its duly-authorized president and secretary, executed to said loan and trust company its note for \$20,000, payable July 1, 1891, and a mortgage upon its real estate at Arkansas City to secure the same; that said mortgage was duly filed for record on December 27, 1890, in the proper office; that said note was subsequently negotiated in due course of trade by said loan and trust company to said First National Bank, and that it was afterwards negotiated for value, before maturity, in due course of trade, by said First National Bank to the National Bank of Commerce of Kansas City; that at the request of the First National Bank the said mortgage was afterwards transferred by said loan and trust company to said National Bank of Commerce; that the note was indorsed by said loan and trust company without recourse, and its payment was guaranteed by Frank J. Hess; that the said note and mortgage are now owned by the said receiver of the First National Bank, the said First National Bank having paid off to the National Bank of Commerce the indebtedness for which the note and mortgage had been held as collateral. It denies any fraud or collusion in the execution or delivery of said note and mortgage, or the negotiation thereof, and says that the same were executed for the purpose of evidencing said indebtedness, and securing the same to said Johnson Loan & Trust Company by said Highland Hall Company. It is contended in said bill that the transfers to the First National Bank and to the National Bank of Commerce relieved the note and mortgage from any defenses which may have existed thereto by the Highland Hall Company against the Johnson Loan & Trust Company. It is also alleged that Frank J. Hess, by virtue of his ownership of a large portion of the stock of said Highland Hall Company, has control of its property, and, under the direction of its board of directors, has rented and is collecting the rents of its property, aggregating \$200 per month thereof, and has appropriated the same to his own use; that he has allowed the taxes upon its property to remain unpaid, until now the lien for taxes to the state amounts to \$2,414.49, and that, to prevent a tax deed being executed by the county clerk of Cowley county to the holders of the tax certificates, said Robinson, as such receiver, had instituted a suit, and obtained an injunction; that said Frank J. Hess had allowed said taxes to remain unpaid with a view of depriving the receiver of said First National Bank of its mortgage, and was conspiring with H. F. Hatch for this purpose. It was prayed therein that a receiver to collect rents and pay taxes should be appointed,

and that the mortgage held by said Robinson, as receiver, etc., be foreclosed, and the property therein set forth be sold; that the priorities of the several liens be decreed herein, and that all orders and decrees necessary in and about a full adjudication and determination of all matters and controversies in this action may be herein had. The recitals of the so-called "supplemental cross bill" merely particularized the manner and times at which the note of the Highland Hall Company for \$20,000, in controversy, was negotiated and renegotiated to the National Bank of Commerce by and to the First National Bank.

The Highland Hall Company filed an answer to the cross bill of George W. Robinson, as receiver, on September 11, 1893, and subsequently, on October 2, 1893, filed an answer and cross bill to the cross bill of said Robinson, upon which no subpoena appears to have been issued, nor is there any answer thereto. The first of these recites that the board of directors of the Highland Hall Company on December 24, 1890, consisted of H. P. Farrar, Fred W. Farrar, J. L. Huey, A. B. Johnson, and Frank J. Hess, who were duly qualified and acting as such for all of the years of 1890 and 1891; that A. B. Johnson was president and Frank J. Hess was secretary during said time; that during the same time H. P. Farrar and Fred W. Farrar were, respectively, cashier and assistant cashier of the First National Bank of Arkansas City. It denied that the said company had ever been indebted, except in 1889, in the sum of \$4,000, to said First National Bank, which had been paid off in the year 1889; that Frank J. Hess, who had parted with all of his stock in the Highland Hall Company to C. W. Purinton, W. C. Brown, and other parties, who are named, being indebted, at the time of the execution of the note and mortgage for \$20,000, to said First National Bank in the sum of \$41,000, and to partly secure the same, and keep the bank from failing, by collusion between the two Farrars and said Hess caused to be executed the said note and mortgage to the Johnson Loan & Trust Company; that the reason the First National Bank was not named as mortgagee was to evade the national banking law in reference to taking notes secured by mortgage upon real estate, and for the purpose of getting around the provisions of the laws of the United States regulating national banks, and prohibiting the loan of more than 10 per cent. of their capital to more than one individual or corporation; that this was done without the authority or a meeting of the board of directors, when the president of the company was off on a wedding trip, and without knowledge of J. L. Huey, one of the directors, R. A. Hess signing the same as president of the company at the office of H. P. Farrar, as cashier of the First National Bank; that said note and mortgage were then kept, and have ever since been retained, by said H. P. Farrar among the assets of said First National Bank until the appointment of the receiver thereof; that no consideration moved to it from the Johnson Loan & Trust Company; that it had no knowledge of any transfer of said note or mortgage to the National Bank of Commerce; that the Johnson Loan & Trust Company never had any-

thing to do with the making or delivery of said note or mortgage; that the said Highland Hall Company had no authority to make the said note and mortgage; that its real estate was worth \$3,000; that it owed nothing thereon, and had husbanded its rents and income. The other answer and cross bill does not materially differ from that just mentioned, except that it contains denials of the allegations of the cross bill of Robinson.

The answer of Frank J. Hess to the cross bill of Robinson admits that he was indebted to the First National Bank of Arkansas City in the sum of \$41,000, and says that the note and mortgage of the Highland Hall Company were executed, in evasion of the national banking laws, as set forth in the answer of said company, to the Johnson Loan & Trust Company. He denies that he owned or that he controlled all of the stock of the said Highland Hall Company at the time the note and mortgage for \$20,000 were executed, but says that he had placed the same in the hands of his creditors in good faith for the indebtedness he owed them in excess of the face value of such stock.

The testimony in the case established the following facts: The Highland Hall Company was a company which was incorporated May 13, 1882, under the laws of Kansas, with a capital of \$10,000, for the purpose of constructing buildings, and of buying, selling, and leasing real estate; also of loaning money on real estate and personal security, discounting notes, and such other business as might be authorized by law. Its place of business was Arkansas City, and the term for which it was incorporated was 99 years. It adopted a set of by-laws, which, among other things, provided that: "The directors of this company shall have charge of all property belonging to this company, and shall have general supervision of all business transacted by this company. They shall audit all bills against the company, and no bill shall be paid till so audited." Article 16. After providing for the mode of electing a board of directors at a meeting of stockholders "thirty days' notice of [the] time and place" of which had to be "published in some newspaper in Arkansas City," it goes on to say how and when the board shall organize and proceed to an election of officers. It further provides that "the officers of the company shall consist of a president, vice president, secretary, and treasurer, * * * which shall hold their position one year, or until their successors shall have been elected and qualified." The mode of casting votes for officers is provided for, and also how many of the board shall constitute a quorum. There are to be regular monthly meetings of the board of directors on the first Monday in each month for the transaction of such business as may be necessary. The duties of the president, vice president, secretary, and treasurer are provided for. It was made the duty of the president to preside at all meetings when present, call extra meetings when necessary, and to have general superintendence of the affairs of the company. The duties of vice president were virtually the same as those of the president when the latter, from any cause, was unable to attend. The secretary's duties were "to keep a true and

correct record of all meetings and actions of the board of directors." The treasurer's duty was to collect and receive and keep all funds of the company, and disburse the same only on orders of the president, attested by the secretary. The Highland Hall Company, among other things, duly acquired lots 6, 7, and 8, in block 68, Arkansas City, upon which there were valuable improvements, on March 7, 1887. On that day it sold said property to Frank J. Hess for \$30,000, of which \$10,000 was in the shape of an incumbrance, which said Hess assumed, and he paid \$2,500 in cash, and gave his notes for the remainder. A deed was made by the company, which was placed in escrow, to be delivered when the notes were paid. He could not meet the notes without borrowing the money, and to enable him to do this the stockholders of the company seem to have transferred to him all of the stock of the company, aggregating \$10,000. Of this stock 998 shares were held in his own name, and 1 each of the 2 remaining shares was held by H. P. Farrar and A. B. Johnson. This was on or about May 9, 1888. On the same date these three stockholders met, and increased the stock to \$50,000, or 5,000 shares of \$10 each. On the same day the old board of directors and officers resigned, and new ones were elected, and a copy of the resolution at the stockholders' meeting, signed by A. B. Johnson as president, and attested by H. P. Farrar, and certified to by four directors, showing the increase of stock, was forwarded to the secretary of state of Kansas. Of the 5,000 shares so created, Frank J. Hess received all but 4 shares, 1 each of said 4 shares being issued to J. L. Huey, F. W. Farrar, H. P. Farrar, and A. B. Johnson, who held the same merely as nominal stockholders. To pay for this stock, and justify an increase of stock, Frank J. Hess reconveyed to the Highland Hall Company the property he had purchased from it (upon which he claimed to have expended \$5,000) for \$35,000, and conveyed some other property known as the "Office Building," of the value of \$15,000. This stock so issued to Hess was hypothecated in pledge or absolutely transferred to different parties at different times. On December 24, 1890, the books of the Highland Hall Company showed that the stock owned by Frank J. Hess was still in his name, except 500 shares, which appeared in the name of his wife. He had received from her \$3,000, and there is nothing in the evidence to show that she made him a present of it. There was evidence tending to show that he had used this \$3,000, and made money out of it. It is claimed that he made \$10,000 to \$15,000 out of it, which formed the basis of the transfer of the stock to her. The other shares were held in pledge on December 24, 1890, by Charles W. Purinton, W. C. Brown, the Union Guaranty Savings Bank, the American National Bank of Arkansas City, and the First National Bank of Arkansas City, though such pledges were not noted on the books of the company. Frank J. Hess was also a large stockholder in other corporations, and he kept the run of the business of these corporations, including that of the Highland Hall Company, at his office, keeping an account with each of them. He mingled their bills with his, and paid their debts some-

times with his funds, and his debts with their funds. He owed to the First National Bank of Arkansas City \$41,000 on December 24, 1890. Part of this he claimed was the debt of the Highland Hall Company, and he says it exceeded \$20,000. But the evidence does not sustain this view. On the contrary, it shows that a very much smaller sum, if anything, had gone to the Highland Hall Company out of this indebtedness to help pay indebtedness which it had owed upon property. The receipts from its rents are not shown. These went, so far as the evidence discloses, to Frank J. Hess. On December 24, 1890, on the suggestion and at the instance of H. P. Farrar, cashier of the First National Bank, he procured a note for \$20,000, payable July 1, 1891, with interest from maturity till paid at the rate of 10 per cent. per annum, and a mortgage on all the real estate it owned to secure it, to be executed in the name of the Highland Hall Company to the Johnson Loan & Trust Company. The name of the Johnson Loan & Trust Company was used to deceive the officers of the government who should be directed to examine into the affairs of the said First National Bank. There is no evidence tending to show that the Highland Hall Company was indebted to the Johnson Loan & Trust Company. For the purpose of having the note and mortgage properly executed, a lawyer was consulted by H. P. Farrar, at whose direction a resolution was written out to be adopted by the board of directors of said hall company. In a conference held at the First National Bank between H. P. Farrar, F. W. Farrar, and Frank J. Hess it was agreed that, as these three comprised a majority of the board of directors of the hall company, they would at once pass the resolution, which they accordingly proceeded to do, Hess writing out the minutes for this purpose. The resolution read as follows: "Resolved, that the president and secretary are hereby authorized to borrow twenty-five thousand (\$25,000.00) dollars on lots 6, 7, and 8, block 69," etc. "Frank J. Hess, Chairman." This record was also signed by H. P. Farrar and F. W. Farrar. This was no regular meeting. It had not been held pursuant to any notice served upon any of the directors. The president, A. B. Johnson, who was a director, was at the time absent on a wedding trip; and J. L. Huey, the other director, was at home sick. No attempt was made to notify either of these, probably because it was deemed unnecessary by the parties. It being ascertained by Hess that Johnson was absent from the city, he went to H. P. Farrar, and the minutes of the Highland Hall Company were then altered so as to show that R. U. Hess was elected a director in place of J. L. Huey, who, it was first said on the minutes, had "resigned," but this was changed to show that he had "not qualified." The minutes were also changed so as to show that R. U. Hess was elected president of the company on December 22, 1890, and A. B. Johnson vice president, whereas in fact A. B. Johnson had been president of the company. R. U. Hess does not appear to have been a stockholder in the company at this time. Neither J. L. Huey nor A. B. Johnson appear to have sent in their resignations, or to have been advised of these proceedings. Thereafter, R. U.

Hess, as president, and Frank J. Hess, as secretary, executed the note and mortgage for the \$20,000. This note was immediately indorsed without recourse to the First National Bank, and it negotiated the note to the National Bank of Commerce, before maturity, for value, in the usual course of trade, on two different occasions; the said National Bank of Commerce having taken the same on both occasions without notice, in good faith. The note and mortgage were taken up and are now owned by the First National Bank.

The relationship between the Farrars and Frank J. Hess leaves no doubt that they knew all of the circumstances attending the connection of Hess with the Highland Hall Company, the circumstances attending the contraction of the debt of \$20,000 covered by the note and mortgage, and the manner in which it was executed. The note and mortgage were undoubtedly executed at H. P. Farrar's instance for the benefit of the bank of which he was then cashier, and, so far as appears, manager. The American National Bank of Arkansas City and the First National Bank of Arkansas City are both insolvent, and their assets are in the hands of receivers appointed by the comptroller. H. F. Hatch is receiver of the American National Bank, and George W. Robinson is the receiver of the First National Bank. The latter now holds, and claims a decree to enforce, the note and mortgage for \$20,000 against the Highland Hall Company. The stock of the Highland Hall Company is now held as follows: H. F. Hatch, as receiver of the American National Bank, holds 1,000 shares, as pledgee of Frank J. Hess, on a debt of \$10,994.63; W. C. Brown holds 800 shares; George W. Robinson, as receiver of the First National Bank, holds 200 shares, in pledge from Frank J. Hess; Mary A. Hess holds 500 shares; C. W. Purinton holds the remaining shares in pledge from said Hess. Purinton holds other security, as does Robinson. The property known as the "Office Building" has been heretofore released from the mortgage.

The testimony in this case clearly shows that the note and mortgage for \$20,000, purporting to have been executed by the Highland Hall Company, a corporation of the state of Kansas, cannot be enforced in the hands of Robinson, as receiver of the First National Bank of Arkansas City. He holds these subject to the same defenses that applied to the bank itself. *Casey v. La Société de Credit Mobilier*, 2 Woods, 77, Fed. Cas. No. 2,496; *Yardley v. Clothier*, 3 U. S. App. 207, 221, 222, 2 C. C. A. 349, 51 Fed. 506. That bank, it is plain, took the note and mortgage with notice of all defenses thereto. It was executed for a pretended indebtedness to a third person,—that is, the Johnson Loan & Trust Company,—although it was known that nothing was due to that company by the Highland Hall Company by the parties who acted for said bank, and it was used to enable the bank to protect itself against loss on the debt that Frank J. Hess owed it. H. P. Farrar, its cashier, knew all the circumstances attending the execution of said note and mortgage at the time of its execution. It is folly to say that under such circumstances it is a holder for value, and in good faith, of the note. *Mechem*, Ag. §§ 718, 724, 729; *Tied.*

Com. Paper, § 116. The note and mortgage were executed in a manner prohibited by law. Three of the directors, without notice to the other two, who composed the board of directors of the Highland Hall Company, undertook to hold a meeting, and authorized the execution of the note and mortgage. And when they discovered that the president, A. B. Johnson (who was also a director), was absent on a wedding trip, they ousted the other absent director, J. L. Huey, without notice or resignation, and proceeded to install a brother of Frank J. Hess as a president, and with a stroke of the pen converted Johnson into a vice president. 2 Cook, Stock, Stockh. & Corp. Law (3d Ed.) § 713a; Paola & F. R. Ry. Co. v. Anderson Co. Com'rs, 16 Kan. 302, 306; Farwell v. Copper Works, 8 Fed. 66; Bank v. McCarthy, 55 Ark. 473, 18 S. W. 759. No doubt they were actuated by the belief that, as the affairs of the corporation had been conducted with no more regard for form in the past, and because Hess was the original owner of nearly all the stock, it was legitimate to go thus far now; for the end seemed to them to justify the means. The authorities, however, condemn such proceedings where stockholders or pledgees of stock exist and require protection, and corporation assets are thereby diverted. McLellan v. File Works, 23 N. W. 321, 56 Mich. 579; New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644; Button v. Hoffman, 61 Wis. 20, 20 N. W. 667; Wirona & St. P. R. Co. v. St. Paul & S. C. R. Co., 23 Minn. 359; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Bartlett v. Brickett, 14 Allen, 62; Millsaps v. Bank (Miss.) 13 South. 903; Manufacturing Co. v. White, 42 Ga. 148. Nor was anything cured or strengthened by the negotiation of said note, before maturity, as collateral security for future advances, to the National Bank of Commerce, on two different occasions. It finally came back into the hands of the original payee charged with the same equities and defenses as applied to it when first issued. 1 Story, Eq. Jur. § 410; Wade, Notice, § 63; Sawyer v. Wiswell, 9 Allen, 42; Calhoun v. Albin, 48 Mo. 304; Kost v. Bender, 25 Mich. 516; Benj. Chalm. Bills, 101; Tied. Com. Paper, § 155.

But the pleadings in the case are faulty. While the desire of the parties seems to be to have the rights of all parties settled, the court is not placed in that control of the property and over parties which the practice of the court in equity requires. The bill itself relies, as at present framed, solely on a lien which it is claimed accrued by virtue of the levy of an attachment on property, in a suit at law, on a debt against Frank J. Hess. This gave no rights as to the Highland Hall Company's property as against any mortgages, based upon a valid consideration as to Hess, executed prior to the levy of the writ of attachment. King v. Clay, 34 Ark. 291; Millsaps v. Bank (Miss.) 13 South. 903, 907. The proof shows without possibility of contradiction that at the time the bill was filed the complainant was the possessor, as pledgee, of 1,000 shares of the stock of the Highland Hall Company for the debt Frank J. Hess owed. And as the cross bill of Robinson, receiver of the First National Bank, seeks to put the court in pos-

session of the res, and this is concurred in by the answer and cross bill of the Highland Hall Company, the court ought now to allow an amendment to the bill so that it may now count upon the collateral so held. The parties defendant to the bill and cross bill of Robinson at least should be served with process, where they have not waived the service of process, and entered their appearance, or, what is equivalent thereto, filed answer. Robinson's cross bill is, in effect, an answer to the bill as it now reads. Inasmuch as the contesting parties are Hatch, receiver, etc., as pledgee of the Highland Hall Company stock, and the Highland Hall Company, on the one side, and Robinson, receiver, etc., the holder of its note and mortgage, on the other side, any equities which the holder of the said note and mortgage may have in virtue of the moneys which were expended by Hess out of the amount for which the note and mortgage were to stand as security for the benefit of said Highland Hall Company and the release of incumbrances upon its property should be made an equitable charge upon the property mentioned in said note and mortgage, and the proceeds thereof subjected to any offsets for rents collected, paramount to the claims of any holders of stock, under pledge or by transfer, for any debt Frank J. Hess owed. *Millsaps v. Bank (Miss.)* 13 South. 903.

The cross bill of Robinson refers to a delinquency in payment of taxes on the property of the Highland Hall Company, and to a sale of the property for taxes. But this is a matter which is not presented in a shape that the court can deal with it. For aught that appears to the contrary, the holders of the tax certificates are entitled to their tax deed, and to a remedy for the recovery of these lands. The parties who hold the certificates do not appear to be before the court in this cause, but are, as the cross bill of Robinson alleges, parties to a suit brought by him in another court to restrain the issuance of deeds.

When the bill is reformed as indicated, and cross bills have been duly answered, or service thereto has been waived (which can, perhaps, be done without the necessity of taking further proof), the proper course, it seems to me, would be to refer the whole case again to a master to ascertain how much of the money owing by Hess to Robinson as receiver went to pay off indebtedness to the Highland Hall Company, less such offsets for rents collected as may have been received by Hess or the First National Bank out of its property prior to the date of the note and mortgage, and not met by expenditures of Hess or said bank for the benefit of the Highland Hall Company; and, when this amount has been ascertained from the proof already in and any additional testimony which the parties may desire to present, a decree should go therefor, and a lien be imposed on the property to satisfy the same. This, if not paid in a given time, to be fixed, should be satisfied by a sale of the property not heretofore released from the mortgage. And the proceeds remaining after the lien thus fixed and the costs of the reference and sale have been paid should be turned over to the Highland Hall Company for the benefit of its stockholders.

The costs incurred in subpoenaing the parties to the bill of complaint as it now stands should be imposed on the complainant, and Hess should be awarded no costs on his answer. The bill should be dismissed, as to the National Bank of Commerce of Kansas City, at the cost of complainant. The costs of the second reference should abide the event, and, if there is nothing due Robinson, he should pay the costs of such reference. All other costs should be imposed on Robinson.

On Exception to Master's Report.

(March 16, 1897.)

WILLIAMS, District Judge. Two references have been had to a special master in this cause since March 5, 1895, the day the opinion was delivered by the court. A large amount of testimony has been taken thereon, and two reports have been made by said master. Exceptions have been filed to the first of these reports by the complainant, by the Highland Hall Company, and by the First National Bank of Arkansas City. No exceptions are interposed to the second of said reports. The exceptions of the complainant and Highland Hall Company are similar in every respect. The exceptions of the bank are accompanied by interrogatories which the master has undertaken to answer in his second report. Items 2, 4, and 6 of the first division of the first report under consideration have not been excepted to. Neither has item 5 of the second division of the report been excepted to. As to these matters the report stands unimpeached, and these matters have been passed over as not open to further controversy. The master's reports with reference to these uncontroverted items ought, therefore, to stand approved and confirmed.

The other items which are objected to will be taken up in their proper order. The first item of debit against the Highland Hall Company is excepted to by all the parties named. This item relates to a note for \$1,000, executed by F. J. Hess to H. P. Farrar, cashier of the First National Bank, dated November 9, 1887, and due January 10, 1888. The note represents purchase money of the property now owned by the Highland Hall Company. This item ought not to be credited to the bank against the Highland Hall Company. The property owned by the Highland Hall Company was conveyed to it by Frank J. Hess in payment for the \$50,000 capital stock of that company he received, excepting four shares. It did not obligate itself to pay any outlays Hess had made upon, or moneys he had borrowed to enable him to buy, the property so conveyed to it. Hess received value for the property he so conveyed in the shares of stock issued to him. If he borrowed money from the First National Bank to pay for this property, and executed his note therefor, that could not constitute a proper charge against the Highland Hall Company. This item, as well principal as interest upon the note, should be disallowed, and the exceptions of the complainant and the Highland Hall Company as to this should be sustained, and the exceptions of the First National Bank as to this item should be overruled.

The exceptions of the complainant and the Highland Hall Company to the third charge of \$250 are too vague to be considered, and ought for that reason to be overruled.

The exception of the complainant and the Highland Hall Company to a credit of \$5,216.63 and interest thereon, embodied in the fifth item of debits charged against the Highland Hall Company by the master, is partially well taken. As against these items there are items which are credited to the Highland Hall Company. The credits are not objected to, but the debits are. As they are a stand-off to each other, except in the matter of interest, the findings of the master should only be disallowed as to the matter of interest in item 5 in excess of the same matter in item 4 (in the second part of the report). This would lead to the striking out of item 5 of the sum of \$776.35; that being the difference between the aggregate of debits in item 5, to wit, \$12,141.35, and the aggregate of credits in item 4, to wit, \$11,365. It is difficult to understand how this matter could be a legitimate charge against the Highland Hall Company beyond the amount actually deposited; for, as has already been stated, the Highland Hall Company was not obligated to pay any loans made to Hess to satisfy incumbrances or indebtedness existing against property which he had conveyed to the Highland Hall Company for the stock of that company, which he had received and has since negotiated. The exceptions of the said complainant and the Highland Hall Company should be sustained as to so much of item 5 of the debits (first division of the report) as charges the sum of \$776.35 interest, and as to so much the said item in the report of the master should be reduced and disallowed.

All of the other exceptions of the complainant and the Highland Hall Company to the master's report ought to be overruled.

The second exception of the First National Bank to the report ought to be overruled. The bank claims a lien on account of moneys advanced by it to Hess, the benefit of which went to the Highland Hall Company. It must work out its equities by showing what became of the funds which came from it into Hess' hands. As against this, what was collected in rents from property belonging to the Highland Hall Company, at least to the extent allowed by the master, should be a set-off. The master has arrived at a result which is fair to the bank, and it ought not to complain.

The third exception of the bank to the master's report, in view of the answers which the master has made to the questions therein propounded, should be sustained. The bank is entitled to be credited with all amounts paid out on the checks of the Highland Hall Company, drawn in the regular course of business, and which it did not know went to purposes foreign to the objects of the corporation. The master answers the question propounded upon this point by the bank as follows: To the question "B" ("whether all checks drawn were not signed by the Highland Hall Company") he answers, "Yes," and to the question "C" ("whether the bank had any knowledge as to where the moneys contained in said account origi-

nated, and for what purpose the same was drawn by such checks") he answered, "No." And he answered that all the moneys deposited in said account were drawn out by such checks. Under these circumstances, to hold the bank responsible for so much of said deposits as were checked out and used other than for the benefit of the Highland Hall Company, would be to burden it with a duty not understood to exist. A bank's cashier or teller may pay out a check of a corporation, when it is drawn in the usual course of business, and there are no circumstances of suspicion to put him on inquiry, without instituting a preliminary inquiry (as to what is to be the destination of the money drawn), before the check is honored. The bank was bound to pay the check when drawn by the company in the usual course of the company's business. Benj. Chalm. Bills, art. 260. The officers of the corporation whose funds were checked out were appointed to look after these matters, and if neither they, nor the stockholders of the corporation, nor any other person holding the stock of the corporation, knew of facts to put the bank's agents on inquiry, or if, knowing them, they failed to put those agents upon notice, it can hardly be claimed with justice that the bank's agents should be blamed, or the bank should be saddled with the loss. The entire amount checked out by the Highland Hall Company should be credited to the bank. The amount deposited and drawn out was \$2,812.19, and the interest computed upon this is \$116.22. The same amount should be charged in item 3 of the debits, and the master's report in this respect is not sustained. The amount allowed as a charge against the Highland Hall Company by the master in this item is \$2,096.93, to which \$831.48 of principal and interest should be added, making a total of \$2,928.41.

The only other exception to the report mentioned is that of the bank to item 5 of the second part of the report. This relates to a matter of \$10,000 and interest. It was an amount found to have been deposited by F. J. Hess in the First National Bank to his individual account. If it had been received from the Highland Hall Company, or for its account, with the knowledge of the First National Bank, and deposited in the name of F. J. Hess, it would have been a proper item of credit in favor of the Highland Hall Company. But no such facts are found to have existed. And, in the absence of such facts, the credit is clearly improper. If F. J. Hess deposited \$10,000, he owed more than that. The bank was not obliged, under the circumstances, to place these \$10,000 to the credit of the Highland Hall Company; and as to this item the exception ought to be sustained. The result of the examination is that the following items must be subtracted from the aggregate of the debits found by the master in favor of the Highland Hall Company, to wit: Principal, \$1,000; interest, \$354.66 and \$776.35,—and that \$831.48 must be added to the aggregate found by the master, which would make the aggregate debited against the Highland Hall Company and credited to the bank equal the sum of \$32,153.02, instead of \$33,452.55. And the amount of credits in favor of the hall company and the debits against the bank should stand as shown by the master except as to the items of principal, \$10,000; interest, \$1,943.34. After deducting

these, the aggregate of said credits in favor of the hall company will be \$18,249.44, instead of \$30,192.78, as found by the master. The difference between the amount of \$32,153.02 and \$18,249.44 ought to be decreed to the First National Bank herein. This amount is \$13,903.58, with interest thereon from the date of this decree. The amount due to the Farmers' National Bank for taxes, as ascertained by the master, to wit, \$2,413.89, with interest thereon at 12 per cent. from October 17, 1894, until paid, should be made a first charge upon the property of the Highland Hall Company after the payment of the costs of the second and third references. After the payment of the taxes, the amount due the First National Bank should be paid.

As to all costs not already provided for in this and the former opinion of the court, a decree should go against Frank J. Hess, with leave to the parties in interest to issue an execution in the name of the complainant therefor against the property of the said Hess. But the costs of said execution, if not realized out of the property of said Hess, should be borne by the party suing out said execution. The Highland Hall Company should have the privilege of paying off the amount due for the references to the master, the amount due to the Farmers' National Bank for taxes and interest, and the amount decreed to the First National Bank, within 60 days from this date, if it elects to do so; otherwise a sale should be had of so much of its property as may be necessary to satisfy the claims, upon the same terms and conditions as apply to sales of similar property under mortgage foreclosure decrees. And this cause should be reserved for further orders as to parties claiming to hold shares of stock of the Highland Hall Company as pledgees of Frank J. Hess; also as to any creditors of the Highland Hall Company.

ATLANTIC TRUST CO. v. WOODBRIDGE CANAL & IRRIGATION CO.
(BUELL et al., Interveners).

(Circuit Court, N. D. California. April 5, 1897.)

CORPORATIONS—PLEDGE OF BONDS.

Const. Cal. art. 12, § 11, and Civ. Code, § 359, providing that "no corporation shall issue stocks or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void," do not prevent a corporation from pledging its bonds as collateral security for a debt less in amount than their par value. Such a pledge is an "issue" of the bonds, so as to make them valid corporate obligations.

This was a petition of intervention filed by P. A. Buell & Co., Louis Einstein & Co., Fresno National Bank, Stockton Lumber Company, Kutner Goldstein Company, Frances Cogswell, H. Bentley, Bank of Central California, and J. H. Swain in the suit of the Atlantic Trust Company against the Woodbridge Canal & Irrigation Company.

John B. Hall and Scrivner & Schell, for complainant.
Wood & Levinsky and Edward P. Cole, for interveners.

MORROW, District Judge. This case now comes up on the petition of intervention of P. A. Buell & Co. and the other interveners above referred to in the title to this cause. The interveners seek to have certain bonds (26 in number) of the defendant corporation allowed out of the proceeds to be derived from the sale in the foreclosure proceedings now pending in this suit. An answer has been filed by the complainant to the petition of intervention, and a stipulation of facts has been entered into between the complainant and the interveners. The facts relating to the issue of the bonds are, briefly, these: The stockholders of the Woodbridge Canal & Irrigation Company, the defendant corporation, by a resolution adopted on July 11, 1891, authorized the officers of the company to borrow the sum of \$100,000, and to issue its bonds in said amount, and to execute its mortgage or deed of trust to secure the same. Pursuant to this authorization, the defendant company made and executed on or about July 17, 1891, 100 bonds, of the par value of \$1,000 each, and numbered from 1 to 100, both numbers inclusive. To secure the payment of these bonds, the defendant company on July 17, 1891 (contemporaneously with the issue of the 100 bonds), executed and delivered to the complainant, the Atlantic Trust Company, as trustee, its indenture of mortgage, or deed of trust. The complainant, on its part, duly executed the said mortgage or deed of trust, and accepted and assumed the trusts created thereby. The deed of trust was duly recorded on August 10, 1891, in the recorder's office of the county of San Joaquin, state of California. By said deed of trust the Woodbridge Canal & Irrigation Company mortgaged to the complainant, as trustee, to secure the payment of the aforesaid issue of 100 bonds, its entire corporate property. The mortgage or deed of trust, after reciting the necessities and purposes for which the defendant company desired to borrow the sum of \$100,000, states:

"And whereas, the said company, to that end, is about to execute and to place in the hands of the said trustee, to be issued, certified, and delivered as shall be directed by resolution of the board of directors of said company, its one hundred corporate bonds, of one thousand dollars each, numbered consecutively from one to one hundred, both inclusive, with semiannual coupons or interest warrants attached, and with certificates to be signed by the said trustee, all of which bonds, coupons, and certificates are in the following form: * * *

Here follow the forms of the bonds, coupons, and certificates, and a description of the entire corporate property covered by the mortgage, as follows:

"All its lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, easements and fixtures, now owned or hereafter to be acquired; and all its canals, flumes, head works, gates, dams, bridges, etc., now constructed or to be hereafter constructed; * * * and all the estate, right, title, and interest, claims and demands, rights of way, and other easements, whether at law or in equity, of the said company, of, in, and to the same, and each and every part and parcel thereof; and also all buildings, fixtures, and personal property thereon, or belonging to said company; and all receipts, incomes, and profits which said company shall derive on account of any contract or agreement for the transfer of water rights, as appurtenant to specified lands, excepting and not including the annual rentals for the use of said water and interest on such contracts or agreements. To have and to hold the above-granted premises and property, with the appur-

tenances, unto the said trustee, its successors and assigns, in trust, and upon the trusts, uses, and purposes hereinafter expressed of and concerning the same, for the use and benefit of any and all persons or corporations who shall hereafter, at any time, become the purchasers, holders, or owners of any of said bonds, subject to the terms, provisions, and stipulations in said bonds contained, and also subject to the possession and management of said canal system and property by said company, its successors, assigns, or lessees, so long as no default shall be made in the payment of either interest or principal of said bonds, as herein provided, and so long as the said company shall well and truly observe, keep, and perform, all and singular, the covenants, agreements, conditions, and stipulations in said bonds and in this indenture contained and set forth, and which are to be observed, kept, and performed by and on the part of said company."

The seventh article of mortgage provides:

"Out of the moneys received from any tolls, income, rents, profits, and earnings of said canal and premises, or out of the proceeds of said sale so to be made as aforesaid, or the sinking fund above provided for, after first deducting the expenses, disbursements, costs, charges, and counsel fees incurred in and about the conducting of said sale, or the working and operating said canal, including the compensation and commission of said trustees in and about the execution of this trust, and all expenses or repairs, replacements, alterations, additions, and improvements, and all payments for taxes, assessments, charges, or liens on said premises, or any part thereof, the trustee shall, if the amount be sufficient for that purpose, pay said mortgage bonds, or so many of them as shall be outstanding and unpaid, together with all interest then due upon the same; and, if the amount be insufficient, then it shall divide the same pro rata among the outstanding bonds, and the surplus of all such moneys or proceeds of sale, if any there be, shall be paid to the company, or its successors or assigns."

The bonds are entitled "1st Mortgage Convertible Gold Bonds of the Woodbridge Canal and Irrigation Company," and they recite, among other things, that:

"This bond is one of a series of one hundred bonds of similar amount, tenor, and date, which are secured by a mortgage or deed of trust, bearing date this day, executed and delivered by the Woodbridge Canal and Irrigation Company to the Atlantic Trust Company, as trustee, conveying and assigning to the said trustee all its corporate property and franchises now owned or hereafter acquired. Any lawful holder of this bond, upon presenting the same at the office of the said trustee, with all unmatured coupons attached thereto, may have the same registered, in his own name or that of any other person, in a book to be kept for that purpose; and such name, with the date of registry, shall be indorsed upon the bond by the said trustee. * * *

The bonds further provide:

"This bond shall not become valid or obligatory until the certificate indorsed hereon shall have been duly signed by or in behalf of the said Atlantic Trust Company, as trustee."

The form of the certificate just referred to is as follows:

"The Atlantic Trust Company hereby certifies that the within bond is one of the bonds issued under and in pursuance of a certain mortgage or deed of trust, dated —, and duly executed and delivered to said company, as trustee, by the Woodbridge Canal and Irrigation Company."

The petition of the interveners alleges, in paragraph 5:

"That each of said bonds, when so executed as aforesaid, bore indorsed thereon certificates in the manner and form as set forth in the plaintiff's said amended bill of complaint."

Article 2 of the stipulation of facts admits that this allegation is true. A further stipulation, entered into on March 29, 1897,

concedes that each one of the 26 bonds held by the interveners was duly certified to by the Atlantic Trust Company. The regularity and validity of the entire issue of the bonds, including the 26 held by the interveners, is therefore conclusively established; and the complainant, as trustee, is estopped from denying or impeaching the validity of any of them. Indeed, the presumption, in the absence of any evidence to the contrary, is in favor of the regularity of the issue. As was well said by Woods, Circuit Judge, in *Stanton v. Railroad Co.*, 2 Woods, 523, Fed. Cas. No. 13,297, in speaking of the duties of bondholders to take notice, and of the presumptions in favor of the regularity of bonds:

"The holders of the bonds were bound to take notice of what was contained in or indorsed upon their bonds. They were bound to take notice of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage. * * * By a reference to the bonds, they [the holders of the bonds] would have seen that the governor had indorsed them, and recited in his indorsement that he had done so in pursuance of law; they would have seen that the face of the bond recited that it was one of a series of numbered bonds, issued in accordance with the laws of the state above recited, secured by the indorsement of the governor, made in pursuance of the same laws, and was a first lien upon the railroad and other property of the railroad company; and they would have seen that the bonds bore the indorsement of the trustees named in the mortgage deed, to the effect that they were the bonds described in, and secured by, the said mortgage. * * * They had the right to presume that the governor had not violated his duty; that, before he indorsed the bonds, he had on file the oath of the president and chief engineer of the railroad company that a sufficient number of miles of railroad had been completed to authorize the indorsement."

It appears from the stipulation of facts that 67 of the 100 bonds, with the coupons attached, secured by the said mortgage when so executed, were by the said Woodbridge Canal & Irrigation Company duly issued, sold and delivered to purchasers thereof, prior to September 1, 1891, for money actually paid to it for the same, and one more of said bonds (numbered 74) was issued and negotiated by said irrigation company prior to the 1st day of September, 1894, for labor done and property actually received by the company, but that the rights of the holders of the 26 bonds held by the interveners to share in the protection of the lien of the mortgage is disputed by the complainant and the holders of the 67 bonds referred to. Respecting the petition of intervention of P. A. Buell & Co., it appears that the notes held by them were for certain lumber furnished for the construction of ditches and flumes. With reference to the bonds held by the other interveners, it is stipulated that they were—

"Issued and delivered by the defendant, the Woodbridge Canal & Irrigation Company, to the various pledgees therein described, for the amount mentioned therein, and under similar circumstances and like conditions as those pledged to P. A. Buell & Co., and that the various interveners therein described are the assignees of said bonds and obligations by assignment for value from the original pledgee, and that the said interveners took said bonds and said obligations of the said defendant, the Woodbridge Canal & Irrigation Company, with full knowledge that the said bonds had been pledged to secure the respective obligations so transferred, and no part of said bonds or obligations have been paid."

The stipulation of facts further recites that the—

"Only consideration paid the said Woodbridge Canal & Irrigation Company for the issuing and delivering of said bonds was the consideration aforesaid, and said bonds were simply intended as a collateral security to secure the obligations of the said defendant, the Woodbridge Canal & Irrigation Company."

It further appears from the averments of the petition of intervention, which, in this respect, is made part of the stipulation of facts, that the defendant corporation, in pledging its bonds as collateral security for the payment of the promissory notes executed by it, in several instances executed and delivered bonds considerably in excess of the sum called for by the promissory notes; that is, taking the bonds at their par value of \$1,000 each. The mere fact, however, that in the instances referred to the bonds were issued for more than the value of the notes they secured, does not, of itself, indicate fraud, or create a fictitious indebtedness. *Railway Co. v. Dow*, 120 U. S. 287, 299, 7 Sup. Ct. 482; *Brown v. Railway Co.*, 53 Fed. 889; *Nelson v. Hubbard* (Ala.) 11 South. 428. It is well settled that a corporation can sell its stock or bonds at less than par. *Union Loan & Trust Co. v. Southern California M. R. Co.*, 51 Fed. 845, 846; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476; *Handley v. Stutz*, 139 U. S. 430, 11 Sup. Ct. 530; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Underhill v. Improvement Co.*, 93 Cal. 310, 28 Pac. 1049; *Railway Co. v. Worthington* (Tex. Sup.) 30 S. W. 1055; *Gamble v. Water Co.*, 123 N. Y. 107, 25 N. E. 201; *Shannon v. Stevenson* (Pa. Sup.) 34 Atl. 218. There is no law in the state of California, such as there is in the state of Wisconsin, fixing the limit at which stocks or bonds can be hypothecated below par for money, labor, or property actually received. In Wisconsin (Rev. St. § 1753) a statute restrains any corporation from hypothecating its bonds as a security for loans without stipulating that they shall be accounted for at not less than 75 cents on the dollar of their par value, and all bonds otherwise issued are void. *Pfister v. Railroad Co.*, 83 Wis. 86, 53 N. W. 27; 5 Thomp. Corp. p. 4707, § 6059. Moreover, the stipulation of facts raises no question of fraud or want of consideration as to any of the 26 bonds now held by the interveners. Section 11 of article 12 of the constitution of the state of California provides:

"No corporation shall issue stocks or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void." Pol. Code, p. 60 (Deering's Ann. Codes & St. Cal).

Section 359 of the Civil Code is identical with the above constitutional provision. There are three distinct purposes for which bonds can be issued by a corporation: (1) Money paid; (2) labor done; and (3) property actually received. Under the facts as stipulated, the pledge of the bonds, if it be valid, must come within the third division, viz. property actually received. It will be observed that neither the constitutional provision nor the Code enactment says anything about the "sale" or "pledge" of stocks or bonds. They simply use the word "issue."

The complainant contends (1) that the defendant corporation had no right to issue and pledge its bonds as security for its indebtedness;

and (2) that the delivery of said bonds, under the conditions set forth in the stipulation of facts, was not an issuance of the same, as required by law. Both of these contested points may be merged into the one inquiry, viz. as to the validity of the issue of the 26 bonds as collateral security. The general power of private corporations to sell or pledge their bonds is well settled. 5 Thomp. Corp. § 6061; 1 Mor. Corp. § 349; Railway Co. v. Dow, 120 U. S. 298, 7 Sup. Ct. 482; Trust Co. v. Weed, 2 Fed. 24; Union Loan & Trust Co. v. Southern California M. R. Co., 51 Fed. 845, 846; Lehman v. Manufacturing Co., 64 Ala. 567; Duncomb v. Railroad Co., 84 N. Y. 190; Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 433. The expression "issue," in the constitution and Code, is certainly broad enough to cover a pledge as well as a sale of bonds. In the contemplation of law, bonds pledged by a corporation are just as much issued as when they are sold. The provision in the constitution and Code referred to was not intended to impair or interfere with the right of corporations to issue their bonds and utilize them according to the usual and ordinary business methods prevalent in the commercial world. The purpose and scope of constitutional provisions like the one involved in this case were well explained by the supreme court of the United States in Railway Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482. The court in that case were considering the eighth section of the twelfth article of the constitution of Arkansas, which is substantially the same as section 11 of article 12 of the constitution of California. Mr. Justice Harlan, after stating the facts, which are analogous to those of the case at bar, said:

"The prohibition against the issuing of stock or bonds except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value."

After referring to a provision in the constitution of Illinois which contains a prohibition similar to that imposed by the Arkansas constitution, and citing the case of Railway Co. v. Thompson, 103 Ill. 187, 201, enunciating similar views, the learned justice proceeds:

"Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question for a given amount of its stocks and bonds falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders."

See, also, Brown v. Railway Co., 53 Fed. 889; Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 432.

Counsel for complainant rely greatly on the case of *Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, 45 Fed. 518, where it was held by Judge Ross that a pledge of bonds as collateral security for a pre-existing indebtedness was contrary to the constitutional provision referred to, and therefore void. The bonds held by these interveners were not issued for pre-existing indebtednesses, so far as the stipulation of facts discloses. The cases must therefore be distinguished on that ground. Furthermore, it appeared in the case cited that the issue of bonds was for a purpose other than that to which it was devoted; and it was held to be a pledge without authority, and in fraud of the rights of the stockholders. It is to be observed that the same learned judge, in *Union Loan & Trust Co. v. Southern California M. R. Co.*, *supra*, recognized and sustained the validity of certain bonds which had been pledged as collateral security.

I am of the opinion, upon the whole of the issues framed by the complainant and the interveners on this petition, that the 26 bonds held by the interveners were duly and legally issued, and are valid, under the constitutional provision referred to, and, furthermore, that the defendant corporation had the right to, and did, pledge them as collateral security. They are therefore entitled, with the 67 first mortgage bonds admitted to have been properly and regularly issued by the defendant corporation, to share in the proceeds to be derived from the foreclosure sale, after satisfying costs and such preferential claims as there may be. If, however, such proceeds of sale are insufficient to pay in full both the bonds held by the complainant and the interveners, they shall be satisfied pro rata. See, in this connection, article 7 of the mortgage or deed of trust; *Stanton v. Railroad Co.*, 2 Woods, 523, Fed. Cas. No. 13,297; *Ketchum v. Duncan*, 96 U. S. 671; *Pennock v. Coe*, 23 How. 130; *In re Regent's Canal Iron-Works Co.*, 3 Ch. Div. 43; *Hodge's Appeal*, 84 Pa. St. 359. Judgment will be entered in accordance with this opinion.

MILES v. VIVIAN et al.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. MORTGAGE TRUSTEES—NEGLECT TO RECORD—LIABILITY TO BONDHOLDERS.

A railroad-mortgage trustee, who certifies on the bonds that they are secured by a mortgage executed and delivered to him, is liable to a holder of the bonds for loss of value occasioned by his neglect to record the mortgage, whereby a subsequent, duly-recorded mortgage obtains priority.

2. SAME—LIMITATIONS OF ACTIONS—LACHES.

The liability in such case arises immediately on the recording of the subsequent mortgage, and a delay by a bondholder of over 20 years thereafter, and until the death of the trustee, in enforcing his claim, precludes him from maintaining a suit, both under the New York statute of limitations, and by the equitable bar of laches.

3. SAME—FEDERAL COURTS.

Although the ordinary chancery jurisdiction of the courts of the United States cannot be abridged by state statutes, they recognize the statutes of limitation of the state in which the court is sitting, and adopt them, if they do not act in obedience to them. And accordingly they will adjudge,

in cases over which there is a concurrent jurisdiction by courts of law and equity, that lapse of time to be a bar in equity which would have constituted a bar if the action had been at law.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Vanderpoel, Cuming & Goodwin (Almon Goodwin, of counsel), for appellants.

Evarts, Choate & Bearman (Treadwell Cleveland, of counsel), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The bill of complaint in this cause was filed against the executors of Marshall O. Roberts, deceased, to recover the value of 10 mortgage bonds, for \$1,000 each, made November 10, 1866, by the Florida Railroad Company, and purchased by the complainant in August, 1868. The bill alleges that Roberts was a trustee for the complainant, and did willfully and fraudulently, and with intent to cheat and defraud the complainant, omit and neglect to cause the mortgage securing the bonds to be recorded, and that in consequence thereof the bonds became worthless. The defenses interposed by the defendants are, among others, those of laches, and the statute of limitations. The cause was heard upon an agreed statement of facts, in lieu of the ordinary proofs, and resulted in a decree for the complainant, from which the defendants have appealed.

The facts are meagerly set forth, and are given a color and construction in the prepared statement much more favorable to the complainant than is warranted by the bill of complaint and the written documents, but, read with the bill and documents, are these:

On or about November 10, 1866, the Florida Railroad Company, a corporation of the state of Florida, executed 10 bonds, each for the sum of \$1,000, payable March 1, 1887, with interest semiannually on the 1st days of September and March, beginning September 1, 1867, for which coupons were annexed to each bond. The bonds purported to be part of an issue of 1,200 bonds of like tenor and effect, all secured by a mortgage of the railroad and other property of the corporation, made and executed November 10, 1866, to Marshall O. Roberts, as trustee. Each of said bonds bore a certificate subscribed by the said Marshall O. Roberts as trustee, as follows:

"I hereby certify that the within bond is one of a series of first mortgage bonds, amounting to \$1,200,000, secured by the deed of trust or mortgage within mentioned, executed and delivered by the Florida Railroad Company to Marshall O. Roberts, Trustee.
M. O. Roberts, Trustee."

In August, 1868, the said 10 bonds, with all the coupons annexed,—the bonds having indorsed thereon the certificate aforesaid,—were purchased by the complainant, and delivered to him by the said Florida Railroad Company. At that time Roberts was a director of the company. The mortgage was never recorded. May 26, 1869, the Florida Railroad Company executed a certain other mortgage to John A. Stewart and Frederick A. Conklin, as trustees, covering the same property described in the previous mortgage, as

security for an issue of \$2,300,000 of bonds. The bonds were issued and negotiated, and in June, 1869, this mortgage was duly recorded, and became a first lien upon all the property of the corporation. When this mortgage was created, Roberts was the president of the corporation, and as such signed it. He became the owner, personally, of a large amount of the bonds. Subsequently the Florida Railroad Company made default in the payment of the interest upon the bonds secured by the later mortgage, and a suit to foreclose the mortgage was duly instituted. Thereafter a decree of foreclosure was entered, and under the decree all the property of the corporation was sold; the price realized upon said sale not being sufficient to pay the amount of that mortgage. If that mortgage had not been recorded, and the earlier one had been, the bonds of the complainant would have been worth 72 cents on the dollar of their face amount. No interest was ever paid upon complainant's bonds, except the amount of the first coupon. In October, 1872, the complainant commenced an action upon his bonds in one of the courts of the state of New York against Roberts; but he never served any complaint or took any other proceedings therein beyond the service of process, and several years later discontinued the action. Roberts died September 11, 1880, and his will was admitted to probate, and the executors therein named duly qualified as such October 8, 1880. The present suit was commenced July 30, 1890.

In disposing of the case, all the charges of fraud are to be eliminated from consideration. The facts do not disclose the slightest evidence of any dishonest conduct on the part of Roberts. Indeed, no attempt has been made in the agreed statement to substantiate by evidence the averments of the bill in that regard.

So far as appears, none of the bonds bearing his certificate were outstanding when the later mortgage was executed, except those bought by the complainant; nor does it appear that any of them, except these, had ever been negotiated by the Florida Railroad Company. It is incomprehensible why the company should have proposed to create an issue of \$2,300,000 bonds, with any expectation of advantage, when those of an issue of \$1,200,000 were only worth 72 cents on the dollar, assuming them to be secured by a prior and recorded mortgage. What could the company gain, except an injury to its credit and business management, by issuing first mortgage bonds presumably not salable for more than 35 cents on the dollar? Why were the complainant's bonds worth only 72 cents on the dollar at the very time the company was about creating the new mortgage? The circumstances, in connection with the long inaction of the complainant after the nonpayment of interest upon his bonds, interrupted only by the bringing of the suit which he apparently never intended to prosecute, suggest persuasively that there is some flaw in the merits of the complainant's case, which, if Roberts were alive, could be exposed.

The case rests upon the fact that Roberts signed the certificate, thereby representing himself to be the trustee named in the mortgage, and that the mortgage has been delivered to him. The mort-

gage mentioned in the certificate must be assumed to have been in his possession, but what duties or powers were by its terms devolved upon him are matters of pure conjecture, as no evidence whatever of its contents is found in the record.

Mortgages of railroad companies and other corporations are usually in the form of trust deeds, with a power of sale, in which trustees are named to take and hold the title of the mortgaged property for the benefit of the bondholders. The bonds are made negotiable so that they may be conveniently disposed of in the market, and the mortgage is, in effect, a contract between the corporation making it and the trustee, as representing all persons who may become holders of the bonds secured by it. The nature and character of the trust assumed by the trustee vary in different instruments of that nature, and are determined by the express terms of the trust deed, and by the implied powers and duties which arise from the relations of the parties to the trust fund. It is said in Jones on Corporate Bonds and Mortgages (2d Ed., "Railroad Securities," § 287) that:

"Immediately upon the execution of the deed, and so long as no active duty is demanded of the trustee, the trust is little more than nominal. It is what is termed a 'dry, naked trust.' Generally the trustees have nothing to do with the negotiation of the bonds, and so long as the interest is promptly paid, so that no forfeiture occurs, their office is silent. But when a forfeiture has occurred through the nonpayment of the interest or principal secured, or through the breach of any other condition of the mortgage, new and important duties arise. The mortgage, in terms, generally requires the trustee to take possession of the mortgaged property and sell it for the benefit of the bondholders. The fulfillment of these express trusts in behalf of the bondholders is the primary and most obvious duty of the trustee."

Among the implied duties of a mortgage trustee, one of the most imperative is to use requisite diligence to protect the security he has taken for the bondholders. Being the grantee in the trust deed, this duty of vigilance requires him to exercise the care which a prudent grantee would deem to be necessary for his own protection; and in this behalf we do not doubt that he should see to it that the trust deed is duly recorded, so that no liens of a subsequent date will attach and obtain priority over the mortgage lien. He is chargeable with any loss resulting from his neglect to record the trust deed. *Cooper v. Day*, 1 Rich. Eq. 26; *Cogbill v. Boyd*, 77 Va. 450.

Because of Roberts' neglect in this particular, the bonds of the complainant became valueless. Fraud not having been shown, the complainant's cause of action rests wholly upon this default. It is idle to assert that Roberts was guilty of a fraud, or a violation of his duty as trustee, towards the complainant, in authenticating by his signature the execution by the Florida Railroad Company of the later mortgage. That corporation had a right to create the mortgage, and to cause it to be recorded, and it was the duty of its president to execute officially any instrument which the corporation was authorized and saw fit to make. The fact that this was done when the complainant's bonds were outstanding and imperfectly secured is as consistent with the theory of mistake and inadvertence

as with that of fraud. If Roberts had known that there were any outstanding bonds of the earlier issue, it is remarkable that he should have permitted the later mortgage to be recorded before the earlier one, at the risk of personal liability to the extent of their value. Railroad mortgages to secure large issues of bonds which are to be offered to the public are seldom created in the dark. On the contrary, they are usually brought to the early knowledge of investors and financiers, and the public generally. Neither the railroad company nor Roberts could have been so foolish as to suppose that the making and recording of the later mortgage would not be speedily known, and attract the attention of the creditors of the company. The execution and recording of this mortgage doubtless caused the loss which the complainant has sustained, but the breach of duty on the part of Roberts was his neglect to record the earlier mortgage. Upon the recording of the later mortgage the complainant's cause of action became complete, and he could have maintained an action at law against Roberts for any loss accruing from the latter's default, and recovered full compensation therefor. He delayed the enforcement of this claim for a period of over 20 years,—until after the death of Roberts. By reason of this delay, we are of the opinion that he was precluded from maintaining the present action, both by the bar of the statute of limitations and by the equitable bar of laches.

It is a general rule that in the case of an express, continuing trust, not disavowed with the knowledge of the beneficiary, the statute of limitations has no application. The cases coming within this rule are technical and continuing trusts, which are not cognizable at law, but which fall within the proper and exclusive jurisdiction of chancery; and the rule has no application to cases of implied trusts. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610; *Harlow v. Dehon*, 111 Mass. 195; *Young v. Mackall*, 3 Md. Ch. 398; *Raymond v. Simonson*, 4 Blackf. 97; *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82. In *Kane v. Bloodgood*, 7 Johns. Ch. 90, Chancellor Kent said:

"I cannot assent to the proposition that all cases of direct and express trust, and arising between trustee and cestui que trust, are to be withdrawn from the operation of the statute of limitations, notwithstanding a clear and certain remedy exists at law. * * * A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine, and to establish upon the solid foundations of authority and policy this rule: that the trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court."

Statutes of limitation are equally obligatory upon courts of equity and courts of law, in cases in which the jurisdiction is concurrent. In such cases courts of equity do not act so much in analogy to the statutes as in obedience to them. 2 Story, Eq. Jur. (13th Ed.) 842. Although the ordinary chancery jurisdiction of the courts of the United States cannot be abridged by state statutes, they recognize those of the state in which the court is sitting, limiting the time for bringing suits, and adopt them, if they do not act in obedience to

them. *Coulson v. Walton*, 9 Pet. 62; *Harpending v. Dutch Church*, 16 Pet. 455; *Badger v. Badger*, 2 Wall. 87, 94; *Clarke v. Boorman*, 18 Wall. 493; *Carrol v. Green*, 92 U. S. 509; *Kirby v. Railroad Co.*, 120 U. S. 130, 7 Sup. Ct. 430. Accordingly, they will adjudge, in cases over which there is a concurrent jurisdiction by courts of law and equity, that lapse of time to be a bar in equity which would have constituted a bar if the action had been at law. *Norris v. Haggin*, 136 U. S. 391, 10 Sup. Ct. 942; *Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct. 162. In *Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684, 11 Sup. Ct. 687, the rule was applied where the state statute barred an action for relief on the ground of fraud unless commenced within four years after the discovery of the fraud. Applying this rule to the present case, the six-year statute of limitations, which has been pleaded by the defendant, would seem to bar the action. If it does not, the ten-year statute applies. *Hubbell v. Medbury*, 53 N. Y. 98.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights unreasonably long, and shows no excuse for having done so. Recent applications of the doctrine by the supreme court are found in *Hanner v. Moulton*, 138 U. S. 486, 11 Sup. Ct. 408; *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. 437; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78; *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894. The complainant was aware of his rights—at least, had sufficient knowledge to put him upon inquiry—at the time he commenced the suit against Roberts, which he afterwards abandoned. No excuse is suggested in the bill or in the statement of facts for the delay of nearly 18 years which subsequently intervened before the bringing of this suit. It is improbable that he omitted to investigate when the interest was not paid upon his bonds, and, as has been stated, none was paid except upon the coupon which matured September 1, 1867. As was said in *Sharpe v. King*, 3 Ired. Eq. 402, 405, "An equity court is no more bound to take care of those who can take care of themselves, and will not, than is a court of law." The case is destitute of any features which should appeal to the special consideration of a court of equity.

We have not alluded to some facts alleged in the bill, and contained in the statement of facts, which were injected into the case upon the theory that there was a trust fund in the hands of the defendants, growing out of the bonds acquired by Roberts. With the failure to establish the averments of fraud, the theory of a trust fund collapses; and, had the point been taken, it would have been the duty of the court below to dismiss the case as one not cognizable in equity, because the complainant had a complete and adequate remedy at law. *Alsop v. Riker*, *supra*.

The learned judge who heard the cause in the court below seems to have considered that the representation made by Roberts in the certificate was, in effect, a continuing warranty that the bondholders should have the benefit of a security by mortgage, and that

the cause of action did not arise until the time of maturity of the bonds. There was no promise or representation except as to an existing state of facts. The statement in the certificate was literally and exactly true. The bonds were secured by a mortgage, and there was no statement that the mortgage had been recorded. The mortgage was a lien upon the real estate covered by it, but a lien which was subject to be postponed to those which might thereafter arise in favor of creditors or subsequent purchasers for value and without notice.

The decree is reversed, with costs, and the cause remitted, with instructions to dismiss the bill.

CALIFORNIA REDWOOD CO. v. LITTLE.

(Circuit Court, N. D. California. April 12, 1897.)

1. PUBLIC LANDS—PRE-EMPTION—CERTIFICATE OF PURCHASE—BONA FIDE PURCHASER.

The holder of a certificate of purchase of public land, based upon a pre-emption entry, acquires only an equitable title to the land, and a purchaser of such certificate can acquire no greater estate or right than the entryman possesses; and it is not entitled to protection as a bona fide purchaser, though without notice of fraud in the making of the entry. *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 64 Fed. 553, followed.

2. SAME—FRAUDULENT ENTRY—BURDEN OF PROOF.

When the holder of a certificate of purchase of public land, based on an entry which has been canceled for fraud, asserts title to the land as against the holder of a patent issued on a different title, the burden of proof rests upon him to show affirmatively that he is entitled to a patent. *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 64 Fed. 553, followed.

3. SAME—CANCELLATION OF ENTRY—NOTICE.

The action of the commissioner of the general land office in canceling an entry of public land is not void because the holder of the certificate of purchase receives no notice of the proposed action. *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 64 Fed. 553, followed.

4. SAME—APPROVAL BY SECRETARY OF INTERIOR.

The fact that a ruling of the commissioner of the general land office canceling an entry of public land for fraud has not been approved by the secretary of the interior, as required by Rev. St. § 2451, gives no right to the holder of the certificate based on such entry to assert title as against the holder of a patent to the land issued upon another title.

This was a bill in equity to have the respondent decreed to hold in trust for the complainant the legal title to a certain quarter section of land.

Page, McCutchen & Eells, for complainant.
Henley & Costello, for respondent.

MORROW, District Judge. This is a suit by the California Redwood Company to have the respondent, B. S. Little, decreed to hold in trust for complainant the legal title to the S. W. $\frac{1}{4}$ of section 22 in township 8 N., of range 1 E., Humboldt base and meridian, containing 160 acres, and acquired by said Little under a patent from the United States in conformity to an act entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada and in Wash-

ington territory," approved June 3, 1878 (20 Stat. 89); also, to compel the respondent to convey said land to complainant in fulfillment of said trust, and that the respondent, his heirs and assigns, and all persons claiming under him or them, may be forever barred and enjoined from setting up any right, title, or interest in said land adverse to the complainant. The claim of complainant to the land in controversy is based upon a pre-emption entry made by one William M. Bohall, to whom a certificate of purchase was duly issued on March 21, 1883, by the receiver of the land office of the Humboldt land district. The complainant claims under this certificate of purchase; having acquired the same through certain mesne conveyances from the entryman, Bohall. The respondent holds a United States patent to the land in controversy, duly and regularly issued to him on December 3, 1890; the entry of said Bohall and the certificate of purchase issued to him, under which the complainant claims, having been in the meanwhile canceled by the commissioner of the general land office at Washington on the ground that the entry of said Bohall had been fraudulently made, as it was procured to be made for the benefit of another, one Charles E. Beach, and not for the benefit of Bohall, the entryman. The evidence introduced on behalf of the respondent shows that the land was not entered for Bohall's own benefit, but that it was for the benefit and in the interest of others; that he had nothing to do with making proof, except to file his sworn statement, which was false; that he did not make the required payment of \$400 for the land; that he received the sum of \$50 from Charles E. Beach for allowing his name to be used to effect the entry, and for subsequently conveying his equitable title in said land, under said certificate of purchase, to Beach. Beach, the proofs further show, conveyed to others, who in turn conveyed to the complainant. The latter did not attempt to controvert this evidence, but introduced testimony tending to show that it knew nothing of the fraudulent character of the entry made by Bohall, and his conveyance to Beach; in other words, it claims that it occupies the position of a bona fide purchaser. It has, however, introduced no evidence of any kind tending to show that any fraud, deception, or imposition was practiced upon the officers of the land department in obtaining the patent issued to the respondent, Litle. No proof has been offered which would tend to show that the entry of Bohall, under whom the complainant bases its right, title, and interest to the land, was valid, or that it was made in good faith. The commissioner of the general land office having canceled the entry for fraud, and a patent having been issued to the respondent, all the reasonable presumptions are in favor of the patent, and the burden of proof was upon the complainant to show affirmatively that it was entitled to the patent. It does not do this by showing merely that the proceedings preliminary to obtaining the certificate of purchase under which it holds were regular and in accordance with law, and that it knew nothing of the fraudulent nature of the entry. As was well said by Judge Hawley in *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 298, 64 Fed. 553, 557, speaking for the circuit court of appeals for this circuit (Ninth) in a case of striking similarity to the one at bar:

"The burden of proof was upon the appellant to show that it was entitled to a patent, and it was essential for it to prove that Waddel's entry was valid, as against the government of the United States. The conclusions of the land department upon the invalidity of Waddel's entry, having been arrived at apparently within the scope of its authority, are *prima facie* correct, and appellant having assailed their correctness, it devolved upon it to affirmatively show that the conclusions were illegal and unauthorized. It cannot fairly be said that Waddel had acquired any vested right to the property, if it be true that his entry upon the lands was secured by fraud."

See, also, *U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 507; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782; *Mill Co. v. Brown*, 7 C. C. A. 643, 59 Fed. 35.

In speaking of the claim, made in that case as it is in the case at bar, that the complainant was a bona fide purchaser for value, and that it was entitled to protection on that ground, the court said:

"The law is well settled that the purchaser of an equitable title takes only such interest in the property as his grantor had at the time of his purchase. Waddel, by his certificate of purchase, only obtained the right to a patent for the land provided his acts were legal, and in all respects such as to warrant the issuance of a patent to him. His rights were in a measure dependent upon the subsequent action of the land department, within its legitimate authority, of ascertaining whether he had complied with all the prerequisites prescribed by law, and whether he was lawfully entitled to the land in question. His purchase of the land was subject to the rules and regulations of the land department. It is true that his entry was sufficient to satisfy the register and receiver of the local land office; but it was subject to the control and supervision of the commissioner of the general land office, and the action of the register and receiver was liable to be reversed upon appeal. When appellant purchased the land, it took it subject to the final action of the land department, and to such proceedings as might thereafter be had in the courts to affirm or set aside the rulings of the officers of such department in regard thereto. It purchased the land before the issuance of a patent. The legal title was still in the government. It therefore obtained, by its purchase, only an equitable interest in the land, and is not, for the reasons stated, entitled to protection as a bona fide purchaser. *Shirras v. Caig*, 7 Cranch, 34; *Vattier v. Hinde*, 7 Pet. 252; *Boone v. Chiles*, 10 Pet. 177, 210; *Smith v. Custer*, 8 Dec. Dept. Int. 269; *Root v. Shields*, Woolw. 341, Fed. Cas. No. 12,038; *Randall v. Edert*, 7 Minn. 450 (Gil. 359); *Shoufe v. Griffiths* (Wash.) 30 Pac. 93. In *Smith v. Custer*, supra, Secretary Vilas clearly enunciated the principles applicable to this case. He said: 'The pre-emption purchaser takes, by his final proofs and payment and his certificate of purchase, only a right to a patent for the public lands in case the facts shall be found by the general land office and the interior department, upon appeal, to warrant the issuance of it. Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the further action of the department, and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public lands he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses.'"

In my opinion, the complainant in this case has failed, upon its proofs, to show that it had, or now has, a better right to the land than the respondent, Little, has under his patent. It is contended, however, that the ruling of the commissioner of the general land office canceling the entry of Bohall was void and of no effect for the reason (1) that the complainant received no notice of such proposed action, and was therefore deprived of its property rights without due process of law; (2) that the ruling of the commissioner does not ap-

pear to have been approved by the secretary of the interior and the attorney general as provided in section 2451 of the Revised Statutes; and (3) it is claimed, as before stated, that in any event the complainant is a bona fide purchaser, and cannot be deprived of the land in controversy by the subsequent issuance of a patent to another. With reference to the first and third propositions, I deem it unnecessary to enter into any discussion of the case, for the reason that the identical questions were passed upon by the circuit court of appeals for this circuit in the case of Mortgage Co. v. Hopper, already referred to, and are therefore binding upon this court, under the doctrine of stare decisis. A reference to that decision will show that it involved a suit precisely similar to the one in the case at bar, and that the facts relating to the original fraudulent entry, subsequent cancellation by the commissioner of the general land office, and the subsequent issuance of a patent to a later and bona fide entryman, are closely analogous. The two propositions referred to and now urged in this case were elaborately and ably considered by the circuit court of appeals, as well as other propositions common to both cases, and they were decided adversely to the contentions of the complainant. I shall therefore content myself by simply referring to, and resting my decision upon the authority of, that case.

The second contention urged by the complainant, viz. that the ruling of the commissioner is void, not appearing to have been approved by the secretary of the interior and the attorney general, as provided in section 2451, Rev. St., does not seem to have been pressed to the court's attention in the case referred to. I do not, however, regard this point as vital or controlling. It is true that the documentary evidence relating to the action of the land department as to the cancellation of the entry under which the complainant holds does not show that the ruling of the commissioner was approved by the officials designated in the section referred to; but I fail to see how this omission or failure, assuming that such be the fact, can affect the validity of the patent issued to the respondent. So far as the facts of this case are concerned, and the claims of the respective litigants are affected, it may be treated as an irregularity. The commissioner undoubtedly had the power to cancel the entry for fraud. The entry having been canceled for fraud, the entryman himself could not be heard to complain of such irregularity. He certainly would be deemed estopped from asserting any benefit to be derived from the mere technical failure of the officials designated in section 2451, Rev. St., to approve the ruling of the commissioner. The equitable maxim that one who comes into a court of equity must come with clean hands would be totally disregarded if the entryman could defeat the bona fide title held by the respondent under his patent by any such contention. It is well settled, as previously stated, that the complainant, having deraigned its title from a certificate of purchase for which no patent was ever issued, does not stand in the position of a bona fide purchaser. See cases cited above. It therefore stands in no better position than does the fraudulent entryman. What he cannot avail himself of, it certainly cannot. As was well said in *U. S. v. Steenerson*, supra:

"If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist,"—citing *The Amisted*, 15 Pet. 518; *League v. De Young*, 11 How. 185.

It is therefore difficult to understand upon what theory the mere failure of the officials referred to to approve the ruling of the commissioner can be deemed to bestow upon the complainant greater rights than the entryman possessed, nor how such failure can operate to invalidate the patent issued to the respondent. Counsel for complainant have referred to two cases, both decided by Judge Hanford, of the district of Washington, in which that learned judge holds that unless the ruling of the commissioner canceling an entry be approved by the secretary of the interior and the attorney general, as provided by section 2451, Rev. St., the cancellation will be inoperative. The cases are *Land Co. v. Hollister*, 75 Fed. 941, and *Hawley v. Diller*, 75 Fed. 946. It is to be observed, however, that the facts of the two cases cited and those of the case at bar, as well as the conclusion at which the court arrived upon the facts, are different. The court did not find, as here, that the entry through which the complainant claims was fraudulent. In the case of *Land Co. v. Hollister*, *supra*, the court found affirmatively that no fraud had been committed in connection with the original entry. So far as the facts of the present case are concerned, I do not regard the mere failure of the secretary of the interior and of the attorney general to approve the ruling which the commissioner undoubtedly possessed the power to make as material, so far as the rights of the complainant and the respondent are affected by this proceeding. The bill will therefore be dismissed, with costs.

UNITED STATES v. BOYD et al. (EWART, Intervener).

(Circuit Court, W. D. North Carolina. April 5, 1896.)

ATTORNEYS—LIEN FOR FEES.

The United States courts protect attorneys in their fees, and therefore, in a suit by the United States to enjoin a sale of timber effected by an attorney for a band of Indians, the timber having been sold, and the sale approved by the court, it was proper to permit the attorney to intervene for the allowance of his claim for services in effecting the sale, to be paid out of the proceeds.

This was an intervening petition, filed by H. G. Ewart in a suit in equity brought by the United States against D. L. Boyd and others to enjoin the sale of timber.

R. B. Glenn and D. A. Covington, for the United States.

L. M. Bourne, G. H. Smathers, and W. T. Crawford, for defendant.

Before SIMONTON, Circuit Judge, and DICK, District Judge.

SIMONTON, Circuit Judge. There is one question remaining open in this case. That arises upon the claim of H. G. Ewart, Esq., for

compensation for his services to the Eastern Band of Cherokee Indians. This matter was referred to the standing master, and he reports the testimony. It appears that Mr. Ewart was under contract in writing with the proper authorities of the Eastern Band of Cherokee Indians to effect a sale of timber for them. The timber has been sold. The sale has been approved in this court in proceedings to which the United States and the Eastern Band of Cherokee Indians were parties. In sustaining his claim, the petitioner introduces evidence as to the value of his services, and substantiates this with a verdict obtained in the superior court of Henderson county, N. C. There does not appear to be any question that the services were rendered. The objections go—First, to the extravagance of the charge; second, to the want of capacity in the Indians to make the contract; and, third, the failure on the part of the petitioner to get the approval of the secretary of the interior to the execution of the contract. The contract, however, has been made, and has been ratified by this court in these proceedings, after examination into it. This disposes of the second objection. It also disposes of the third, because the only reason for getting the assent of the secretary of the interior was to secure the execution of the contract. This end has been accomplished. The charge made by the petitioner is a large one, so much so as to justify the district attorney in resisting it. But to sustain it he has the verdict, taken after investigation, as the master reports, in the state court, and also evidence outside of it. To repel this there is no evidence. Under these circumstances the court would assume an unusual responsibility in differing from these witnesses, there being an entire absence of evidence showing fraud and imposition. It has been suggested that this intervention has no place in the present proceedings, which were filed to enjoin the sale of this timber. But it is germane to this subject. The validity of this sale was at issue,—a sale effected by the petitioner, and incidentally the distribution of the proceeds of sale if it be sustained. Before this can take place, the petitioner wishes his claim investigated. Strictly speaking, he cannot be said to have a lien on these funds, as the money is not in his hands. In *re Paschal*, 10 Wall. 483; *McPherson v. Cox*, 96 U. S. 404. But an attorney always has the protection of the court in securing his fee, and he can ask for it. For want of a better word, it can be called an "equity." In *Massachusetts & Southern Const. Co. v. Township of Gill's Creek*, 48 Fed. 147, the matter is stated thus:

"There can be no doubt that from an early period courts have always interfered in securing to attorneys the fruit of their labors, even as against their own clients. *Ex parte Bush*, 7 Vin. Abr. 74. This is an equitable interference on the part of the court (*Barker v. St. Quintin*, 12 Mees. & W. 441).—the enforcement of a claim or right on the part of the attorney to ask the intervention of the court for his own protection, when he finds that there is a probability that his client may deprive him of his costs (*Mercer v. Graves*, L. R. 7 Q. B. 499). See, in full, *In re Knapp*, 85 N. Y. 285. For the want of a better word, it is called a 'lien'; but this so-called 'lien' is limited to the funds collected in the particular case in which the services were rendered. In *re Wilson*, 12 Fed. 235. This is the rule followed by all courts, without requiring the sanction of a statute. In England, until the statute of 18 Vict., the lien of an attorney was confined to the taxed costs and his disbursements.

The courts of the United States seem to protect attorneys in their fees as well as in their taxed costs. In *Wylie v. Coxe*, 15 How. 415, the courts protected an attorney by securing him the percentage contracted to be paid him on recovery. In *Cowdrey v. Railroad Co.*, 93 U. S. 354, an attorney was secured the fee he had expressly contracted for."

In *Frink v. McComb*, 60 Fed. 486, it was called a lien, and was enforced against a fund in court, not affected by an assignment on the part of the client. And in *Mahone v. Telegraph Co.*, 33 Fed. 702, it followed the dividends on bonds, although the bondholders who had made the contract with the attorney had parted with them long before the dividend was declared. It is clear that the intervention is proper. Let proper provision be made for the petitioner when the funds are all realized.

DOOLEY v. PEASE.

(Circuit Court, N. D. Illinois, N. D. March 1, 1897.)

CORPORATIONS—AUTHORITY OF PRESIDENT AND GENERAL MANAGER—CREATION OF PREFERENCES.

The president and general manager of a business corporation, which is in a failing condition, has no power, without special authorization, to give preferences to certain creditors.

Duncan & Gilbert, for plaintiff.

Green, Robbins & Honore, for defendant.

GROSSCUP, District Judge (orally). I have prepared a long finding of facts, which I will not attempt to recapitulate. My conclusion in this case is due to my holding a simple proposition of law, and I can probably state it by a very short résumé of the facts. The complainant is the receiver of a national bank that had a large claim of over \$200,000 against a silk company in Connecticut. The silk company itself was in financial difficulties, and was about to fail. The president of the company, who was also its acting general manager, having been elected to that place some two or three years before and not having been re-elected, but continuing to act, came to Baltimore, Chicago, and New York, and executed a bill of sale of their stock of goods in these cities, respectively, to the receiver of the bank. He knew at the time that his silk company was on the point of failing, that an application would soon be made for the appointment of a receiver, and that it would go into the hands of a receiver. The circumstances are such that this discloses a clear case of an attempt upon the part of the president and acting general manager of a company that is no longer to be a going concern, but is already an insolvent concern, and is to become a defunct concern, to execute a preference in favor of one of its creditors. I hold that, in the absence of special authority conferred upon the president or general manager for that purpose, by the directors, he has no power to make any such preference. The president and general manager has power to conduct the affairs of the company as a going concern, and do everything consistent with its affairs as a going concern; but, when it comes to preferring creditors of a concern

to be wound up, the owners of the property are the stockholders, through their board of directors; and they have not, by the mere election of a man to the presidency of the company, authorized him to discriminate between their creditors. There will therefore be, in addition to this special finding of facts, a general finding in favor of the defendant, the sheriff who seized the goods under attachment writs.

McGORRAY v. O'CONNOR et al.

(Circuit Court, N. D. California. April 12, 1897.)

PARTNERSHIP—DEATH OF PARTNER—RIGHTS OF HEIRS AND SURVIVING PARTNER.

Under the law of California, which gives to a surviving partner the absolute power of control and disposition of the assets of a partnership (Code Civ. Proc. § 1585), the heirs of a deceased partner have no such right or interest in the partnership property, prior to settlement and distribution by the surviving partner, as entitles them or their judgment creditors to redeem partnership property from a sale under a mortgage.

This was a suit in equity to obtain a decree canceling and declaring void a certain sheriff's deed to land sold upon foreclosure of a mortgage, to allow the complainant to redeem as a judgment creditor, and to direct the sheriff to execute and deliver a deed of the property to the complainant, etc.

L. W. Elliott and A. H. Carpenter, for complainant.

Olney & Olney and Dudley & Buck, for respondents.

MORROW, District Judge. In this action the complainant seeks to obtain the decree of this court canceling and declaring null and void a certain deed executed and delivered by the respondent Thomas Cunningham, as sheriff of San Joaquin county, to the respondent Myles P. O'Connor, on the 16th of November, 1894, conveying to O'Connor the lands and premises described as the E. $\frac{1}{2}$ and N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 5, T. 2 N., R. 8 E., and the S. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 32, T. 3 N., R. 8 E., Mt. Diablo base and meridian, which land and premises were sold by the sheriff under and by virtue of a decree of foreclosure of a mortgage and order of sale made by the superior court of San Joaquin county on the 15th of May, 1894. The complainant also seeks the further decree of the court that he be allowed to redeem the land and premises from such sale, in the character of a judgment creditor of one Clinton H. Carpenter, and that the sheriff make a deed of the property and deliver it to the complainant. The case has been submitted upon the motion of both parties for a judgment upon the pleadings. It appears from the complaint that on the 30th day of October, 1882, C. K. Bailey and C. W. Carpenter, doing business as co-partners in San Joaquin county, as farmers and stock raisers, under the name of Bailey & Carpenter, gave a mortgage on the premises above described to the defendant Myles P. O'Connor as security for the payment of \$10,000. On January 22, 1884, C. W. Carpenter died, leaving an

estate consisting largely of his half interest in the partnership property. He was an unmarried man, and, in a document purporting to be his last will and testament, he gave the bulk of his property to the children of C. K. Bailey, his surviving partner, to the exclusion of his heirs at law. This will was admitted to probate, and Bailey was appointed executor. The will was contested by Clinton H. Carpenter, a brother of the deceased, with whom, it appears, other brothers were associated, but their names are not given in the bill. The executor and legatees were defendants. Two trials were had before a jury, each trial resulting in favor of the contestants; and on each verdict the superior court entered a decree revoking the probate of the will, and declaring the petitioners in such contest the heirs at law of the deceased. From each of the verdicts and decrees the executor and legatees appealed to the supreme court of the state of California, and said decrees were reversed and new trials granted. 21 Pac. 835, and 29 Pac. 1101. The contest over the will is still pending in the superior court of San Joaquin county. On the 10th of October, 1888, Myles P. O'Connor brought suit in the superior court of San Joaquin county against C. K. Bailey and Clinton H. Carpenter, as one of the alleged successors in interest of C. W. Carpenter, deceased, and other defendants, to foreclose the mortgage; and on the 15th day of March, 1890, a decree of foreclosure and sale was made and entered in the superior court for the sum of \$11,808.74 and costs. In the bill it is alleged that this decree was "made and entered in said court and cause against C. K. Bailey and Clinton H. Carpenter and other defendants." On the 15th day of May, 1894, under the order of court in the foreclosure suit, the mortgaged property was sold to the defendant Myles P. O'Connor at sheriff's sale by the defendant Cunningham, and the sheriff's certificate of sale was delivered to O'Connor; and on November 16, 1894, the sheriff delivered to him the deed of conveyance which it is the object of this action to declare null and void and of no effect. It appears, further, that on the 15th day of September, 1894, Amos H. Carpenter recovered a judgment in the superior court of San Joaquin county against Clinton H. Carpenter for the sum of \$12,438 damages and costs, and on the same day this judgment was docketed by the clerk of the court, so that it became a lien upon the property of Clinton H. Carpenter. On the 17th of September, 1894, Amos H. Carpenter sold and transferred this judgment to the complainant in the present suit. After this assignment, and on the 18th of September, 1894, the complainant, in the capacity of a judgment creditor of Clinton H. Carpenter, and claiming a lien on the interest of the latter in the mortgaged premises, tendered to the sheriff of San Joaquin county the sum of \$12,777.05 for the redemption of the real estate from the mortgage sale. The sheriff refused the money from the complainant for the redemption of the property, and refused to give him a deed therefor. It is further alleged in the bill that on the 24th day of May, 1894, Clinton H. Carpenter and other heirs at law of the deceased, and the executor and legatees under the will, entered into an agreement to arbitrate

the matters in difference over said estate, and that such matters should be submitted to an arbitrator, who should determine in his award the value of contestants' interest in said estate, and how much the said Clinton H. Carpenter and other heirs at law of the deceased should receive from said estate as their share thereof; that such reference should in no way affect the controversy then pending over the will, but the same should continue pending in court, and not be discontinued or dismissed until the award of such arbitrator should be fully performed and carried out; that the reference was made, and the parties appeared before the arbitrator, who made his award, in which it was decreed and determined that the interest of Clinton H. Carpenter and other heirs in said estate was of the value of \$11,256.24, and that they were entitled to receive that sum from the estate of the deceased; that the award has never been carried out or performed, and is in full force and effect, and binding upon all the parties interested in said estate. To this complaint a demurrer was interposed on the ground that the complainant had not stated such a cause of action as entitled him to the relief prayed for in the bill. The demurrer was argued before Judge McKenna, and overruled. It is said that it was intimated from the bench that, but for the allegations of the bill that a judgment had been entered against Clinton H. Carpenter in the foreclosure proceedings, the demurrer would have been sustained. However that may be, an answer has been filed by the respondent O'Connor in which it is denied that the judgment was against Clinton H. Carpenter for any sum of money whatsoever, or that any judgment against him was entered in the cause, other than to cut off any supposed right of redemption of the real property described in the mortgage, and that no personal judgment was taken in said action against any of the defendants, except as against the defendant C. K. Bailey.

The answers of the respondents are sworn to, and were filed March 26, 1896; and on the 1st of April, 1896, complainant filed his replication. The answers of the respondents are direct and positive in their denials of the material allegations of the bill, and as the complainant did not waive an answer under oath, and as no testimony has been taken in support of the bill, the allegations of the answer responsive to the bill must be taken as true. *Slessinger v. Buckingham*, 8 Sawy. 470, 17 Fed. 454; *Satterfield v. Malone*, 35 Fed. 446; *Walcott v. Watson*, 53 Fed. 429; *Vigel v. Hopp*, 104 U. S. 441; *Morrison v. Durr*, 122 U. S. 518, 7 Sup. Ct. 1215; *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881. An effort appears to have been made by the complainant to avoid the effect of the answer by a motion to strike out certain portions of it, but notice of this motion was not given until June 29, 1896,—nearly three months after the replication had been filed, and only two days before the expiration of the time for taking testimony as provided by rule 69 of the equity practice. This motion has since been considered and denied, not only because it had not been made at the proper stage of the proceedings, but for the reason that the allegations proposed to be struck out were responsive

to the allegations of the bill. But, aside from any question of pleading, the controlling question in the case is this: Was the complainant in September, 1894, as a judgment creditor of Clinton H. Carpenter, entitled to redeem the land in question from the mortgage sale? The right of redemption, in this state, is given by statute, and is conferred upon two classes: (1) The judgment debtor, or his successor in interest in the whole or any part of the property; (2) a creditor having a lien by judgment or mortgage on the property sold, or in some share or part thereof, subsequent to that on which the property was sold. Code Civ. Proc. § 701. Can complainant's claim be maintained under the first subdivision of this statute? The mortgaged property was the partnership property of the firm of Bailey & Carpenter, and, under the law of this state, upon the death of one partner the possession of the partnership interests vests exclusively in the surviving partner, who has the absolute power of control and disposition of the assets of the partnership. Code Civ. Proc. § 1585; *People v. Hill*, 16 Cal. 113, 118; *Theller v. Such*, 57 Cal. 447, 459. It appears from the bill that the estate of Carpenter has not been distributed or separated from the partnership assets of Bailey & Carpenter, but is still in the hands of C. K. Bailey, who, as surviving partner, still continues the partnership business. This fact alone is sufficient to dispose of any supposed right of redemption having thus far descended to the heirs of Carpenter. In *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086, a partnership business was formed by Robertson & Burrell for the purpose of engaging in the business of raising, buying, and selling stock, transacting a general farming business, and dealing in real estate and other property. Robertson died, and the business was continued by Burrell, the surviving partner, until his death. The heirs of Robertson then brought an action against the administrator of the estate of Burrell to compel an accounting, and for the appointment of a receiver to take charge of the Burrell estate as being partnership property. A demurrer to the complaint in the court below was sustained. On appeal to the supreme court, the judgment was affirmed. In speaking of the right of the heirs to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner, the supreme court said:

"Plaintiffs are not the proper parties to maintain this action, and they have not the legal capacity to do so. While, in a sense, they are beneficiaries of the trust which resulted by the death of their father, the fulfillment of which was imposed upon the surviving partner, yet there were certain intermediate steps and processes necessary to be taken and followed before their beneficial interests could be reduced to possession. And it is these necessary processes which the action under consideration entirely ignores. For there was another trust intervening in time and right and duties between the close of the surviving partner's trust and their enjoyment of its fruits. It is true that, as heirs of their father, the title to his property, real or personal, vested in them, but their title did not carry with it the right of immediate enjoyment. The rights and duties of the administrator of their father's estate interposed and intervened. The administrator, also, is a trustee with well-defined duties, among the first of which is that of collecting the assets of the estate, and paying its just debts, after due notice to creditors. The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the pos-

session and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator. * * * Whether the partnership assets consist of real or personal property, or both, is quite immaterial, since in every case it is made the duty of the surviving partner to account with the personal representative."

It is clear that, under the law as thus established in this state, the complainant has not succeeded to such an interest of the judgment in the whole or any part of the property as entitles him to redeem under the statute. This determination disposes of the question of a judgment lien, under the second subdivision of the statute, obtained by Amos H. Carpenter in September, 1894, on the property of Clinton H. Carpenter. As the latter had not succeeded to any interest in the mortgaged premises, either directly or by the terms of the award in his favor, there was nothing to which the judgment lien could attach. A decree will be entered in favor of the respondents, and for their costs.

HUNTINGTON v. LAIDLEY et al.

(Circuit Court, D. West Virginia. March 31, 1897.)

1. EQUITY PLEADING—PLEA AND ANSWER.

A plea containing a full defense to the bill is waived by also filing an answer which goes to the whole bill; but if the answer does not go to the whole bill, and is filed merely to fortify the plea by denying allegations of fraud, this is in accordance with the requirement of equity rule 32, and any new matter, or prayer for affirmative relief, may be stricken out or regarded as surplusage.

2. SAME—RES JUDICATA.

In a suit to set aside deeds for fraud, a plea of res judicata need not specifically deny the charges of fraud in the bill concerning the deeds; there being no charge of fraud as to the obtaining of the judgments relied upon as a bar.

3. SAME.

Equity rule 37, which provides that "no demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea," does not apply where the plea extends to the whole bill.

This was a suit in equity by Collis P. Huntington, as special receiver of the Central Land Company of West Virginia, against John B. Laidley and others, to set aside a deed for fraud. On motion to strike out plea and answer.

Simms & Enslow, George C. Sturgiss, and Maxwell Evarts, for complainant.

James F. Brown, J. H. Holt, Wm. E. Chilton, and A. F. Mathews, for defendants.

GOFF, Circuit Judge. The amended bill in this cause was filed January 26, 1894; and the plea and answer of the defendants, on the 26th of February, 1896. The case is now before the court on the complainant's motion to strike out the said plea and answer. The defendants allege in the plea that the complainant is estopped from

raising the matters and things set forth in the bill, because that most of them have been decided against the Central Land Company; of which complainant is receiver, in certain suits heretofore determined in the state courts of West Virginia, the same being courts of competent jurisdiction, and the judgments rendered therein being now unreversed and still in full force and effect, and also that the complainant by said judgments is equally concluded and prevented from raising all the other matters set forth in the bill. The defendants accompany the plea with an answer denying the allegations of fraud as set out in the bill, and the facts on which the same are said to be founded, and asking for affirmative relief. Complainant insists that the plea goes to the whole of the amended bill, and that under our general chancery practice the same is overruled by the answer. The defendants claim that their pleading is justified by the thirty-second equity rule, which reads as follows, viz.:

"The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded."

It will be noticed from an examination of the pleadings that the plea proper is to the entire bill, and that the answer, so far as it is responsive to the bill, is only a denial of the fraud and combination, and the facts relating thereto, specifically set forth in the bill. The defendants have thus availed themselves of their undoubted right to plead to the whole bill. If they had also answered the whole bill, then unquestionably the plea would have been thereby overruled. If such plea had contained in itself a full defense of the bill, an answer would have been unnecessary, and would have been taken as a waiver of the plea. *Ferguson v. O'Harra*, Pet. C. C. 493, Fed. Cas. No. 4,740; *Sims v. Lyle*, 4 Wash. C. C. 301, Fed. Cas. No. 12,891. The plea in the case at bar professes to cover the whole bill, and therefore, under our general equity practice, an answer was not necessary; nor has one, in the sense we use that word in, been filed. That part of the pleading which is called the "answer" is intended, not as an answer to the entire bill, but it is tendered for the purpose of fortifying the plea and denying the fraud charged, and is filed under the requirements of the latter part of said rule 32. As a matter of course, the new matter alleged and the affirmative relief asked should not have been incorporated into the pleading, which should have been confined to the purposes mentioned in that rule. That which was so improperly introduced into the pleading will be considered as surplusage, or stricken out, as may hereafter be deemed best. If the plea is good, it disposes of the allegations of fraud set forth in the bill concerning the deed made by Sarah H. G. Pennybacker to John B. Laidley, which were raised in the pleadings, and disposed of by the judgments rendered in the suits brought and decided in the courts of the state of West Virginia, and it does so by virtue of its power and effect as a plea of *res adjudicata*; and consequently it was not required that such allegations should be specially denied in the

plea filed in this cause, as the object of the bill is to set said deed aside for the frauds said to have been committed preceding the rendition of the judgments so pleaded in bar, and no charge of fraud is made as to the obtaining of said judgments; it being kept in mind in this connection that the answer filed in support of the plea denies the charges of fraud pertaining to the other matters, as to which the plea claims that the complainant is also concluded.

In this case the defendants interposed no demurrer to this amended bill, or to any part thereof, nor did they plead to part and answer as to the residue, but they pleaded to the whole bill; and as the bill specially charged fraud, and the rule required that in every case of that character a plea to such part should be accompanied with an answer fortifying the plea and denying the fraud and combination alleged, as also the facts on which the charge was founded, such answer was made a part of the pleading. This we think was proper, and to hold otherwise would be to deny to defendants the right to file a plea in a case in which fraud was charged, unless the plea applied to a part only of the bill. Such construction of the rule mentioned is not, in our opinion, justified by the language of the same, nor warranted by the practice under it. But it must be understood that the answer so accompanying the plea will be restricted to the purpose of denying the fraud and combination charged, and that it cannot in the further proceedings in this cause be put to any other use. Rule 37, equity practice, referred to by counsel in argument, does not apply to this case, as the plea here extends to the whole bill. If the plea had applied to a part only, and an answer had been filed to the residue, which also extended in part to some matter covered by the plea, then that rule would have saved the plea, in the absence of other objections that the answer had reference to some part of the same matter as was covered by the plea. In other words, that rule only applies in cases where the demurrer or plea extends to only a part of the bill, and the answer is intended to cover the residue. Under the practice as it existed previous to the adoption of this rule, if the plea was to a part only, and the answer to the remainder, and such answer, by inadvertence or otherwise, referred to the matters covered by the plea, the effect was to overrule the latter. The thirty-seventh rule was evidently intended to change that practice, as a careful examination of its provisions will show. It reads as follows:

"No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

The motion to strike out the plea and answer must be overruled. The effect they are to have, or the disposition that may be made of them, treating them as a part of the record of this cause, is yet to be determined.

GOLDEN REWARD MIN. CO. v. BUXTON MIN. CO.

(Circuit Court, D. South Dakota, W. D. March 13, 1897.)

1. PATENT FOR MINING CLAIM—FAILURE OF ADVERSE CLAIMANT TO CONTEST.

Under Rev. St. §§ 2325, 2326, a decision of the land office awarding a patent for a mining claim after due publication of notice is conclusive upon an adverse claimant who has failed to file his claim, except for reasons which a court of equity might allow to be urged against a judgment at law.

2. SAME.

The question as to the true boundary of a mining claim for which a patent is asked is a question of fact, coming properly within the jurisdiction of the land department; and its action therein is conclusive, in the absence of fraud.

3. SAME—PRINCIPAL CHARGED WITH KNOWLEDGE OF AGENT.

Where there was a conflict in the boundaries of the patents for two mining claims issued to separate corporations, the corporation to which the later patent was issued, having failed to adverse the claim of the other company, cannot claim relief in equity, upon the ground of mistake in the boundary, although the person whom it employed to take all necessary proceedings to obtain its patent was also the agent of the other company, it being charged with the knowledge of its agent as to the conflict.

4. SAME.

Where a corporation, in applying for a patent for a mining claim, made a distinct disclaimer of a specific quantity of land, as being in conflict with a prior patent, it cannot claim relief in equity as to the conflict.

5. CORPORATIONS—NEGLIGENCE OF AGENTS.

As a corporation acts only through its officers and agents, it may be divested of its property by the negligence of its agents in failing to adverse an application for a patent for a mining claim.

G. C. Moody, Wm. R. Steele, and W. L. McLaughlin, for complainant.

Martin & Mason and Granville G. Bennett, for defendant.

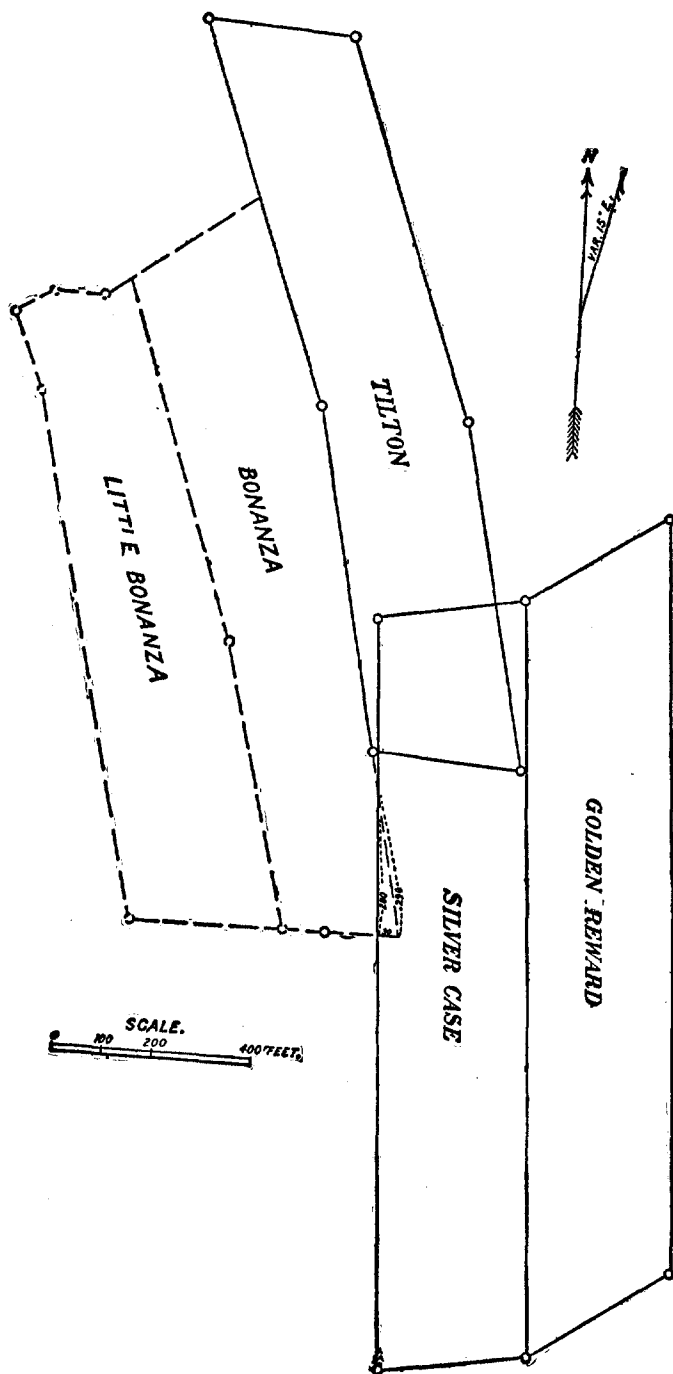
CARLAND, District Judge. The complainant, a citizen of the state of South Dakota, filed its bill against the defendant, a citizen of the state of Iowa, for the purpose of having the title to a portion of the Bonanza mining claim, situated in the Whitewood mining district, Lawrence county, S. D., declared and decreed to be held in trust by said defendant for the use and benefit of the complainant. The bill also prayed for an injunction against the prosecution of an action at law now pending in this court, brought by the defendant against the complainant, to recover the sum of \$220,000, alleged to be the value of certain ore taken by complainant from that portion of the Bonanza mining claim in dispute in the present action. The amount of mineral land in dispute, as shown by the testimony, is 1.34 acres. A demurrer to the bill was interposed, and, after argument, was overruled. The ruling, however, on the demurrer, is immaterial, as the case made by the bill is not the case made by the evidence. The cause has been submitted on pleadings and proofs, and, after a careful examination of a voluminous record, I have arrived at certain conclusions, hereinafter stated. If the disposition of this cause depended upon a finding that the original southeast corner of the Bonanza mining claim was, at the time said claim was surveyed for patent, swung

onto the Silver Case mining claim to the extent claimed by witnesses for complainant, I should not be able to find from the evidence that such was the fact, as the evidence is in sharp conflict, and is not of that clear and convincing character that is necessary to impeach a document of such solemnity as a patent from the United States.

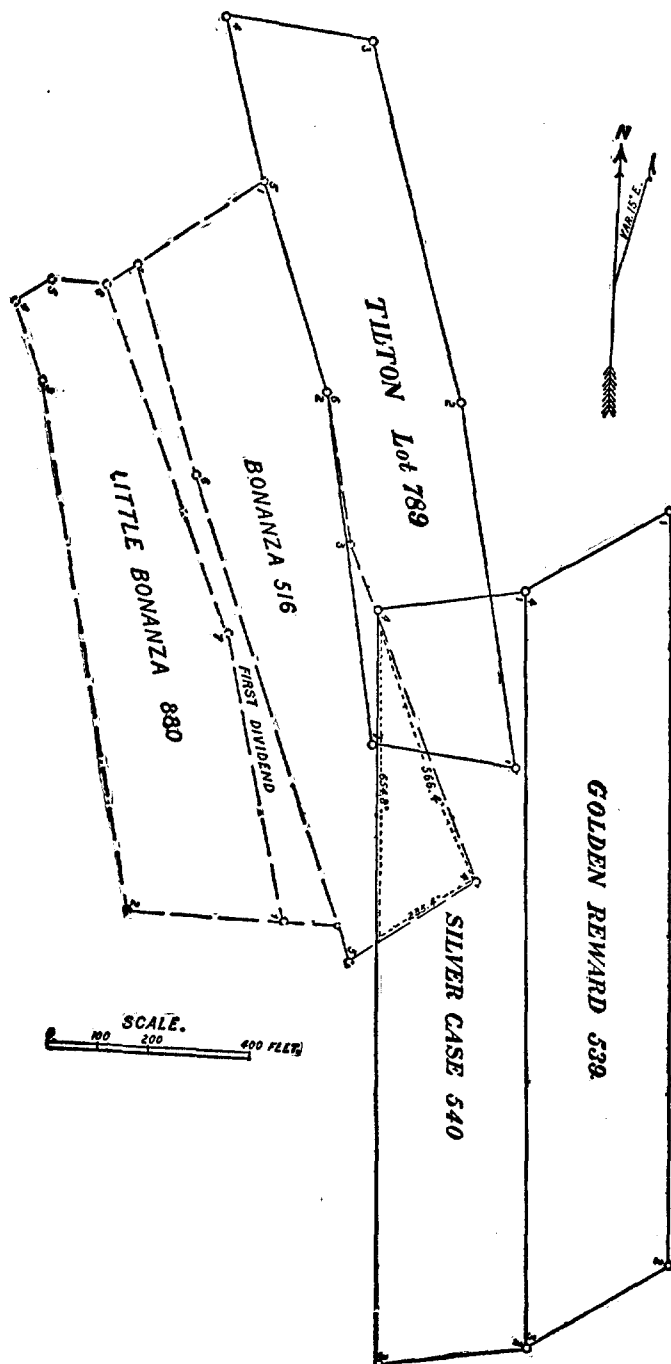
As one of the positions taken by the complainant at the hearing is based on the idea that the southeast patent corner of the Bonanza is at the place where the same was originally located, I prefer to base my decision on certain principles of law which, in my opinion, are fatal to the right of the complainant to the relief prayed for in its bill; and I shall therefore concede, for the purposes of this opinion, that, at the time of the official survey of the Bonanza for patent, the southeast corner stake was, by mistake, moved onto the Silver Case to the extent claimed by complainant. With this concession in the case, a fair preponderance of the evidence shows the following state of facts:

On the 31st day of March, 1888, the defendant, the Buxton Mining Company, filed in the United States land office, at Deadwood, Dakota territory, an application for a patent for the Bonanza mining claim, which application contained a correct description of said claim according to courses and distances. Upon the filing of said application, the usual order was made for the posting and publishing of the notice of said application, and the usual notice was posted on the claim, at the land office, and also was published in a newspaper for the period required by law and the rules and regulations of the general land office. No adverse claim having been filed within the period of 60 days, such proceedings were thereafter had that on the 12th day of March, 1891, a patent was issued by the United States to the defendant, the Buxton Mining Company, for the Bonanza mining claim. On the 11th day of August, 1888, the complainant, the Golden Reward Mining Company, filed an application in the United States land office, at Deadwood, Dakota territory, for a patent from the United States for the Silver Case mining claim. This application contained a description of the claim by courses and distances, and the description concluded with these words: "Containing 8.76 acres, after deducting 1.50 acres, in conflict with Bonanza lode lot 516, and not claimed by this claimant." Notice of said application, containing the description of the Silver Case, as set forth in the application for patent, was posted and published as required by law; and, no adverse claim being filed, such proceedings were thereafter had as resulted in the issuance of a patent by the United States to the complainant, for the Silver Case, March 17, 1892. It will now be observed that, so far as the record of the proceedings which resulted in the issuance of the patents for the Bonanza and Silver Case are concerned, they show that each applicant received a patent for just what it applied for, and that there were no adverse claims.

The proofs show that the Bonanza was first located, and its original location, with reference to adjoining claims, as claimed by complainant, is represented by the following diagram:



Its location as patented, with reference to adjoining claims, is shown by the following diagram:



It thus appears, and it is conceded, that there always was a conflict between the Bonanza and Silver Case; the contention of the complainant being that, at the time the Bonanza was surveyed for patent, the original southeast corner of the Bonanza was swung onto the Silver Case to such an extent as to change what was formerly a conflict of $\frac{18}{100}$ of an acre to $\frac{134}{100}$ of an acre. It appears also that the defendant Buxton Mining Company was the owner of the Little Bonanza mining claim, which is shown by Exhibit A to lie along the westerly side of the Bonanza, and by Exhibit B to lie along the westerly side of the Little Dividend.

Complainant claims that the swinging of the Bonanza onto the Silver Case not only allowed the defendant to obtain a portion of the Silver Case, but also allowed it to locate and patent the First Dividend. On the other hand, the defendant claims that, when it surveyed the Bonanza for patent, it was found that the claim was too wide at its southerly end line by 100 feet, so that, in order that the claim might conform to the limitations prescribed by law, it was necessary to draw in the west side line of the Bonanza, thus creating a space between the Bonanza and Little Bonanza, which defendant located and patented as the First Dividend. The official surveys upon which the applications were based, to obtain patents for the Bonanza and Silver Case, were made by Peter L. Rogers, United States deputy mineral surveyor. The official survey of the Bonanza was completed December 10, 1887, and of the Silver Case April 21, 1888. In November, 1887, the defendant employed one Thomas H. White to superintend and take all necessary proceedings to obtain a patent for the Bonanza. In January, 1888, the complainant employed the same Thomas H. White to superintend and take all necessary proceedings to obtain a patent for the Silver Case. Both of these employments were accepted by said Thomas H. White, and, under his supervision, patents were obtained for said mining claims, as hereinbefore stated.

It is the theory of the bill filed by complainant that the deputy mineral surveyor, Peter L. Rogers, was a mere agent of White, and that Rogers did whatever White requested him to do; that White, while he was, to the knowledge of defendant, the agent of the complainant, to obtain a patent for the Silver Case, was corrupted by the defendant to swing the Bonanza onto the Silver Case in making the official survey. These allegations of the bill are not only not proven by the evidence, but are disproven. The testimony fairly shows that Peter L. Rogers made the official surveys of both mining claims, and that the official survey of the Bonanza was completed before White was employed by complainant to obtain a patent for the Silver Case. There is no evidence upon which to base any finding that the defendant knew anything about the fact that White had been employed by complainant to obtain a patent for the Silver Case. Fraud is never presumed. White is deceased, and his testimony cannot be had. A sworn officer of the government has sworn that the surveys are correct. The department of the government vested with the power to pass upon the proceedings for patent has, without objection, approved them. It therefore results, after a careful consideration of all the testimony in the

case, and after making the concession that the proofs show that the Bonanza was swung onto the Silver Case to the extent claimed by complainant, that there was a mistake made by the official surveyor in locating the boundary lines of the two mining claims. There is no evidence in the record upon which to base a finding that fraud was committed by any one. Attention has been called to the fact that the location certificate of the First Dividend was not filed for record until the time for adversing the Bonanza had elapsed; that White was not paid for his services by defendant until after the expiration of the same period. These isolated facts might be material if associated with fraudulent acts, but standing alone they prove nothing.

Is, then, the mistake mentioned such as a court of equity will relieve against in a proceeding of this character? At the threshold we must not forget that this proceeding is not one between contesting claimants to mineral land in a United States land office, nor is it a proceeding to try in court an adverse claim under the statutes of the United States, but it is a proceeding directly attacking a patent for mineral lands granted by the government of the United States. With the patent as the object of attack, we must come armed with the weapons which are necessary to overcome this grant of the government, or defeat is inevitable.

Sections 2325 and 2326 of the Revised Statutes regulate the mode of procedure where adverse claims are filed against applications for patents to mineral lands. Section 2325, among other things, provides:

"If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of \$5.00 per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 provides for a stay of proceedings in the land office upon the filing therein, within the 60 days, of an adverse claim, and also provides that the party filing the adverse claim shall, within 30 days thereafter, commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. These provisions provide a method whereby all parties having adverse claims to mineral lands, for which a patent is asked, may have their day in court. If a party fails to file his adverse claim in the land office in the time provided by law, or if, having so filed it, he fails to commence proceedings in accordance with section 2326, he waives his adverse claim. With reference to the proceedings in the land office, the publication of the proper notice for the prescribed period is due process of law. The proceeding is judicial in its character, and in the nature of a proceeding in rem. If there is no adverse claim, a decision of the land office awarding the patent to the claimant is a judgment by default, as conclusive as to the matter adjudicated as a judgment

upon contested issues. The expression "it shall be assumed" must be construed to mean "conclusively assumed," as any other construction would defeat the object of the statute. In using the word "conclusively," I do not mean to say that the statute has closed the doors of a court of equity to adverse claimants in every case; but I think it may safely be asserted that the failure to adverse, as provided by the sections referred to, deprives the adverse claimant of all remedies except those which a court of equity might allow to be urged against a judgment at law. *Wight v. Dubois*, 21 Fed. 694; *Kannagh v. Mining Co. (Colo. Sup.)* 27 Pac. 245; *Hamilton v. Mining Co.*, 33 Fed. 562; *Four Hundred & Twenty Min. Co. v. Bullion Min. Co.*, 3 Sawy. 634, Fed. Cas. No. 4,989; *Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. 74; *U. S. v. Throckmorton*, 98 U. S. 65; *Vance v. Burbank*, 101 U. S. 519.

In *U. S. v. Throckmorton*, 98 U. S. 65, the exception to the maxims, "*Interest rei publicæ ut sit finis litium*," and "*Nemo debet bis vexari pro una et eadem causa*," is thus stated:

"Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party, and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and in similar cases, which show that there never has been a real contest in the trial or hearing of a case, are reasons for which a new suit may be sustained to set aside and annul the former judgment and decree, and open the case for a new and fair hearing."

Of course, where a party has had a full and fair opportunity to be heard, he is as much concluded by the judgment as if he actually was heard. 1 Black, Judgm. § 87; *U. S. v. White*, 17 Fed. 561; *Howard v. City of Huron (S. D.)* 60 N. W. 803.

In *Vance v. Burbank*, supra, it is said:

"The appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are. It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department; so that it may properly be said there has never been a decision and a real contest about the subject-matter of inquiry."

Laying aside the question of fraud, as limited and defined in the cases cited, it is settled that the action of the land department in issuing a patent is conclusive upon all questions of fact coming properly within the scope of its jurisdiction, and is not subject to review by any other tribunal. The question as to what were the true boundaries of the Bonanza and Silver Case was a question of fact, coming properly within the jurisdiction of the land department. *Carson City Gold & Silver Min. Co. v. North Star Min. Co.*, 73 Fed. 597; *Doe v. Mining Co.*, 54 Fed. 940.

Whether we have in view the sections of the Revised Statutes quoted, or simply the decisions of the land department, which resulted in the issuance of the patents, in either case, in order to suc-

ceed in this proceeding, the complainant must bring itself within the operation of some one of the rules under which it is permissible to attack the patent.

It is contended by counsel for complainant that it was prevented from making its defense or adverse claim to the application for the Bonanza patent by the acts of White and the defendant, confederating and acting together for the purpose of suppressing the truth as to the amount of land claimed within the boundary lines of the Bonanza. How and by whom was the truth suppressed? How and by whom was the complainant prevented from adverseing the Bonanza claim for patent? If the defendant, in its application for the Bonanza patent, was claiming property that belonged to the complainant, then the complainant was a defendant in that proceeding. Was it served with process? The testimony shows that it was in the manner provided by law. Did it make any defense? None. And there is not a syllable of testimony that any one prevented it from so doing, or that any one suppressed the truth as to the claim made by defendant in its application for the Bonanza patent. The president of the complainant swears that he had no knowledge of the application for the Bonanza patent till the fall of 1888. This knowledge, which the president did not have, must have been actual knowledge; for when the evidence shows, as it does in this case, that the notice of the application for the Bonanza patent was posted and published as the law requires, then the law says that the complainant had notice, and it will not be permitted to say that it did not. The notice which the law provides is what is required; no more, no less. There is no evidence in the record that anything was done to prevent the complainant from receiving this legal notice. It was a domestic corporation, with its officers, agents, and corporators residing at Deadwood, the place where the local land office was situated, and a place but a few miles from the Bonanza claim, and the place where the notice was published. The conditions were most favorable for the giving to the complainant the notice required by law. I think I am justified in saying that the evidence shows two reasons why the Bonanza application was not adverseed by the complainant: First. The conflict that was always known by all parties to exist between the Bonanza and Silver Case, whether it amounted to $\frac{15}{100}$ of an acre or $\frac{134}{100}$ of an acre, at the time of the application for patent, was considered of but little value. The second reason is found in the answer of the president of complainant to the question as to whether he knew that any plat was posted: "I did not know anything about it. As I have explained before, I had some other business of more importance to me, and was attending to the mercantile business, and did not pay any attention to mining." These reasons must be correct, or else the complainant had no adverse claim to assert. White was not employed by complainant to adverse the Bonanza patent application, and not at all until after the official survey of the Bonanza had been made; so that it is impossible to find anything that White did or did not do in reference to the Bonanza that in any way prevented the complainant from presenting its ad-

verse claim. The fact that the complainant had employed White to obtain a patent for the Silver Case did not relieve it of the duty to employ some one to adverse the Bonanza patent application.

It is conceded by counsel for complainant that the officers of complainant were negligent in not better looking after the interest of the corporation, but it is asserted that the corporation ought not to be divested of its property by the negligence of its officers and agents. It is a sufficient answer to this proposition to observe that a corporation acts only through its officers and agents. By their acts a corporation is benefited or injured. By their industry and strict attention to their duties, corporations accumulate property. By their negligence, they may lose it. In the practical affairs of life, the nebulous fiction of our thought called a "corporation" cannot be separated from its living members. Especially is this so in a case, like the one under consideration, where the officers and agents controlled a majority of the stock.

If I am correct as to the foregoing propositions, then the complainant has lost its interest, if any it ever had, in the mineral land in controversy. But, as the complainant relies strongly for the maintenance of its rights on the employment of White to obtain a patent for the Silver Case, it is necessary to inquire as to what effect that employment had on the rights of the parties.

Peter L. Rogers completed the official survey of the Silver Case on April 21, 1888. This survey was made by Rogers at the request of White, the agent of the complainant. At the completion of the official survey, White, as the agent of complainant, knew the boundaries of the Silver Case, and there is no evidence in the record that will prevent the charging of the knowledge of White to the complainant; and, if the complainant is not to be charged with White's knowledge, wherein did White suppress the truth? On July 24, 1888, the surveyor general of Dakota territory certified to the correctness of the official survey of the Silver Case, and to the plat accompanying the same. The plat and official survey thus certified were true copies of the original; and the plat and survey, not only by lines, figures, letters, and signs, but in so many words, described the area in conflict with the Bonanza as 1.50 acres. On the 30th day of July, 1888, George C. Hickok, as secretary of the complainant, thereunto duly authorized, swore to an application for a patent for the Silver Case, in which application there was a distinct disclaimer of 1.50 acres, as being in conflict with the Bonanza. The notices issued on the filing of this application contained exactly the same declaration. It will not do for the complainant to say that this application was made after the expiration of the period in which adverse claims could be filed to the Bonanza, and therefore the description of the Silver Case could not be otherwise; for, if the complainant is to be charged with White's knowledge, it had known the extent of the conflict since April 21, 1888; and if it is not to be charged with White's knowledge, and its own position, taken as true, that it had no knowledge of the Bonanza patent proceedings until the fall of 1888, then this act of the corporation was a voluntary and deliberate disclaimer of

title to the land in controversy. The complainant was the actor in the Silver Case proceedings, and was bound to know what it was claiming. Especially is this the case when we consider the fact that complainant, by its own testimony, always knew that there was some conflict between the Silver Case and the Bonanza. The way the official survey described the amount of conflict rendered it possible for any one who could read to determine its amount. So it cannot be claimed that there was any suppression of the truth by any one. If the secretary of the complainant could not tell what 1 acre and $\frac{50}{100}$ acre meant, after swearing to the application for patent; or, if he knew and did not care, then he was either so incompetent or negligent as to prevent the corporation from asking a court of equity for relief.

Counsel for complainant, at the hearing, advanced a claim for relief, which, while it is inconsistent with the whole theory of the bill, is alleged to arise from the case made by the defendant. The claim is this: Defendant claims that the Bonanza, as originally located, July 27, 1877, was, at its southerly end, 100 feet wider than the law permitted; in other words, it was 400 feet wide, instead of 300. Complainant says, if this is so, then the location was void, for the excess, and that no valid claim was filed for the excess until the Bonanza amended location certificate was filed, March 20, 1888; and as the Silver Case was located January 16, 1884, that the latter location is prior and better in right to the Bonanza amended location to the extent of 100 feet of the mineral land in conflict. Defendant replies that there is no evidence as to where the vein or lode was situated on the Bonanza claim, and that, where the vein has not been actually established and run, the point of discovery is presumed to be the middle of the vein, and that a line extended southerly on the Bonanza, from the point of discovery, as shown by the evidence, would throw the excess on the westerly side of the Bonanza; that is, the excess over 150 feet from the middle of the vein would be on the west side. Complainant again avers that the presumption referred to only applies to vertical veins, and not to flat ones, such as the Bonanza is shown to contain. Again, conceding the claim of the complainant, and admitting that the excess in the Bonanza location was on the easterly side, still it simply results that, when the application for the Bonanza patent was made, the defendant was claiming a portion of the Silver Case, which, if the complainant did not adverse, would be lost to it, as, on this theory of the complainant's case, there could be no fraud and no moving of stakes, but simply a claim for patent, prosecuted to final conclusion, without objection. I see no escape from the conclusion that a decree must be entered dismissing the bill of complaint, with costs.

LAWRENCE v. STEARNS.

(Circuit Court, W. D. Michigan, S. D. April 13, 1897.)

1. RES JUDICATA—EXTENT OF ESTOPPEL.

The judgment in an action is conclusive, in a subsequent action between the same parties upon the same cause, as to all questions which might have been presented and determined in the first suit; but in a subsequent action between the same parties upon a different cause it is conclusive only upon such questions as were actually litigated and determined in the first suit.

2. SAME—JUDGMENT FOR NEGLIGENCE—SUIT FOR INDEMNITY.

One who has been prosecuted to judgment upon a cause of action based on the negligent act of another, who has been called in to defend and has defended the suit, may sue such other party for indemnity, and rest his case upon the former adjudication, it being shown that it was in consequence of such negligence that the former judgment passed.

3. SAME—EVIDENCE AS TO QUESTIONS LITIGATED—OPINIONS OF COURT.

Under the provision of the constitution of Michigan (article 6, § 10) that the decisions of the supreme court shall be in writing, signed by the judges, and filed in the clerk's office, the opinion of the supreme court of that state is competent, and the best evidence of the grounds of the adjudication in any case upon the questions litigated and determined therein.

4. LACHES—KNOWLEDGE OF GROUND OF ACTION.

In a suit by the receiver of a bank to charge its president with losses arising from his negligent management, where it is fairly inferable from the evidence that the facts constituting such negligence were not disclosed by the president to the directors until long after their occurrence, and until disclosed by the bringing of a suit by a third party, and the judgment therein, the lapse of more than the statutory period of limitation since the actual occurrence of the negligence cannot be imputed to the receiver as laches.

5. BANKS AND BANKING—MISMANAGEMENT BY PRESIDENT—EXCESSIVE LOANS TO RELATIVE.

Where the president of a bank, having the management of its business, has loaned to a near relative a large share of the capital of the bank, and, with knowledge that securities offered to the bank by such relative are subject to conditions likely to eat away much of their value, has accepted the securities at their face value, crediting his relative therewith, and surrendering obligations, good at the time, he is liable to the bank, because of such negligent management, for a loss resulting from the depreciation of the securities so accepted.

Fletcher & Wanty, for complainant.

Crane, Norris & Stevens, for defendant.

SEVERENS, District Judge. The bill of complaint in this case was filed for the purpose of recovering from the defendant the damages resulting from an alleged breach of trust on his part while acting as president and managing officer of the Northern National Bank of Big Rapids. This bank was chartered on the 19th day of September, 1870, for the period of 20 years, and its charter was extended by the comptroller of the currency on the 5th day of September, 1890, until the 19th day of September, 1910. The capital stock of the bank at the time of its organization was fixed at the sum of \$150,000, but on the 10th day of January, 1893, its capital was reduced by the direction of the comptroller of the currency, to \$100,000. The bank failed and closed its doors shortly before the 5th day of August,

1893, and on that day the complainant, Lawrence, was appointed receiver by the comptroller of the currency, and entered upon his duties as such a few days after, and has since continued in the possession of the assets of the bank for the purpose of collecting its assets and liquidating its financial affairs. It is alleged in the bill that the defendant, Stearns, was president of the bank from its organization to the 3d day of August, 1891, and that La For a S. Baker, who was a nephew of said Stearns, was cashier of the bank from its organization to about the 11th day of January, 1887; and that after Baker ceased to be cashier substantially the whole control and management of the bank passed into the hands of the president, who afterwards exercised the powers which the two had previously exercised. It is alleged that on the 22d day of January, 1888, the bank held paper to the amount of \$15,000, made by Baker, and indorsed by the Baker Lumber Company, and paper amounting to \$15,000, made by the Baker Lumber Company, and indorsed by Baker; that the Baker Lumber Company was a corporation organized in bad faith for the purpose of carrying on the business of Baker, and to be used as a cover under which he could obtain loans from the bank in excess of the amount permitted by law; that Baker owned all the stock except one or two shares, and that the organization of said corporation was merely colorable; that Stearns knew all of these facts, and loaned to Baker the sum of \$30,000, being the aggregate of the two amounts above mentioned. It is further alleged that on the 22d day of March, 1886, Baker sold to Anderson & Griffin certain pine lands for the sum of \$50,000, \$5,000 of which was paid down, and a note of Anderson & Griffin for the remaining \$45,000, payable on or before two years from date, with interest at 7 per cent., was taken for the balance. The note was secured by a mortgage upon the property sold, and Baker at the same time gave to Anderson & Griffin a written guaranty that these lands, together with some other logs therein mentioned, would produce 13,000,000 feet of pine lumber, and that he would refund the sum of \$3.50 per M. for the number of feet it fell short of that amount; and it is charged that the defendant, Stearns, had full knowledge of all the particulars of this transaction. It is further stated that on the 9th day of February, 1887, Baker assigned the above-mentioned note and mortgage to Palmer & Brown as security for a loan of \$20,000 which they had made to him upon his note indorsed by Stearns, and that Anderson & Griffin made payments upon this note and mortgage to Palmer & Brown to such an extent that on the 22d day of January, 1888, there remained due to Palmer & Brown \$4,508.56, leaving still due and unpaid on the Anderson & Griffin note and mortgage the sum of \$23,089.12; that on the 3d day of August, 1887, Stearns, acting for the bank, and by concert with Baker, bought the Anderson & Griffin note and mortgage from Palmer & Brown, but the bargain was not closed up until the 22d day of January, 1888, on which day Stearns, acting for the bank, paid to Palmer & Brown the sum of \$4,508.56, being the amount still due to them on the note of Baker indorsed by Stearns, took an assignment of the note and mortgage to himself, and forthwith transferred the note and mortgage of Griffin & Anderson to the

bank in payment of a note of the Baker Lumber Company, indorsed by Baker, of \$7,500, and two notes of \$5,000 each, made by Baker and indorsed by the Baker Lumber Company (all of which were parts of the indebtedness of those persons to the bank, above mentioned), canceled and delivered up the notes, and gave the Baker Lumber Company a credit upon the books of the bank for the sum of \$1,080.56, being the balance of the whole sum purporting to be due upon the Anderson & Griffin note and mortgage, which credit of \$1,080.56 the Baker Lumber Company afterwards checked out. It is alleged that the defendant, Stearns, in this purchase of the Anderson & Griffin note and mortgage, acted without the knowledge of the directors or other officers of the bank, and that he conducted the same personally. It is charged that the defendant, in making this purchase of the Anderson & Griffin note and mortgage, and parting with the assets of the bank therefor, knew of the guaranty agreement made by Baker to Griffin & Anderson that the lands should produce 13,000,000 feet of pine, and the contract for indemnity against their producing a smaller amount. It is further alleged that soon after this purchase for the bank, it having turned out that the quantity of pine on the lands which Baker had sold to Anderson & Griffin was very much less than the sum stipulated in Baker's guaranty, and that the deficiency was nearly half of the stipulated 13,000,000 feet, Griffin & Anderson filed their bill of complaint in the circuit court for Newaygo county in chancery against the bank, Stearns, and Baker for the purpose of having the amount of the deficiency in the quantity of lumber charged up against the sum due on the note and mortgage to Baker, which the bank now held; it being alleged that the bank had notice of Griffin & Anderson's rights when it took their note and mortgage. Personal service upon the defendants in that suit was obtained. Baker made no defense, but Stearns, who was charged in the bill with having had full knowledge of the Baker guaranty when he carried through the transactions above mentioned in purchasing the note and mortgage for the bank, assumed and conducted the defense for the bank, and filed an answer in its behalf, and he also filed an answer for himself. In both these answers it was denied that either the bank or Stearns had any knowledge of the existence of the Baker guaranty at the time of the purchase of the note and mortgage from Palmer & Brown and the taking of the same by the bank. Replications being filed to those answers, proofs were taken, and the parties went to hearing. The court found that Stearns did in fact have knowledge of the guaranty, and decreed in favor of the complainants. The bank and the defendant, Stearns, appealed to the supreme court, where, upon a hearing, the supreme court reached the same conclusion upon the facts, and decreed that upon the payment by Griffin & Anderson of the sum which the bank had paid to Palmer & Brown,—who, as the court held (57 N. W. 808), were bona fide holders of Griffin & Anderson's note, to whose position, to the extent of the amount paid by the bank, the latter succeeded,—Griffin & Anderson were entitled to have the note canceled, and the mortgage discharged; it being found that there was a deficiency of 5,500,000 feet in the quantity of the lumber as guarantied by Baker, for which Griffin & Anderson were entitled

to a credit of \$19,250. This was a sum larger than the amount due upon the note and mortgage at the time of the bank's purchase, after deducting the amount paid to Palmer & Brown. Thus the whole sum of the notes of Baker and of the Baker Lumber Company, which were canceled and surrendered, and also the amount credited to the Baker Lumber Company, and which was afterwards checked out as above mentioned, was lost to the bank. In the present case the defendant, Stearns, answers, substantially admitting all of the material parts of the bill, except that he denies that at the time he took the Griffin & Anderson note and mortgage for the bank, and discharged the obligations of Baker and the Baker Lumber Company, and gave the latter the credit, he had any knowledge of Baker's guaranty. He pleads also certain facts in exoneration of some of the material facts admitted, but there was a replication to his answer, and there is no proof of such alleged circumstances. He also pleads the statute of limitations in bar of the suit. But the question of fact as to whether Stearns had notice of the existence of the Baker guaranty which destroyed the value of the Griffin & Anderson securities is the vital one in the case. To prove that he had such knowledge, the complainant has put in evidence the record of the suit in the state court, above mentioned, and insists that that record shows that it was there adjudicated that he did have such notice, and that it was in consequence of that that the bank was held chargeable and suffered the loss. It is insisted by the complainant that that adjudication establishes the fact for the purposes of the present case. The defendant, on the other hand, denies that that record can have any such effect here, and in support of this contention it is urged: (1) That the record does not show that the point or question here involved was actually litigated and determined by the decree, and that the latter is not sufficient as an estoppel as to such matters as merely might have been there litigated and determined. (2) That the rule that where one is held in damages for the negligent act of another, he may, upon an adjudication charging him, sue the party whose negligence produced the result, and obtain indemnity, does not apply; at least, that there is no estoppel against the defendant in the second suit in respect of the facts adjudicated in the first. (3) That the opinion of the supreme court wherein the conclusions of fact were stated is no proof that the decree of that court proceeded upon the grounds therein stated.

1. It will be assumed for the purpose of discussing the first two of the above propositions that the opinion of the supreme court of the state in the former suit is competent evidence of the matters there decided, and which formed the basis of the decree (a subject of discussion which will be taken up later on), for it is clear that, if that opinion is not competent evidence upon the question as to what matters were decided in that case, there is nothing in the proofs in the present case upon which it can be held that the defendant's knowledge of the character of the Anderson & Griffin note and mortgage was found and determined in the former suit. But it is also clear that the pleadings in that case were such that such knowledge on the part of Stearns might be a material, indeed

a vital, fact to be determined in order to reach the proper conclusion. It must be admitted that upon the face of that record—not, of course, now including the opinion of the supreme court—it does not necessarily follow that the decree passed upon the fact as being found that Stearns had knowledge of the quality of the note and mortgage, for the decree might have passed upon a finding that the bank had knowledge or was charged with notice in some other way. But it might be that the foundation of the court's decree consisted of a finding that the bank was chargeable with notice of the equities of Anderson & Griffin by reason of the fact, if that were found, that Stearns himself, who was its president and managing officer, and conducted that very business, had such notice. Inasmuch as the president did in fact conduct the transaction on the part of the bank, and the bank was asserting and endeavoring to protect its right and title to the note and mortgage, it was chargeable by implication with such knowledge as he had. *Wilson's Ex'x v. Pauly*, 37 U. S. App. 642, 18 C. C. A. 475, and 72 Fed. 129. Numerous authorities are cited to establish the distinction, and the result of that distinction in determining the application of the doctrine of estoppel, between those cases where the second suit is upon the same cause of action and between the same parties as the first, and those cases where the second suit is upon a different cause of action though between the same parties; the rule being that the judgment in the former cases is conclusive as to every question which might have been presented and determined in the first suit, whereas in the latter cases the judgment operates as an estoppel only upon the point or questions actually litigated and determined, and not as to other matters which might have been, but were not, litigated and determined. *Cromwell v. County of Sac*, 94 U. S. 351; *Dooley v. Potter*, 140 Mass. 49, 2 N. E. 935; *Railroad Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72; *Johnson Steel St. R. Co. v. Wm. Wharton, Jr., & Co.*, 152 U. S. 252, 14 Sup. Ct. 608; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 Sup. Ct. 733; *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816; *Ryder v. Loomis*, 161 Mass. 161, 36 N. E. 836; *Schwan v. Kelly*, 173 Pa. St. 65, 33 Atl. 1107. This distinction relating to the manner in which the question arose and was determined in the former suit is undoubtedly well established, and, the present case being one falling within the second class, it follows that it must be made to appear—First, that the question here involved might have been one of inquiry and determination in that case; and, second, that it actually did become a matter of inquiry and determination. *Russell v. Place*, 94 U. S. 606; *Steam Packet Co. v. Sickles*, 24 How. 333; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004. As a matter of fact, it appears from the record of the former suit, as already stated, that the matter in question here might have been litigated in the former suit; and upon the question of fact it is manifest that it was in fact litigated. It became the central point of the controversy, and the case turned upon its decision. Stearns, in his answer for the bank, denied that it had notice of the guaranty, and the opinion of the supreme court shows that it was upon the notice imputed to the

bank from the knowledge of Stearns that the bank was charged. No other ground was suggested.

2. The question next to be considered is whether one who has been prosecuted to judgment upon a cause of action based upon the negligent act of another who owed a duty to him, and where such other party has been called in to defend, and has actually assumed the conduct of the defense, may sue such other party for indemnity, and rest his case in respect of the question of negligence upon proof of the former adjudication, it being shown that it was in consequence of such negligence that the former judgment passed. I think this question must be answered in the affirmative. The principle involved is one which lies at the foundation of many cases, and has become defined and settled as a distinct branch of the law of estoppel. *Robbins v. Chicago*, 4 Wall. 657; *Washington Gas-light Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564; *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663, 39 N. E. 360; *Lloyd v. Barr*, 11 Pa. St. 41; *Westfield Gas & Milling Co. v. Noblesville & E. Gravel Road Co.*, 13 Ind. App. 481, 41 N. E. 955. The case of *City of Boston v. Worthington*, 10 Gray, 496, cited by counsel for the defendant as one which clearly states the law upon this subject, is in harmony with the doctrine stated. It asserts that the former judgment against the plaintiffs was conclusive against the defendants in the second suit upon all of the points for which the record of the former suit is offered here. The points upon which it is said the former judgment would not be conclusive are such as in the present case are established by the pleadings and the relations of the parties.

3. It being established that the pleadings in the former suit of *Griffin & Anderson* against the bank, Stearns, and Baker constituted grounds upon which the question of Stearns' negligence might be litigated, and might become the pivotal question in the case, the next question is whether the proof upon that subject which has been offered is competent to show that in fact it was a material and decisive question in the case, and was decided. It is insisted by counsel for the defendant that the opinion of the court is not competent evidence to prove such fact, and the defense in the present case has been rested largely upon this contention. As already stated, if the defendant's position is right upon this question, the case fails, and it appears to me to be equally certain, if the propositions already affirmed in this opinion are sound, the disposition of this question the other way practically decides the case against the defendant. It is insisted that the opinion of the court is nothing but hearsay; that it is no part of the judgment, nor, indeed, any part of the record. And it is insisted that if the question as to the grounds of the decree may be gone into by proof outside of the decree itself, that witnesses should be called, and the matter proved in the ordinary way. This does not appear to me to be a reasonable contention. In fact, I think there can be no higher or better evidence than the written opinion of the court itself upon which the decree is framed. The constitution of the state, by section 10 of article 6, declares that:

"The decisions of the supreme court shall be in writing, signed by the judges concurring therein. Any judge dissenting therefrom shall give the reasons of such dissent in writing, under his signature. All such opinions shall be filed in the office of the clerk of the supreme court."

Thus an official character is given to the opinions of the court, and, when filed as the constitution requires, they become authentic evidence of their contents. How is the matter to be proved? Shall the judges be called to testify upon what reasons moving their minds the decision was made? It seems very doubtful whether such proof would be admissible at all. The evidence of what they did is in writing, officially signed and filed by them, and the reasons for their decision are required to have been stated in such writing, and I am well satisfied that the writing itself is the best, if not the only, authentic evidence which could be received. I must, therefore, hold that the objection against its admissibility must be overruled. *Phelps v. Harris*, 101 U. S. 370; *Legrand v. Rixey's Adm'r*, 83 Va. 862, 3 S. E. 864; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 Sup. Ct. 733; *New Orleans, M. & C. R. Co. v. City of New Orleans*, 14 Fed. 373; *Southern Minn. Ry. Extension Co. v. St. Paul & S. C. R. Co.*, 5 C. C. A. 249, 55 Fed. 690; *Esterbrook v. Savage*, 21 Hun, 145; *Insurance Co. v. Herbert* (Sup.) 33 N. Y. Supp. 819. The case of *Insurance Co. v. Hamilton*, 22 U. S. App. 386, 11 C. C. A. 42, and 63 Fed. 93, is not in conflict with this view. The question there involved was the sufficiency of the opinion in the court below as a finding of facts upon which to review the judgment. It was not a finding of the ultimate facts upon which the judgment rested. And, further, there was no law which required the opinion of the court below to be in writing and filed with the clerk, as was the case here.

4. The statute of limitations is pleaded in the answer in this case, but it would appear that the facts upon which the defendant's liability rested were not known until a long time after the transaction occurred. They rested in the knowledge of the defendant, Stearns. He was the manager of the bank, and conducted the transaction in question. There is no reason to suppose that he disclosed the facts within his knowledge to the board of directors. On the contrary, the inferences from the record are strong that he did not make any such disclosure. In the state court he had stoutly denied having had any knowledge whatever of Baker's guaranty, and it is reasonable to suppose and presume as against him that he did not disclose as a fact to the directors that he had any such knowledge. So far as is shown, and I think it right to conclude, the first notice of the existence of such knowledge was when the bill was filed in the state court, and then it was disputed by him, and continued an open question until the supreme court of the state decided that the fact was so. I think this is a case for the application of the doctrine that laches cannot be imputed where the cause of action was concealed by the defendant.

5. Upon the facts it appears to me that the complainant's case is made out. The defendant had charge of the business of the bank. He had suffered Baker, who was a near relative, and the Baker Lumber Company, to appropriate of the funds of the bank a sum constituting a large share of the capital of the bank. This is not the gravamen

of the charge, but it casts some light upon his subsequent proceedings. With knowledge that the securities he was taking were affected by the guaranty of Baker which might eat away their value, he took these securities, and gave Baker credit for the whole amount which those securities represented, assuming them to be perfectly good for their face. He canceled and surrendered the notes of Baker and the Baker Lumber Company, and gave the latter a credit for the balance, which he allowed the company to check out from the bank. It is shown that Baker at that time was responsible, and the presumption is that the Baker Lumber Company was also responsible. Certainly it is a fair presumption as against the defendant, who had loaned the funds of the bank to that company to the full limit allowed by law. It is said that some time afterwards, when the suit in the state court was begun, Baker had himself become insolvent, but this in no wise contravenes the proof that at the time when the Griffin & Anderson note and mortgage were taken and Baker's obligation discharged he was solvent. In my opinion, no man of such judgment as a bank president and managing officer should possess would without gross negligence have dealt with these affairs in such a way if they had been his own. Besides what affirmatively appears, I am satisfied that there was something behind the scenes in the relations of the defendant and Baker which must have been influential in the transaction. It appears that Baker wrote a letter at about the time in respect of the transactions which might throw light upon the subject, but the defendant fails to produce that letter, and fails to make any statement whatever in regard to the attendant facts except by mere averment in pleading. It is said that the letter was destroyed. The reason given in the answer for this is that it contained matter relating to Baker's domestic affairs, but there is no proof of this, and the case is open to the presumption which applies to one who has put evidence out of the way. The reason for the destruction of the letter stated in the answer would not be altogether unreasonable if it were supported by proof, but it is not thus supported. The defendant has been content to rest his whole defense in respect of the facts substantially upon the ground that the evidence offered by complainant to establish his fault was not competent for that purpose. If it were shown that he consulted the board of directors, and laid the facts of which he was cognizant before them, and they had approved the transaction, although it would have seemed like reckless business, it would stand in a somewhat different light. It is charged in one of the paragraphs of the bill, among other things, that he acted without the knowledge of the board of directors, and that he personally conducted the transaction. The answer admits that he personally conducted the transaction, but denies all the other allegations in that paragraph. If they knew and approved the transaction, it would be a fact tending to exoneration, and it is reasonable to suppose that if it was a fact he would have pleaded and proved it. I cannot say with certainty that there was any actual bad faith on the part of Mr. Stearns other than such as is involved in gross negligence in the management of this affair for the bank. In my judgment, it is necessary to say that, having regard

to the interests of stockholders and depositors who confided in his intelligence, business capacity, and good faith, such a transaction ought not to be excused, and that the security of people dealing with such institutions ought not to be permitted to be destroyed by such recklessness in the management of the affairs of the bank as the present case discloses.

My opinion is that the complainant is entitled to a decree for the amount claimed.

SILVER PEAK MINES v. VALCALDA et al.

(Circuit Court, D. Nevada. April 5, 1897.)

No. 618.

1. WATERS AND WATER COURSES—APPROPRIATION OF SPRINGS ON PUBLIC LANDS.

In appropriating the waters of a spring upon public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit of, and as, under the conditions and circumstances at the time, are practicable to accomplish the purpose of the appropriator in making a beneficial use of the water.

2. SAME.

In an action of ejectment, involving the plaintiff's right, as against the defendant, to the waters of springs upon public land located by the plaintiff as a mill site in connection with a mine,—the right depending upon the prior appropriation, occupation, and use,—the jury were not called upon to determine what was necessary for plaintiff to prove in order to entitle it to a patent; and the court properly charged the jury that the documentary evidence relating to the plaintiff's application for a patent was admitted only for the purpose of explaining the acts and conduct of the plaintiff, and the good faith of its possession of the land in controversy.

3. SAME—LOCATION OF MILL SITE.

In an action of ejectment, involving the right to the waters of certain springs upon public land located by the plaintiff as a mill site,—both plaintiff and defendant claiming under possessory rights,—it was not necessary for plaintiff to show, in order to establish his right, that the water had been used for "mining and milling purposes"; it being sufficient, if actual possession was shown, to prove that the water had been appropriated by it to any beneficial use, as for domestic and culinary purposes.

This is an action of ejectment brought by Silver Peak Mines against Giovanni Valcalda and others. Upon motion for new trial.

M. A. Murphy, for plaintiff.

Robert M. Clarke, for defendants.

HAWLEY, District Judge (orally). This is an action of ejectment to recover possession of certain lands, and the right to the waters of certain springs situate thereon. The land is public land of the United States; neither party at the time of the trial having the legal title thereto, and both claiming the property under possessory rights. The case was tried before a jury, who found a verdict in favor of the plaintiff. The defendants move for a new trial. There are 15 assignments of error, and 11 specifications of particulars in which it is claimed that the verdict was contrary to, and not supported by, the evidence, which are urged and relied

upon in favor of the motion. The evidence in this case was in many respects unusual, extraordinary, and peculiar. Nearly every legal point presented and ruled upon by the court was excepted to, and every proposition of fact advanced by either party was denied by the other. The case, upon the trial, glistened with objections, technical and otherwise. The defendants had located a mill site in connection with a mine, and there was a keen contest as to whether the mill site or the springs claimed by the plaintiff were included in the metes and bounds of the land as described in the plaintiff's complaint. Nearly every witness was vigorously attacked, and his testimony assailed, either by opposing witnesses or by the respective counsel. The jurors were impartial and intelligent. They were accepted without any challenge from either party, and gave close attention to the testimony of the respective witnesses. Unless the court erred in its rulings, the verdict of the jury should not be disturbed. The only question which will be considered upon this motion relates to the right of plaintiff to recover the water of the springs and incidentally as to the land. The rulings of the court upon all other points I am satisfied are correct, and the verdict of the jury is accepted as settling the conflict of evidence upon the facts.

Was there any error of the court upon any point concerning the water rights? It is claimed that the complaint is insufficient, that there is no evidence to sustain the verdict, and that the court erred in refusing to give an instruction asked by defendants. The complaint avers that the plaintiff was on the 16th day of March, 1896, and for over 25 years prior thereto, by itself, its grantors, and predecessors in interest, had been, the owner, lawfully possessed and entitled to the possession, of certain described pieces of land, situate at Red Mountain, in the county of Esmeralda. After averring the unlawful and wrongful ouster of plaintiff by defendants on the 17th of March, 1896, the complaint proceeds:

"That there is situated on said land springs of water, from which the miners employed in working the mining properties belonging to this plaintiff procure their supply of water for domestic and culinary purposes; and the same cannot be had without going a much greater distance from said mining properties, and at an enormous outlay of money in hauling the same in wagons, and the water that can be procured at other places is not of as good quality as that contained in said springs; and the defendants have refused, and still refuse, to permit the agents of this plaintiff to draw water from said springs, to its damage," etc.

This allegation, as to the water right, is imperfectly stated. The defect is, however, more as to a matter of form than of substance. No demurrer was interposed to the complaint. The parties went to trial upon the issues raised by the complaint and answer. The answer denied the averments of the complaint, and set up possessory title in the defendants. Under these circumstances, no objection can now be urged to the form of the averments. The complaint states a cause of action.

With reference to the evidence, in so far as the point under consideration is concerned, it is only necessary to state that it, among other things, shows that the land is nonmineral and non-

agricultural in character, and is situated four or five miles from certain mining lodes owned by the plaintiff; that the Crown Mine, owned by plaintiff, was located February 18, 1888; that on October 1, 1888, the plaintiff, by F. M. Taylor, its attorney in fact, located five acres of the land in controversy, "as a mill site in connection with the Crown Mine, and claims all the water running from springs included in said mill site;" that both locations—mine and mill site—were recorded in the records of the Silver Peak and Red Mountain mining district; that the notice of the location of the mill site and water right was posted upon the ground; that on October 1, 1888, a survey of the mill site was made by a deputy mineral surveyor, and duly recorded in the local land office; that posts were placed in a proper manner at each corner of the land; that work was done by plaintiff in cleaning out the springs and running a tunnel for the purpose of increasing the supply of water at the springs; that application had been made at the United States land office for a patent to the Crown Mine and mill site. In appropriating the waters of a spring upon the public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit of, and are, under the conditions and circumstances at the time, practicable to accomplish the purpose of the appropriator thereof in making a beneficial use of the water. This principle is embodied in an instruction which was prepared by defendants, and given by the court in its charge. The court charged the jury, among other things, as follows:

"(1) Under the laws of the state of Nevada, a party in the actual possession may maintain an action of ejectment to recover possession of land from which it has been ousted by a party who does not have the legal title or right of possession thereto. If the plaintiff had actual prior possession of the land, this is enough to enable it to recover from a mere trespasser, who subsequently entered, while the plaintiff was so in possession, without any title. The question of fact for you to determine here is the question of possession. In all cases where a party relies solely upon possession, as in this case, there must be a subjection of the land to the will and control of the claimant. The occupant must assert a claim and exclusive ownership over the land, and his acts must at all times be in harmony with his claim. His possession must be apparent, open, notorious, and unequivocal, carrying with it the evidence and marks of ownership. In this connection I will read you a portion of the instructions asked by the defendants. The plaintiff, in its complaint, sets up a claim to the waters of certain springs, which it is alleged are situated upon the lands described in the complaint touching these springs, and the right to have and use the waters thereof. You are instructed that, the land being public lands of the United States,—the United States not having parted with the legal title thereto,—the right to these springs and the waters thereof depend upon the actual occupancy, control, or appropriation and use thereof; and, as to such springs, you are instructed that plaintiff is not entitled to recover the same, or damages therefor, unless you believe from the evidence that plaintiff was in the actual possession, occupancy, control, and dominion of the land where the springs are situated, or was in the actual possession of the springs, and in the use and enjoyment of the waters therefrom. You should apply the same rule to the springs as you have been instructed to apply to the land. (2) The evidence of acts sufficient to constitute such a possession of public land as will maintain an action of ejectment must necessarily, in a great measure, depend upon the character of the land, the locality in which it is situated, and the object for which the water and land were

taken up and claimed. The law does not require vain or useless things to be done. It requires more to be done in the location of agricultural land than it does of timber or other lands. To illustrate: In order to get the actual possession, within the rules that I have stated, of agricultural land, it would be necessary, in order to comply with the law, that the land should be absolutely fenced, or that it should be cultivated, and the party in possession would only be entitled to such part of it as was in actual cultivation, if not fenced; while in timber land all the law requires is that the boundaries shall be marked * * * in such a manner as that they can be readily traced,—no need of any fence, no need of any cultivation,—in order to give notice to the public, and to show the dominion and control of the claimant. (3) It is not necessary that the land in controversy, which has been designated as the 'Crown Mine Mill Site,' should be inclosed with a fence, or that it should be reduced to cultivation, to constitute possession. If you believe from the evidence that there was a house, stockade, stable, and corral on the said land, erected by the plaintiff in this action, or by those from whom it derived possession of the premises; that the plaintiff at divers times improved the springs upon said land, and in 1888 or 1889 made a claim * * * for five acres of land, and the waters flowing from the spring on the land, as a mill site and water right; that it caused the land to be surveyed; and that posts were placed at each corner of said land, indicating the corners and boundaries thereof, and continued to remain in such possession thereof until ejected by the defendants, if it was ejected, so as to subject the land to its dominion and control, and to notify the public that the land was claimed and occupied,—this would constitute possession of the land."

At the close of the charge, when the court asked if there were any exceptions thereto, exception was taken and allowed to subdivision 3, and counsel for defendants then asked the court to further instruct the jury:

"That, when land is located for a mill site or for milling purposes, the party locating and claiming the same must, within a reasonable time, use the land for the purpose for which the location was made."

The court stated that the instructions, as given, embodied the true rule, and declined to give the instruction asked, as worded. Exceptions to this ruling were duly taken and allowed.

The instructions given by the court as to what facts were necessary to be established in order to entitle a party to recover solely upon actual possession were in accordance with the decisions of the supreme court of Nevada upon that question. *Sankey v. Noyes*, 1 Nev. 68, 71; *McFarland v. Culbertson*, 2 Nev. 231; *Staininger v. Andrews*, 4 Nev. 59, 67; *Robinson v. Mining Co.*, 5 Nev. 44, 66; *Smelting Co. v. Way*, 11 Nev. 171, 175; *Lechler v. Chapin*, 12 Nev. 66, 72; *Courtney v. Turner*, 12 Nev. 345, 352. See, also, *Campbell v. Mining Co.*, 1 C. C. A. 155, 49 Fed. 47; *North Noonday Min. Co. v. Orient Min. Co.*, 11 Fed. 125, 128; *Wilson v. Fine*, 38 Fed. 789. If the instruction asked for had been given without any further qualification or explanation, it would have tended to confuse, instead of to enlighten, the jury upon the controlling issues in the case. The right to the waters of the springs depended upon the prior appropriation, occupation, possession, and use. Did the plaintiff have such a possession thereof as amounted to its dominion and control over the property? The jury were not called upon to determine what was necessary for plaintiff to prove in order to entitle it to a patent from the United States to the springs of water upon the land located by it as a mill site. The documentary evidence relating to the plaintiff's application for a patent was ad-

mitted, as stated in the charge of the court to the jury, "for the purpose of explaining the acts and conduct of the plaintiff, and its good faith, if any, of its possession of the land in controversy. * * * Such documents, entries, and receipts are wholly insufficient to establish any legal title in either party, and you must exclude them from your consideration for the purpose of establishing any legal title." This instruction was correct. *Carter v. Ruddy*, 6 C. C. A. 3, 56 Fed. 542, 544. Under the pleadings in this case, in so far as the right to the water of the springs is involved, it was not necessary for the plaintiff to show that the water had been used for "mining and milling purposes." It was sufficient, if actual possession was shown, to prove that the water had been appropriated by it to a beneficial use. The fact that the water was used for culinary and domestic purposes by plaintiff, its agents and employes, was of itself sufficient to establish a beneficial use of the water. The real question was one of fact,—whether the plaintiff, as against the defendants, was entitled to the possession of the land and the springs situated thereon. Upon this question there was a decided conflict in the evidence, which was, under proper instructions from the court, determined and settled by the verdict of the jury in favor of the plaintiff. The rights of the United States in the premises were not in any manner involved. In so far as the laws of the United States had any application to this case, the plaintiff's right to the water of the springs, acquired under the local customs, laws, and the decisions of courts, are recognized by the provisions of section 2339 of the Revised Statutes, which reads as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

The laws of the United States as to land located for mill sites provide that nonmineral land, not contiguous to the lode, not exceeding five acres of land, can be appropriated for a mill site by the owner of the lode, and, if the owner of the lode is the applicant for the mill site in connection therewith, the expenditure of the required amount of money on the lode claim obviates the necessity of any additional expenditure on the mill site. *Rev. St. § 2337*; *Sickels*, Min. Dec. (1881) 464; *Hartman v. Smith*, 7 Mont. 19, 14 Pac. 648. This, as before stated, was not an action to determine whether or not either party, upon the facts, was entitled to a patent; and for that reason the court declines to review the cases cited by counsel, namely: *Charles Lenning*, 5 Land Dec. Dep. Int. 190; *Cyprus Mill Site*, 6 Land Dec. Dep. Int. 706; *Iron King Mine & Mill Site*, 9 Land Dec. Dep. Int. 201; *Mint Lode & Mill Site*, 12 Land Dec. Dep. Int. 624. What constitutes the use of land as a mill site "for mining and milling purposes," under the provisions of section 2337, *Rev. St.*, so as to entitle a party to a patent, is a mixed question of law and fact. In *Hartman v. Smith*, *supra*, the court said:

"The statute does not mention any particular kind of mining purposes for which it shall be used; and therefore, if used in good faith for any mining purpose at all, in connection with the quartz lode mining claim, such use would be within the meaning of the statute. It is certainly not intended that it shall be used for such work as is done upon the mine itself; for the land must be nonmineral, and not adjacent to the mining claim. We cannot say, under this statute, what shall be the extent of the use,—whether much or little,—or the particular character of the use. The phrase 'mining purposes' is very comprehensive, and may include any reasonable use for mining purposes which the quartz lode mining claim may require for its proper working and development. This may be very little, or it may be a great deal. The locator of a quartz lode mining claim is required to do only a hundred dollars worth of work each year, until he obtains a patent therefor. But if he does only this amount, and uses the mill site in connection therewith, is not this the use of the mill site for a mining purpose, in connection with the mine? Who shall prescribe what shall be the kind and extent of the use under this statute, so long as it is used in good faith, in connection with the mining claim, for a mining purpose?"

It will be time enough when the government is called upon to dispose of its title to determine the dignity and character of the evidence that must be presented by the applicant in order to obtain a patent, whether such determination is made by the courts or in the land department.

After a careful examination of all the questions involved in this case, I am of opinion that no error occurred which was in any manner prejudicial to the defendants. The motion for a new trial is denied.

NATIONAL PARK BANK OF CITY OF NEW YORK v. HARMON.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

NATIONAL BANKS—ASSESSMENTS UPON SHAREHOLDERS—PLEDGE OF SHARES.

A corporation which receives shares of national bank stock in pledge, with power to use and sell, and which, in good faith, without suspicion of the bank's insolvency, causes new certificates to be issued in the name of one of its employes, merely because it is unwilling they should stand in the name of the original owners, remains a mere pledgee, and is not liable, as a shareholder, to assessment on the stock.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law brought by the receiver of the Stock Growers' National Bank against the National Park Bank of the City of New York to recover an assessment made by the comptroller of the currency upon stockholders of the Stock Growers' National Bank. The trial judge ruled that the defendant was a shareholder, and directed a verdict for plaintiff. The defendant brings this writ of error.

Louis F. Doyle, for plaintiff in error.

Dayton, Dunphy & Swift, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The question presented by the assignments of error is whether the defendant was, within the meaning of

section 5151 of the United States Revised Statutes, a stockholder of the Stock Growers' National Bank, a national banking association.

The Stock Growers' National Bank became insolvent in August, 1893; a receiver was appointed; and April 23, 1894, the comptroller of the currency, in virtue of the authority conferred upon him by law, made an assessment upon the stockholders of \$100 upon each and every share of capital stock of the bank owned by them, respectively, at the time of its failure. This action was brought to recover the assessment upon 40 shares of the capital stock, which stood upon the books of the bank in the name of one Holbrook, upon the theory that Holbrook was merely the nominal, and the defendant was the real, stockholder, as to those shares.

It appeared upon the trial that the shares originally belonged to one Stebbins; he being the registered owner upon the books, and the bank having issued to him a certificate therefor. Stebbins pledged the certificate to Chrystie & Janney as collateral for a loan, with authority to them to use or sell the same, and indorsed thereon an assignment and transfer of the shares in blank, accompanied with a power of attorney to transfer the shares on the books of the bank. Subsequently, and on or about November 24, 1891, Chrystie & Janney pledged and delivered the certificate to the defendant as collateral security for the payment of a loan of \$7,000 on demand. By the terms of the pledge the defendant was authorized, in case of nonpayment of the loan, to sell the shares, without notice, at public or private sale, and apply the proceeds to the payment thereof. July 6, 1892, the loan of Chrystie & Janney not having been paid, the defendant procured a transfer of the shares to be made on the books of the Stock Growers' National Bank to Holbrook; surrendering the certificate which had been pledged, and receiving from the bank a new one, showing Holbrook to be the owner of the shares. The new certificate, when received by the defendant from the Stock Growers' National Bank, was immediately indorsed in blank by Holbrook, and placed among the demand-loan collaterals of the defendant; and up to the time of the trial it had been held by the defendant as collateral to the loan of Chrystie & Janney, and Chrystie & Janney were paying interest upon the loan to the defendant. Holbrook was an employé of the defendant, was irresponsible, and had no interest in the transaction. The defendant caused the transfer to be made to him because it was unwilling to allow Stebbins to remain the registered owner of the shares, and desired to have them stand upon the books of the Stock Growers' National Bank in the name of its own employé, as registered owner. There was no evidence tending to show that the Stock Growers' National Bank was insolvent when this transaction took place, or that the defendant caused the transfer of the shares to be made from Stebbins to Holbrook because of any suspicion of the insolvency of the Stock Growers' National Bank. The defendant never received any dividends nor voted upon the shares. Upon these facts, we conclude that the defendant was not liable as a stockholder of the insolvent bank.

The adjudications of the supreme court are controlling authority for several propositions applicable to the case in hand, which are as fol-

lows: (1) The real owner of the shares of the capital stock of a national banking association may in every case be treated as a shareholder, within the meaning of section 5151. (2) Any person who holds himself out as the owner of the shares, by allowing himself to appear as the registered owner thereof upon the books of the banking association, may likewise be treated as a shareholder, within the meaning of that section. (3) If the real owner of the shares transfers them to another person, or causes them to be placed on the books of the banking association in the name of another person, with the intent simply to evade the responsibilities imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed. (4) If a person receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to the creditor,—doing so in good faith, and for the purpose only of securing payment of that debt without incurring the responsibility of a shareholder,—he will not be treated as a shareholder within the meaning of section 5151. The case of *Pauly v. Trust Co.* (recently decided by the supreme court) 17 Sup. Ct. 465, after reviewing previous decisions of the supreme court upon the general question, affirms the latter proposition.

In the present case the defendant never became the owner of the shares, but remained, as it always had been, merely the pledgee thereof, and, as was pointed out by the opinion in *Pauly v. Trust Co.*, could not become the owner by selling the shares to itself because of its fiduciary obligation to exercise the right of sale for the benefit of the pledgors.

It follows that the trial judge erred in ruling that the defendant was a shareholder within the meaning of section 5151, and directing a verdict for the plaintiff.

The judgment is reversed.

KENNEDY et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 6, 1897.)

1. LIMITATION OF ACTIONS—CUSTOMS DUTIES—CLAIMS AGAINST UNITED STATES.

In a suit against the United States for drawbacks on exportation of imported goods, the six-years limitation contained in the act of March 3, 1887, relative to suits against the United States, begins to run from the date of exportation, not from the date of the decision of the treasury department passing upon the claim.

2. CUSTOMS DUTIES—ACTION FOR DRAWBACKS—PARTIES.

Rev. St. § 3477, relating to assignments of claims against the United States, etc., does not apply to a claim for drawbacks on re-exported goods, made in the name of a person producing an outward bill of lading in his own name, though a third party was the real owner of the goods, since at its

Inception the claim against the United States was the claim of the person named as exporter.

8. SAME—RIGHT TO DRAWBACK.

No right of drawback arises, under Rev. St. § 3019, when bags made of imported materials are leased to steamers for foreign voyages with the understanding that they are to be brought back again to the United States.

This was an action at law by Joseph S. Kennedy and William R. Moon, partners under the firm name and style of Kennedy & Moon, against the United States, under the act of March 3, 1887, which provides for the bringing of suits against the United States. The plaintiffs sought to recover the sum of \$8,517.39 as drawbacks upon certain bags made of imported jute, and exported, under Rev. St. § 3019. The case was tried upon two of the entries, of which there were some 87 on the bill of particulars, namely, on the entry of the bags alleged to have been exported by the petitioners on the 8th of March, 1888, by the *Ariete*, and on the entry on the *Sirius*, December 8, 1888.

It appeared that the bags in question never belonged to the petitioners, but were the property of D. W. Mainwaring & Co., who leased them to the various steamers named in the bill of particulars, and that the bill of lading was indorsed to Kennedy & Moon, to act as exporters, for the benefit of drawback, by said firm of Mainwaring & Co.

Rev. St. § 3019, reads as follows: "There shall be allowed on all articles wholly manufactured or materials imported, on which duties have been paid when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the secretary of the treasury. Ten per centum on the amount of all drawbacks so allowed shall, however, be retained for the use of the United States by the collectors paying such drawbacks respectively." The regulation made by the secretary of the treasury January 5, 1885 (S. 6708), provides as follows: "The person producing an outward bill of lading in his own name, or duly indorsed to him by the party named in the bill of lading, authorizing the indorsee to act for customhouse purposes, shall be recognized as the exporter of the bags and bagging or meats for the purpose of making entry and receiving the drawback or a refund."

The petitioners insisted that they were entitled to recover, for the reason that there was an exportation of the bags in question, within the meaning of Rev. St. § 3019; citing *Kidd v. Flagler*, 54 Fed. 367, upon which case they principally relied. The defendants maintained, by way of partial defense: (1) That the right to recover on a large number of the entries on the bill of particulars had expired by reason of the proviso in the second paragraph of the act of March 3, 1887, relating to suits against the United States, which reads as follows: "Provided that no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." (2) That the parties plaintiff were not the real owners of the cause of action, and consequently not the proper parties to sue on the claim, under Rev. St. § 3477, relating to the assignment of claims against the United States. (3) That there was no evidence in the case to show that the bags in question had been taken without the United States and brought into some port, harbor or haven, with intent to land the goods there." (4) That, assuming that the bags had actually been taken without the United States upon the vessels to which they had been leased, there never had been such exportation thereof, within the meaning of Rev. St. § 3019.

Albert B. Comstock, for plaintiffs.

Wallace Macfarlane, U. S. Atty., and James R. Ely, Asst. U. S. Atty.

LACOMBE, Circuit Judge. This case was taken under advisement by the court, after being partially tried, in order to rule upon two questions which it was agreed covered all the items in the bill of particulars, and upon one question (the statute of limitations) which it was contended covered some of the items only; also, to rule upon the sufficiency of certain evidence given as to the first two items, with the expectation that, after the court had thus indicated its opinion as to the weight of the testimony, some stipulation as to the facts might be entered into, with a view of shortening the trial. The court has considered all these questions, bearing in mind the desirability of so disposing of the case in the first instance that in event of an appeal a new trial may not be necessary.

1. The evidence which was introduced as to the two items was sufficient to satisfy the court that the articles in question had been manufactured of materials imported, which had paid duty when so imported, and that the evidence submitted by the plaintiffs substantially conformed to the regulations of the secretary of the treasury touching proof to be made upon claims for drawbacks.

2. In the opinion of this court, the statute of limitations runs from date of exportation, not from the date of the decision of the treasury department passing upon these claims.

3. The provisions of section 3477 of the Revised Statutes do not apply, for the reason that under the regulations of the treasury department (S. 6708; dated Jan. 5, 1885), it is provided that the person producing an outward bill of lading in his own name, or duly indorsed to him by the party named in the bill of lading, authorizing the indorsee to act for customhouse purposes, shall be recognized as the exporter of the bags, for the purpose of making entry and receiving the drawbacks or refund. Since in this case it was the plaintiffs' firm, and not the manufacturer of the bags, who produced the outward bill of lading, the claim against the United States was, at its inception, the claim of the plaintiffs, and no assignment of it as a claim was necessary to entitle the plaintiffs to recover.

4. Upon the evidence as it stands, I do not think plaintiffs are entitled to recover, for the reason that the bags in question were "leased" to the steamship company, with the understanding, of course, that they were to be brought back to this country. They were not "exported," within the meaning of section 3019.

The result is that a judgment should be directed for the defendant. There should be no difficulty in so preparing the statement of facts that upon appeal all of these questions may be passed upon.

NEW YORK ELECTRIC EQUIPMENT CO. v. BLAIR.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. NEGLIGENCE—PERSONAL INJURIES—EVIDENCE OF NOTICE TO DEFENDANT.

In an action for personal injuries, evidence of notice to the defendant, before the injury, of the nature of the dangers to be apprehended, and of the unsafe practices which he is employing, is competent upon the question of his negligence by the use of methods which he knew, or ought to have known, were hazardous.

2. SAME—OPINION EVIDENCE.

In an action to recover damages alleged to have been caused by the negligence of the defendant in hoisting pipes, it is not competent for a witness, called as an expert, to state whether it is necessary, in the proper performance of duty in hoisting pipe, that certain specified precautions should be taken, since the question is one which the jury can determine upon a statement of the facts.

3. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to a question, on the ground that it is immaterial, irrelevant, and incompetent, is insufficient, if the particular fault relied upon is not otherwise pointed out, and is such as, if stated at the trial, could have been obviated.

4. APPEAL AND ERROR—EVIDENCE—WAIVER OF OBJECTIONS.

By the admission, without objection, of irrelevant testimony, showing all the facts upon a topic which might, on objection, have been excluded, a party waives any reversible error in the admission of subsequent testimony of the same character.

Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to review the judgment of the circuit court of the United States for the Southern district of New York, which was entered upon a verdict in favor of the plaintiff for \$15,000, in an action brought to recover damages for severe personal injuries received by the plaintiff in consequence of the alleged negligence of the defendant's servants. The accident occurred on April 1, 1895, in the extension of a building on Elm and Leonard streets, in New York City. The plaintiff was in the employ of Otis Bros., constructors of passenger elevators, and was at work in elevator shaft No. 1, on a platform about six feet above the fourth floor. The defendant was equipping the building with electrical appliances, and its employes were hoisting iron pipes of ten feet in length and an inch in diameter, in bunches of six, from the first floor to the ninth floor, in elevator shaft No. 3. There were four shafts, which were apparently close to each other. The pipes in each bundle were tied together by a rope twisted around them near the bottom of the bundle, and looped about them again towards the top. No bagging or canvas was placed around the lower ends of the pipes, and the coupling ends were intended to be placed at the top of the bundle, so as to form a sort of cone, with the larger ends upward. The plaintiff offered evidence tending to show that the defendant's workmen who were attending to this business, were warned to be careful, and were told that the right way to raise the pipes was to roll canvas on the bottom of the bundle, and make a hitch from the bottom and around the canvas; that a bundle passed the fourth floor in its upward ascent, with one pipe projecting below the other pipes, with its coupling end downwards; that a pipe forthwith came down the same shaft, and struck a cross beam between the second and third shaft above the fourth floor; that this pipe struck the plaintiff, threw him to the fourth floor, broke his lower jaw, lacerated his scalp, and that permanent partial motor paralysis of the right side was the result, which will probably be progressive, and entirely prevent his working again. The defendant's testimony tended to show the safety of the method of securing the bundles, the care with which they were tied, and the improbability that a pipe fell from a bundle. The defendant also urged the inability of the plaintiff to prove that its pipe fell and inflicted the injury.

Edward C. James, for plaintiff in error.

Frank Dudley Tansley, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). Upon the writ of error, the defendant relied much upon the alleged error of the trial judge in refusing to grant a motion, at the close of the testimony on both sides, to direct a verdict for the defendant upon the ground that the plaintiff's testimony presented no adequate question of fact to go to the jury, and that a cause of action had not been proven. The statement of what has been given of the facts which the plaintiff attempted to show directly, or to have inferred from proven facts, is sufficient to indicate that he undertook to prove that his injury was occasioned by the negligent conduct of the defendant's servants, and against which they had adequate warning. An examination of the record leads to the conclusion that the jury were justified in finding that the plaintiff had sustained the burden of proof which he took upon himself, and in finding that his injury was caused by the undue and improper carelessness of the defendant's employes in attempting to hoist bundles of inadequately protected iron pipes to the ninth story of the building. The remaining exceptions, save one, were in regard to the admission or rejection of testimony.

A witness for the plaintiff testified that on the day of the accident, and before it occurred, and on the preceding day, he notified the men who were hoisting pipe of the necessity of care. Another witness testified that on the morning of the accident he told the men who were assisting in hoisting pipe on the ground floor that the proper way was to wrap canvas around the bottom of the bundle for the purpose of holding the pipes fast. An overruled objection was taken to the testimony of the first witness that it was immaterial and incompetent upon the question of negligence, but notice to the defendant, before an injury, of the nature of the dangers to be apprehended and of the unsafe practices which he is employing, is competent upon the question of his negligence by the use of methods which he knew, or ought to have known, were hazardous to the lives of those who are necessarily exposed to the danger. *Brady v. Railway Co.*, 127 N. Y. 46, 27 N. E. 368. The defendant moved to strike out the testimony of the second witness, because it did not appear that the conversation was with one of its employes. The denial of the motion is the ground of an exception. There was enough evidence to justify the conclusion that the person who was notified was not only not a volunteer workman, but was doing electrical work in the employment of the defendant. The defendant thereupon called a steam fitter and engineer of 35 years' experience in hoisting pipes and tying pipes in bundles, and asked him this question: "Do you know whether it is necessary, in the proper performance of duty in hoisting pipe, that there should be bagging attached to the end of the pipe?" The plaintiff's objection to the competency of the proposed testimony, and to the similar questions which called for the opinion of the witness

upon the safety of the method which was used, were sustained, and the defendant excepted. It is well understood that the opinions of experts can be given upon questions of science, art, nautical skill, and the class of subjects which require, in order to be understood, special knowledge and study, and in regard to which the jury would therefore be in a state of uncertainty without the aid of those who have been specially instructed. *Transportation Line v. Hope*, 95 U. S. 297. Especially is this true when the knowledge is attained by reasoning rather than by descriptive facts. *Schwander v. Birge*, 46 Hun, 66. So that the mere fact that the opinion of an expert may be upon the question which the jury is to decide is not sufficient to exclude the testimony; but there is a very large class of practical questions upon which a jury is perfectly competent to decide, after having become acquainted with the facts as they existed at the time of the transaction, and in the history of the subject to which the questions relate. For example, the witness could properly state the relative efficiency of different methods of hoisting pipe; but when he was asked to state whether it was necessary, in the proper performance of duty, to attach bagging to the end of the pipes, he was asked the question which the jury could determine upon a statement of simple facts. The province of expert testimony is well stated in *Schwander v. Birge*, *supra*, as follows: "The governing rule declared from the cases permitting the opinion of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exist in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject, so as to possess them with a full understanding of it." So, also, if "the facts cannot be adequately placed before the jury so as to impress their minds as they impress the mind of a competent skilled observer," expert opinions are allowed. *Ferguson v. Hubbell*, 97 N. Y. 507. The expert testimony in this case was properly excluded. *Railroad Co. v. Van Dyke*, 18 C. C. A. 632, 72 Fed. 458; *Harley v. Manufacturing Co.*, 142 N. Y. 31, 36 N. E. 813; *Roberts v. Railroad Co.*, 128 N. Y. 455, 28 N. E. 486.

The plaintiff called a physician, who had qualified himself as an expert upon mental and nervous diseases, and had made three examinations of the plaintiff, and who stated the character of the disease under which the plaintiff was suffering; that it would be, with reasonable probability, progressive; and that his mental power would also diminish. The defendant objected to the questions upon this subject that they were incompetent and not part of the *res gestæ*. One question was objected to as immaterial, irrelevant, and incompetent. The point is now made that the testimony was incompetent, because competent testimony must be predicated upon facts explicitly stated and communicated to the jury. This objection is valueless for at least two reasons. The first is that the objection, when taken, did not state the particular fault which is now relied upon, and which, if stated at the trial and if true, could easily have been obviated. The alleged error is a specimen of a practice not to be encouraged, which is to object with a rattle of words that

conceal the real nature of an objection capable of being removed on the spot, and to announce its true character for the first time in the appellate court. In *Noonan v. Mining Co.*, 121 U. S. 393, 7 Sup. Ct. 911, the introduction of articles of incorporation was objected to because they were "immaterial, irrelevant, and incompetent" evidence. Upon the specific objection, which was urged upon the writ of error, that they were not sufficiently authenticated to be admissible, Mr. Justice Field said:

"The objection 'incompetent, immaterial, and irrelevant' is not specific enough. The rule is universal that, when an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not be obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances this can be done."

The alleged ground upon which the objection was based did not exist to any material extent. The witness testified that he found the patient suffering from partial motor paralysis of the right arm and leg, and that from his professional experience such a condition is a progressive one. The circumstances of the paralysis might have been stated with more diffuseness, but the character and nature of the disease which were ascertained, not by hearsay nor by listening to the testimony, but by personal observation, were communicated to the jury. *Griswold v. Railroad Co.*, 115 N. Y. 61, 21 N. E. 726; *McClain v. Railroad Co.*, 116 N. Y. 459, 22 N. E. 1062. The plaintiff had testified without objection that before the accident he was getting \$2.25 per day; that his wife and two children, a boy and a girl, were dependent upon him for support; and that he had no property. The next question, "How old is the little girl?" was objected to and admitted. The plaintiff answered, "Eleven years." The point is now made upon the authority of *Pennsylvania Co. v. Roy*, 102 U. S. 451, that the testimony was inadmissible. The kind of testimony which the *Roy* decision excludes had been received without objection, and the defendant had permitted the irrelevant matter to go to the jury. By the admission, with consent, of all the objectionable facts, the defendant waived any reversible error in the admission of subsequent testimony of the same character. The remaining error which is assigned is the refusal of the court to charge the jury that the use or nonuse of bagging by the defendant is not necessarily negligence. As the omission to protect the rods by canvas was the fact upon which the question of negligence substantially turned, the court declined, as a matter of course, to charge the jury that the omission was not necessarily negligence. The judgment of the circuit court is affirmed, with costs.

E. S. HIGGINS CARPET CO. v. O'KEEFE.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. MASTER AND SERVANT—DUTIES TO MINORS.

Where a boy 15 years old, employed in a factory, and assigned to the duty of feeding a machine which had unprotected cogwheels at the side in plain view, got his hand between the cogwheels while his attention was momentarily diverted, and was injured, the master was not liable, as the risk was obvious, and the boy had accepted the hazard.

2. SAME—FACTORY ACT.

The New York "Factory Act" does not impose any liability upon an employer for injuries received by a minor in his service, arising from the obvious risks of the service he has undertaken to perform. And the liability of the employer is not changed by reason of the act requiring cogwheels to be covered, as such protection is waived by a person accepting employment upon the machine with the cogs in an unguarded condition.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law, brought by O'Keefe, by guardian, against the E. S. Higgins Carpet Company, to recover damages for personal injuries. The jury returned a verdict for plaintiff, and defendant has brought this writ of error.

Knevals & Perry, for plaintiff in error.

Atwater & Cruikshank, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The action was brought to recover for personal injuries sustained by the plaintiff, upon the theory that the defendant, his employer, was guilty of negligence in providing an unsafe appliance for the use of the plaintiff.

It appeared upon the trial that the plaintiff, a boy then about 15 years old, entered the service of the defendant, and, after working for several months in the room where a machine run by steam, known as a "wool picker," was in constant use, was assigned to the duty of feeding the machine. The machine had cogwheels at the side, in plain view, and they were not protected by any guards or covering. In feeding the machine, the wool was placed upon a band moving over and carried by rollers, the band and rollers being located in a box or trough having sides sufficiently high above the belt to inclose the requisite quantity of wool. The cogwheels were outside this trough, and at the further end, about two feet from the place where the operator stood in feeding the machine. On the second or third day after plaintiff had been assigned to the machine his right hand was caught in the cogwheels, and so severely crushed that amputation became necessary. The evidence for the plaintiff tended to show that he was feeding the machine at the time, and, while his attention was momentarily diverted by a boy who was near by, he got his hand between the cogwheels. The plaintiff testified: "I told him to go away; and my feed was running out; and I took some wool that went through

once, to run it through again; and I was watching this boy what he was doing; and my hand accidentally slipped and went in through the cogwheels." The evidence for the defendant tended to show that the plaintiff was cleaning the machine. He was aware that the rules of the defendant prohibited him from cleaning it while it was in motion.

Error is assigned of the refusal of the trial judge to instruct the jury to find a verdict for the defendant. We are of opinion that upon the facts the defendant was entitled to this instruction, and that there was no evidence to justify the leaving of the case to the jury.

The plaintiff, although a minor, was of sufficient age and experience to be fully aware that his hand would probably be crushed if it were caught between the cogwheels while the machine was in motion. He knew that the cogwheels were not guarded in any way, and testified that when he was assigned to feed the machine he was told by the foreman that he must look out for himself, and be careful. He entered upon and continued in his employment with full knowledge of the risks incident to feeding or working about the machine consequent upon the location and condition of the cogwheels and the absence of guards. If he had been an adult, it is plain that he would have had no cause of action. We think the circumstance that he was a minor is of no importance. The rules which govern actions for negligence in the case of children of tender years do not apply to minors who have attained years of discretion. In *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286, the action was brought to recover for the injuries received by a minor of the age of 14 years while working upon a machine which was alleged to be of a dangerous character. She had worked upon the machine sufficiently long to become acquainted with and fully appreciate the danger to be apprehended from allowing her hand to be caught between its rollers. The court held that in accepting the work and entering upon the employment about this machine the plaintiff assumed the usual risks and perils of the employment, such as were incident to its use in its then condition, so far as such risks were apparent; and that, being of an age to appreciate, and having full knowledge of, the danger, and at the same time being competent to perform the duty demanded from her, the fact that she was a minor did not alter the general rule of law upon the subject of employes taking upon themselves the risks which are patent and incident to the employment. In *Buckley v. Manufacturing Co.*, 113 N. Y. 540, 21 N. E. 717, the action was brought against the employer to recover damages for injuries received by a lad about 12 years old, who was hurt upon a machine in the regular course of his duties. While endeavoring to turn a screw into the band for the purpose of keeping it in position, it came out, and rolled upon the floor. He picked it up, and in endeavoring to readjust it his foot slipped, and he threw his hand out to save himself from falling, and thrust it into the cogs. The court said:

"The hands of the plaintiff, in anything which he had to do or was doing about the machine, would not come within nine inches of the cogs where he was injured. It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that, if his fingers got into the cogs, they would be crushed into pieces. He was not injured

because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell, and instinctively threw out his hand to recover himself. * * * There is no rule of law that a minor may not be employed about a dangerous machine, and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machines. All the law requires is that the minor should, be properly instructed as to the danger to which he is exposed; and, if he is injured because he has not received such instruction, then, as a general rule, the employer may be held responsible. But where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the general rule that the employé takes upon himself the risks which are patent and incident to the employment."

The court held that the action was not maintained. In *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648, the action was against an employer for negligence to recover for injuries received by a minor of the age of 19 years, while at work with a planing machine, in performing duties to which he had been assigned. The court said:

"The plaintiff had been at work in front of this machine for three weeks, and during that time had full opportunity to observe the manner of handling this hood, and placing it upon the machine. He had the same opportunity of informing himself with respect to any danger attending such an act as the master had."

The court further said:

"This principle applies to the plaintiff, though he was not at the time of full age. Like any other servant, he took upon himself the ordinary risks of the service, and all dangers from the use of machinery which were known to him, or obvious to persons of ordinary intelligence."

In *Nagle v. Railroad Co.*, 88 Pa. St. 35, it was held that the presumption that a boy of 14 has capacity to avoid danger can be rebutted only by clear proof of absence of discretion. The court said:

"At what age must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury, but of law for the court."

If the plaintiff was injured while cleaning the machine, he had no cause of action, because he was willfully violating the express instructions of his employer. If he was injured while feeding the machine, and in the due course of his ordinary duties, he had no better cause of action, because the risk was obvious, and he had accepted the hazard. If he was injured by reason of his own inadvertence or inattention while watching the other boy, he had no better cause of action than he would have had if injured while he had been properly and carefully attending to his duties.

The provisions of the statute known as the "Factory Act" (chapter 398, Laws N. Y. 1890), requiring cogs to be properly guarded, have no application to the case, except as regards the question of the negligence of the defendant. As construed by the highest courts of the state, the statute does not impose any liability upon an employer for injuries received by a minor in his service in consequence of the fault of the employé, or arising from the obvious risks of the service he has

undertaken to perform. *White v. Lithographic Co.*, 131 N. Y. 631, 30 N. E. 236; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986. In *Graves v. Brewer* (recently decided) 4 App. Div. 327, 38 N. Y. Supp. 566, the court held that the liability of the employer was not changed by reason of the factory act requiring cogwheels to be covered, because such protection could be waived, and was waived by a person accepting employment upon the machine with the cogs in an unguarded condition, as the danger was apparent, and one of the obvious risks of the employment.

For these reasons the judgment is reversed.

HENION v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. MASTER AND SERVANT—RULES GOVERNING EMPLOYEES—EVIDENCE.

A station master who has, for several weeks, been employed at a station located at a curve of the road, may be presumed to be familiar with the manner in which trains are allowed to approach the curve, and to have assumed the risk thereof, so far as it concerns his work; and in an action for injuries caused by his being struck by a train while in performance of his duties, it is not error to exclude evidence of the rules of other companies governing engineers as to the manner of approaching curves.

2. SAME—SAFETY OF EMPLOYEE'S PLACE OF WORK—BAGGAGE PLATFORM—EVIDENCE.

Whether a railroad platform was reasonably safe for employes handling baggage, or whether it was dangerous, because too narrow, or located too near the track, may be determined by the jury from the facts; and evidence showing how the platforms of other companies are constructed is incompetent.

3. SAME—ASSUMPTION OF RISK—CHARGES.

Where the charges given eliminate from the case the issue whether the employe had assumed the risk of the dangers causing the injury, plaintiff is not prejudiced by a refusal to charge propositions of law bearing on that issue.

In Error to the Circuit Court of the United States for the Southern District of New York.

Hahn, Myers & Bronner, for plaintiff in error.

Henry W. Taft, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE, Circuit Judge.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant entered upon the verdict of a jury. The action was brought by the plaintiff, as administratrix of Thomas A. Henion, deceased, to recover damages for his death, which it was alleged was caused by the negligence of the defendant. The deceased was a station master in the employ of the defendant, and as such it was his duty to receive and deliver the baggage of passengers arriving by the defendant's trains at Noroton station, Conn. He was struck by the locomotive or some one of the cars of an express train while he was handling a trunk which had

arrived by a previous train, and received injuries from which he afterwards died. It was alleged that the defendant was negligent, because it had provided an unsafe place for the work which the deceased was employed to perform, and had failed to make proper regulations for the conduct of the train by which he was injured.

Error is assigned of the rulings of the trial judge in excluding testimony offered by the plaintiff, and of his refusal to instruct the jury as requested by the plaintiff. The bill of exceptions sets forth "all the evidence in any way material to any of the facts in issue."

It appeared in evidence that the deceased had been in the service of the defendant for about four years, and had been station master at the place of the accident for several weeks; that the train by which he was struck was an express train, which did not stop at his station, and was passing at its usual time and rate of speed; and that upon approaching the station the whistle of the locomotive had been blown at the whistling post, and then the bell was rung while the train passed; these being the regular signals indicating the approach of the train. There was a conflict of evidence as to the place where the deceased was when he was struck by the train; the evidence for the plaintiff tending to show that he was standing upon the platform, near the edge, and was putting a trunk upon a truck; and that for the defendant tending to show that he was standing, with the trunk upon his shoulder, between the platform and the tracks, so near the tracks that he was struck by the pilot frame of the locomotive. The platform had been very recently built, and was intended for temporary use pending changes in the roadbed of the railway, which were not completed at the time. It was opposite the station house, located upon a curve in the roadbed, was substantially on a level with the tracks, was 5 feet wide and 240 feet long, extended to within about 24 inches of the nearest rail at one side, and had an embankment and railing at the other side except where a flight of steps led up to the station house. The truck used for removing baggage was about 4 feet wide.

Testimony was offered by the plaintiff for the purpose of showing the rules adopted by other railroad companies governing the conduct of engine men in approaching a curve, and what was the standard of such companies as to width and elevation of baggage platforms. The trial judge excluded the testimony.

We think there was no error in excluding this testimony. It is the duty of the master to supervise, direct, and control the operation and management of his business so that his servants shall not be subjected to needless risks through his own methods of carrying it on; and consequently the law imposes upon a railroad company the duty towards its employes, not only of furnishing proper and reasonably safe appliances and machinery, and experienced and careful co-employes, but also of making and enforcing rules which, if faithfully observed, will protect them against unnecessary danger. If the deceased had been a new employe of the defendant, ignorant of its rules for the conduct of its trains in approaching the curve in question, possibly it might have been pertinent to ascertain whether they were such as were generally adopted by railroad companies for the

purpose of showing whether they were proper and adequate ones for the protection of the defendant's employes. But the deceased had been station master upon this particular curve for so long a time that it is to be presumed he was familiar with the mode by which the defendant permitted its trains to approach it, and, that being so, the law presumes that he assumed all the risks incidental to that mode of approach, so far as they had any relation to the duties he was to perform. Any evidence, therefore, tending to show that a safer mode might have been pursued, would not have been of the slightest value.

Some of the testimony which was excluded, offered for the purpose of showing how the platforms of other railroad companies were generally constructed, was subsequently introduced by the plaintiff, and she was permitted to prove what was the width of the platforms in use on railroads of approved construction. Inasmuch as the platform in question was a temporary affair, it is difficult to see in what view any of this evidence was material. But we think it was all incompetent upon another ground. If the defendant failed to provide the deceased with a reasonably safe place for the work which was expected of him, it was because the platform was too narrow, and located too near the tracks; and whether, because of these features, it was a dangerous or a reasonably safe place, was a matter which could be determined by a jury without the aid of any comparisons with other platforms, or of any expert testimony. When the facts can be placed before a jury, and they are of such a nature that juries generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, there is no occasion to resort to opinion evidence.

The trial judge, in submitting the case to the jury, after instructing them that the plaintiff, in order to recover, must satisfy them by a fair preponderance of proof that the accident occurred by some negligence on the part of the defendant, that it was the duty of an employer to all persons whom he employs to provide a place reasonably safe for them to discharge the particular duties that are laid upon them, and that the first question for them to determine was whether this duty had been performed in the present case, instructed them that the case presented a question of fact for their determination whether the platform was a reasonably safe place for the use of the defendant's employes, in view of its location, dimensions, proximity to the tracks, and the nature of the duties which were to be performed upon it; and that, if it was not, the defendant was guilty of negligence. Upon the question of the contributory negligence of the defendant he instructed them that, if they found that the platform was an unsafe place at the time when trains were passing, it was a question of fact for them to determine whether the deceased, in undertaking to discharge his duties there, was himself negligent, either in choosing the time to work, or in failing to watch for the train, or in stepping down upon the track, or between the track and platform, in doing the work.

The instructions which were requested on behalf of the plaintiff and were refused by the trial judge, aside from those not substantially covered by the instructions which had been already given, were

to the effect that it was the duty of the defendant to give the deceased adequate warning of the approach of the train, if, under the circumstances of the case, there was risk of injury to him in discharging the duties to which he had been assigned; that it was the duty of the deceased not to abandon his post, but to remain there for a reasonable time, until he could complain of its dangers to his employer, and require them to be obviated; and that it was a question for the jury whether, by reason of his remaining, he assumed the risks of the situation.

We think the instructions given were exceedingly favorable to the plaintiff, and that those refused were quite unnecessary, and their refusal was not prejudicial to the plaintiff. Upon the evidence there was no dispute that the defendant had given the deceased adequate warning of the approach of the train, the train having approached in the customary manner, and with the usual signals, with all of which the deceased was familiar. The trial judge might properly have instructed the jury that it was a question for them to determine whether the deceased, by remaining in the employment of the defendant with knowledge of the situation and the risks, had not consented to assume the hazards; but he did not give them that instruction, and eliminated any such issue from the case. The plaintiff therefore had no reason to complain that he refused to charge the propositions of law specifically requested bearing upon that issue. His instructions in regard to the negligence of the defendant presented the real issue as to that branch of the case. Those in respect to the negligence of the deceased narrowed the issue to the single question whether the deceased failed to exercise the care of a prudent man in attempting to do his work as he did, when, by reason of the approach of the train, and the facilities of the platform, the place selected was unsafe.

We have not attempted to discuss in detail all the questions presented by the assignments of error. We have considered those which have any color of merit, and are satisfied that none of the exceptions by the plaintiff were well taken.

The judgment is affirmed.

CAREY v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. EVIDENCE—WRITTEN ADMISSIONS—AFFIDAVIT—PROOF BY COPY.

Pursuant to a stipulation that either party might read in evidence any document "proved or admitted" in a prior action, plaintiff, to prove an alleged admission contained in an affidavit by defendant, read a copy of the affidavit, taken from the exemplified copy printed in the record of the case. Nothing was read from such record to show that defendant executed the affidavit, or that it had been proved or admitted in the case. *Held* no evidence of the alleged admission to go to the jury.

2. CORPORATIONS—PROOF OF MEMBERSHIP—ENTRIES IN CORPORATE BOOKS.

Entries in the books of a corporation showing the transfer of stock to a certain person, and payments by him thereon, are not prima facie evidence that he is a stockholder, in a suit to charge him as a stockholder of the corporation.

2. SAME—BOOKS AS EVIDENCE—STATUTE.

A statute providing that one "in whose name shares of stock stand on the books of the company shall be deemed the owner thereof, as regards the company," only estops the company from disputing that such person is a stockholder, and does not render the books admissible against him to prove that he is one.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Burton N. Harrison and Arthur H. Masten, for plaintiff in error.
George Zabriskie, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment in favor of the defendant entered on the verdict of a jury rendered by the direction of the court.

The action was brought to recover from the defendant, as the alleged holder of 250 shares of the capital stock of the National Express & Transportation Company, a corporation of the state of Virginia, two assessments made upon stockholders,—the first by the chancery court of the city of Richmond, December 14, 1880, for 30 per cent. of the par value of the shares, and the second by the circuit court of Henrico county, Va., March 26, 1886, for 50 per cent.; being in all the full amount alleged to remain unpaid of the original subscription price.

The trial judge ruled that the evidence upon the issue whether the defendant had ever become a stockholder of the company was insufficient to authorize the submission of that issue to the jury, and the only assignments of error which have been argued are those which challenge the correctness of this ruling.

The plaintiff sought to prove that the defendant was a stockholder—First, by an admission alleged to have been made by the defendant in an affidavit in a suit brought by Alexander J. Mayer against the National Express & Transportation Company in the supreme court of the state of New York; and, secondly, by entries in the books of the National Express & Transportation Company showing the transfer of 250 shares of stock from the company to the defendant November 1, 1865, and his payment of two calls thereon for \$1,250 each,—the first, November 1, 1865, and the second March 9, 1866.

To prove the admission by the defendant, the plaintiff read, pursuant to a stipulation between the parties, a copy of an affidavit purporting to have been subscribed and sworn to by the defendant October 1, 1866. The stipulation provided that either party might read in evidence from the printed record in a certain equity cause, subject to any legal objection except as to the form of a question, any deposition, record, book, document, or extract therefrom, "proved or admitted" in such cause. The plaintiff also produced and read a copy of the same affidavit from an exemplified copy of a record in the suit of Mayer v. National Express &

Transportation Company. Thereafter he called upon the defendant to produce the original affidavit, and gave evidence sufficient to excuse its nonproduction by himself. He offered no other evidence tending to show that the defendant had ever subscribed or verified an affidavit in substance similar to the copy, or any affidavit whatever. At the close of the evidence the plaintiff moved for leave to withdraw a juror, on the ground of surprise "in not being able to find the original of the defendant's affidavit." The court denied this motion, and, upon the defendant's motion to direct a verdict in his favor, ruled, among other things, that there was no evidence sufficient to go to the jury that the defendant had ever made the affidavit. We think this ruling was correct.

Obviously, all the evidence which was thus offered by the plaintiff was introduced for the purpose of making secondary proof of the contents of the original affidavit. It was incumbent upon him, before he could complete his secondary evidence and avail himself of the copy of the affidavit as proof of the contents of the original, to show that the original had been made by the defendant. If he had produced the original affidavit itself, instead of a copy from the exemplification, and from the printed record in the equity cause, the document would not have proved itself; and it would still have devolved upon him, in order to establish an admission in writing by the defendant, to prove the defendant's signature, or to prove in some other way that the defendant had made the affidavit. The copy read from the exemplification, and from the printed record in the equity cause, could have no greater force as evidence than the original affidavit would have had. The plaintiff apparently was under no misapprehension at the trial that he had failed to prove the alleged admission of the defendant, and that there was no evidence tending to show the genuineness of the original affidavit. We are at a loss to understand upon what theory it can be plausibly insisted in his behalf now that there was any. The circumstance that the copies were read in evidence is of no importance. It was a matter going merely to the order of proof whether they were read first, and the execution of the original proved subsequently, or vice versa. By consenting to the order of proof adopted, the defendant did not waive any right to object in due season to the insufficiency of the proof. The purpose of the stipulation pursuant to which the copy was read from the printed record in the equity cause was to enable the parties to dispense with the production of the depositions, documents, etc., which had been proved in the cause, and to read from the printed record in lieu of reading from the originals, but it was not intended to enable them to avail themselves of incompetent or inadequate evidence as sufficient proof of any fact in dispute. If anything had been read from the printed record tending to show that the defendant was the author of the affidavit, a different question would arise, but nothing of that sort was read. It did not appear that the affidavit had been "proved or admitted" in the equity cause, and, so far as appears, it may have been used merely for the purpose of some interlocutory proceeding in the cause.

Inasmuch as there was no evidence of the alleged admission of the defendant, the only evidence in the case tending to prove that he was a stockholder was that consisting of the entries in the books of the corporation. We are thus brought to the important question in the case, which is whether the entries contained in the corporate books of the company afforded prima facie evidence that the defendant was a stockholder. The relation of corporation and stockholder is a contractual one, and can only be created with the consent, express or implied, of both parties. The assent is evidenced when the name of the stockholder appears as such upon the books of the company; as to the corporation, by its act in placing his name there; and, as to the stockholder, by his knowledge and acquiescence in the act. It is not enough that he appears to be a stockholder upon the books, and when this occurs without his sanction he incurs no liability as such.

It is an elementary rule of the law of evidence that a party cannot make evidence in his own favor, of a contract, by his own statements or declarations of its existence or its terms. They are evidence against him, but not for him. Accordingly it has uniformly been held that entries in the books of a co-partnership, in the nature of declarations showing who are the persons that compose the firm, are not evidence in behalf of the partners, as against a third person, for the purpose of showing that the latter was a member. There is no reason why a different rule should be applied to the entries in the books or records of a corporation which tend to charge a party with the responsibilities of a stockholder. Corporations are not exempt from the ordinary rules of evidence, and there is no stronger presumption of honesty, or regularity or accuracy as to their books or records than there is in the case of natural persons.

Prior to the case of *Turnbull v. Payson*, 95 U. S. 418, in which Mr. Justice Clifford made an observation to the contrary, there was no respectable authority for the proposition that, without the aid of some statute changing the ordinary rule of evidence, the appearance of the name of a person on the books of a corporation as a stockholder, without other evidence, created a presumption, as against him, of his ownership of the stock. The only reported decision in which it had been so declared was the *nisi prius* case of *Hoagland v. Bell*, 36 Barb. 57. The opinion consisted merely of the statement that the appearance of the defendant's name on the stock book as a shareholder was prima facie evidence that he was so, and the burden was then thrown on him to disprove that he was a stockholder. No reasons were assigned, no authority was cited, and there was no discussion of the question upon principle. It may be that the statute under which the corporation was organized dispensed with the ordinary proof by a provision, which has occasionally been adopted, giving to such an entry upon the books of the corporation the force of evidence. No subsequent decisions by the courts of New York have adopted that decision, and, as will be seen, it is irreconcilable with their later decisions.

Turnbull v. Payson was an action to recover an assessment upon a stockholder, and the plaintiff offered to prove that the defendant was

a stockholder (1) by the books of the corporation, in which the name of the defendant was entered as the owner of 50 shares; (2) by the stock book of the company, with a duplicate of the stock certificate issued to the defendant, showing that he was the owner of the same number of shares; (3) by testimony that the certificate was sent to the agents of the company to be delivered to the defendant when he paid 20 per cent. of the shares, and that he made the required payment; and (4) by a receipt, signed by the defendant, showing that the company paid the defendant a dividend upon his stock. The court decided that the exceptions to the evidence thus offered were not tenable, and Mr. Justice Clifford said:

"Taken as a whole, it is clear that the evidence offered was amply sufficient to warrant the jury in finding that the defendant was a stockholder, as alleged."

He then made this observation:

"Where the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant."

He cited as authorities for the observation *Hoagland v. Bell*, supra; *Plank Road Co. v. Rice*, 7 Barb. 162; *Turnpike Road v. Van Ness*, 2 Cranch, C. C. 451, Fed. Cas. No. 11,986; *Mudgett v. Horrell*, 33 Cal. 25; *Coffin v. Collins*, 17 Me. 440; *Merrill v. Walker*, 24 Me. 237. None of the citations support the proposition, except the case of *Hoagland v. Bell*, which has been referred to. In *Plank Road Co. v. Rice* it appeared that the defendant had signed a subscription paper for the stock, that he accepted a certificate, and that his name was entered as a stockholder. In *Turnpike Co. v. Van Ness*, the question was whether a sufficient amount of stock had been subscribed by other persons to make the defendant's subscription binding. There was no question that the defendant had subscribed. The court held that for this purpose, and as between the corporation and the defendant, a book containing subscriptions which he had himself received when acting as a commissioner to receive subscriptions was *prima facie* evidence that the subscriptions were genuine, and that the defendant's election and acting as manager was *prima facie* an admission by him of the existence of the corporation. In *Mudgett v. Horrell* the point decided was that the stock books are not conclusive against a person charged as a shareholder. The statute in that case made the books *prima facie* evidence of the facts therein stated, in any action or proceeding against the company, or against any one or more stockholders. While all of the judges agreed that the books were not conclusive, two of them held that they were not competent evidence at all to prove that a person whose name was entered in them was a stockholder, saying:

"There is a species of absurdity in holding that the books were admissible evidence to prove the very fact on which their admissibility depends."

Coffin v. Collins was replevin against a deputy sheriff for taking logs of one Jordan on execution against a corporation. The defendant sought to justify under the charter, which made stockholders

individually liable for judgments against the company, by proving that Jordan was a stockholder, and for that purpose offered the charter, in which he was named as an incorporator, together with proof that the company was organized by some of the persons named in it, and carried on business as a corporation. The court held that the testimony was properly excluded, and said:

"Whatever proof may have been offered of the acceptance of the charter by some of the corporators, it does not appear that Jordan became actually a member. His being named in the act does not necessarily prove his assent to, or acceptance of, the powers conferred."

Merrill v. Walker is apparently a miscitation, as the case has nothing to do with corporations, stockholders, or evidence.

In Chase v. Railroad Co., which was decided in 1865 by the supreme court of the state of Illinois (38 Ill. 215), the question was whether the corporate books were admissible against a defendant in an action to recover for unpaid shares; and the court were unanimously of the opinion that they were not, in the absence of proof that he was a member of the corporation. Chief Justice Breese, in delivering the opinion of the court, placed the decision upon the principle that a party cannot make evidence for himself against a third party.

The remark of Mr. Justice Clifford in *Turnbull v. Payson* has been cited in several subsequent adjudications as authority for the general proposition which it embodies (*Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. 866; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Railroad Co. v. Applegate*, 21 W. Va. 172), in all of which cases it was unnecessary to decide the proposition, because there was other evidence tending to show a subscription for or purchase of shares by the defendant; and in *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381, where the point was not necessarily in question, and the judgment proceeded upon the ground of the erroneous reception of evidence.

Read in connection with the facts of the case, it is by no means clear that Mr. Justice Clifford meant to imply that the *prima facie* presumption would arise merely from the appearance of the name of the alleged stockholder on the books of the corporation. The case was one where the name properly appeared upon the books, and it is to be presumed that the observation was addressed to the state of facts under consideration. In any other view, it was obiter. Under the circumstances, we do not feel constrained to consider the proposition as authoritatively decided by *Turnbull v. Payson*, and we think it such a departure from principle that it ought to be rejected. In many cases its application might be most dangerous and unjust. When the alleged stockholder has died, and the suit is against his legal representatives, such a rule of evidence might be fatal to their rights.

The books and records of corporations, when properly kept, are evidence of the acts and proceedings of the corporate body, but cannot be used to establish claims or rights of the corporation against third persons, unless pursuant to the sanction of some statute. Ang. & A. Corp. § 679. And they are not evidence

against a stockholder in respect to a contract entered into by him with the corporation, notwithstanding he has access to them, because, as to such a contract, he is regarded, not as a stockholder, but as a stranger. *Hill v. Waterworks Co.*, 2 Nev. & M. 573; *Haynes v. Brown*, 36 N. H. 545; *Hager v. Cleveland*, 36 Md. 476. In *Wharton on Evidence* ([3d Ed.] § 662), it is said that, in suits by a corporation against its members, its books cannot be used as "proving in behalf of the corporation self-serving entries." Such is the rule recognized by the adjudications of the courts of New York. In *Bridge Co. v. Lewis*, 63 Barb. 111, it was held that the books of the bridge company containing an account of the tolls received for the bridge were not admissible as against the defendant, a stockholder of the company, to prove the amount, without the necessary preliminary proof as to such tolls, but that such books, proved by its treasurer to have been kept by him and to contain correct entries of tolls, as given to him by the toll gatherer, coupled with the proof by the toll gatherer that he had made correct returns of the tolls received by him, were admissible, because proved by the treasurer who kept them. In *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046, an action was brought by the receiver of an insolvent corporation to charge the defendant, as a trustee of the corporation, for the unlawful appropriation of its funds, and his liability was sought to be established by the account books of the corporation. The court, after a full review of the authorities, held the evidence incompetent, upon the principle that the business transactions of a corporation and its members are on the same footing as those with strangers; that the business entries in the books of a corporation are no more evidence against its members than they are against strangers; and that, as to the competency of such books, directors and stockholders occupy the same position. These two cases practically overrule *Hoagland v. Bell*. If the books and records of a corporation are not evidence to establish a claim of the corporation against a member arising upon contract or otherwise, they ought not to be for the purpose of proving the existence of the contract of membership.

The true ground upon which the books of a corporation, showing who are shareholders, are admissible in evidence, is that they are the best evidence of the assent of the corporation to the contract of membership. Until that assent is proved, the contract is not complete, and no person who has bought shares of stock can be subjected to the liability of a stockholder. When it appears that a person has subscribed for or purchased shares, has voted upon them, has received dividends upon them, or in any other way has consented to occupy the relation of a stockholder, the contract of membership on his part is shown; and the stock books become competent evidence, because they show that the corporation has likewise consented.

We approve the language of a recent commentator, which is as follows:

"On principle, the books and records of the corporation are not competent evidence to prove that the defendant is a stockholder; for the general rule is

that one party to an alleged contract cannot prove the existence of the contract by his own private memoranda or records. The mere statement of this principle ought to be enough to convince one of its correctness, without argument." *Thomp. Corp.* § 1924.

The plaintiff in error urges that the books of the corporation were admissible in the present case because of the statute of Virginia which provides as follows:

"A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as regards the company."

This statute only means that the corporation which has acknowledged such a person as a stockholder, and admitted him to be such upon its records, shall not be at liberty to dispute the relation. Its language does not require any broader meaning.

We conclude that the trial judge was correct in ruling that there was no evidence that the defendant was a stockholder, and in directing a verdict accordingly.

The judgment is affirmed.

JONES & LAUGHLINS, Limited, v. SANDS et al.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

APPEAL — ANCILLARY RECEIVERSHIP — RIGHTS OF NONRESIDENT CREDITORS — FINAL ORDER.

An order of the circuit court, denying the petition of nonresident creditors of an insolvent foreign corporation to be made formal parties to a suit for the appointment of ancillary receivers, and to be allowed to participate in the distribution of assets by such receivers, is not a final determination of the creditors' right to participate in such distribution, from which an appeal will lie to the circuit court of appeals.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Lockwood & Hill, for appellants.

Frederic G. Dow, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal by Jones & Laughlins, creditors of an insolvent Connecticut corporation. At the suit of a stockholder of the corporation, brought in behalf as well of all the other stockholders and of the creditors of the corporation, receivers of all its property and assets were appointed, to collect and dispose of its assets and pay its debts, by a court of the state of Connecticut having jurisdiction of the parties and the subject-matter. Thereafter a bill was filed in the United States circuit court for the Southern district of New York in a suit between the same parties, alleging the insolvency of the corporation, setting forth the proceedings in the suit in the Connecticut court, alleging the corporation to have property and assets within the state of New York, and praying for the appointment of ancillary receivers to collect and administer such as-

sets; and a decree was made in the cause appointing such receivers. The decree, among other things, provided as follows:

"Such receivers shall forthwith make and file an inventory and advertise for claims of the resident creditors of the corporation, taking the instructions of the court from time to time as to the conduct of the receivership, shall take prompt action to collect all debts due the corporation maturing in this state, and under the direction of the court shall dispose of the assets, doing such work as may be necessary to put unfinished goods in a proper condition for sale, and depositing the proceeds in bank or trust company, as the court may direct. Directions as to the disposal of any surplus remaining after payment of all creditors resident in this state will be given in due time by this court."

Thereafter the appellants filed a petition in the cause upon the theory that, although they were nonresident creditors, they were entitled to share in the distribution of the assets, and praying that so much of the order as limited the right of nonresident creditors to participate in such distribution be vacated and set aside, and that due notice of all further proceedings in the cause be served upon the petitioners. From the order denying the prayer of the petition the present appeal was brought. Appellees have moved to dismiss the appeal.

The petitioners are parties to the cause, being represented by the receivers. As such they are entitled at any time by petition to present any questions affecting their rights which they desire to have heard and determined by the circuit court; and from any determination made by the court touching these rights, which is final in its nature and effect, they are entitled to appeal. It is wholly a matter of discretion whether the court will allow such quasi parties to become formal parties to the cause by intervention. *Forbes v. Railroad Co.*, 2 Woods, 323, Fed. Cas. No. 4,926; *Anderson v. Railroad Co.*, 2 Woods, 628, 630, Fed. Cas. No. 358. In the opinion by the court below, denying their petition, Judge Lacombe said:

"If any creditor not a resident of this state believes that he is entitled to participate in such distribution, he may submit proof of his claim to the receivers. If they reject the claim, as, under the practice prevailing here, they undoubtedly will, such creditor is entitled to have the propriety of such action passed upon by the master to whom, in the first instance, all disputed questions as to allowance or disallowance of claims are to be presented. If the master's decision be adverse to the creditor, he may review it upon exceptions to the report, and, if such exceptions be overruled by the circuit court, such determination is a final decree, from which he may appeal to the circuit court of appeals. * * * Creditors who believe that they are entitled to share in the distribution may file their claims with the receivers, and, whether the same be allowed or disallowed, they will have the same opportunity as all the other creditors to overhaul the receivers' account, to present their own claims before the master, and to object to the allowance of any other claims, as they may be advised."

In these observations we fully concur. The present appeal, however, is premature. The question of the right of the appellants to participate in the distribution of the property in course of administration by the circuit court is not yet finally determined. They can preserve their rights as to all the questions they desire to raise by presenting them by petition to the court, and, if these questions are erroneously decided, they can appeal from any decree making dis-

position of the assets which is final so far as it affects them, and upon such appeal review all interlocutory orders affecting their substantial rights. The order refusing their petition to be made formal parties to the cause, and denying the other relief asked for, is not a final decision within the meaning of the statute authorizing appeals to this court. The motion to dismiss the appeal is therefore granted.

WARTH v. MACK et al.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

HIRE OF CHATTELS — CONTRACT — TERMINATION BY DESTRUCTION OF THE CHATTEL.

Plaintiff delivered to defendants a patented machine, under a contract providing that they should pay for its use a stipulated royalty semiannually until the expiration of the patents; that they might terminate the contract by returning the machine, and paying the amount then due; and that, if the machine should be destroyed by fire, plaintiff should furnish another at a specified price, and, if he refused to do so, defendants might have one made, the new machine, in either case, to be subject to the payment of royalty and to all other conditions of the contract. *Held*, that defendants, upon the destruction of the machine by fire without their fault, could not terminate the contract, and avoid liability for royalty subsequently accruing, without procuring another machine, and delivering it to plaintiff.

In Error to the Circuit Court of the United States for the Southern District of New York.

Albert Stickney and Rudolf Dulon, for plaintiff in error.

Hoadly, Lauterbach & Johnson (John V. Bouvier, of counsel), for defendants in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment at law. The action was tried before the court, trial by jury having been waived by the written stipulation of the parties.

The action was brought to recover royalties amounting to \$2,250, alleged to be payable pursuant to a written contract, dated February 9, 1892, executed by Albin Warth, the testator of the plaintiff, and the defendants.

The provisions of the contract, so far as they are material, are as follows:

"Whereas, certain letters patent of the United States of America have been issued to Albin Warth, of Stapleton, in the county of Richmond and state of New York, for his new and useful improvement in machines for cutting textile and other materials, also in feed mechanism and mechanical movement for the same, and for improvements in fastenings for said goods, and which said letters patent are numbered and dated as follows, to wit:

"[Then follows the enumeration of twenty-seven specified patents, the first dated August 2, 1870, and the latest November 21, 1882.]

"And whereas, Mack, Stadler and Company, co-partners, doing business in the city of Cincinnati, in the state of Ohio, are desirous of acquiring the right to use in their own business, in the manufacture of clothing, under the firm

name of Mack, Stadler & Co., at the city of Cincinnati, the cutting machine owned by said Warth, built under the aforesaid patents, or some one or more of them, marked D, numbered 88, and of one one-quarter inch cutting capacity:

"Now, know all men by these presents, that the said Albin Warth, licensor, for the consideration of eleven hundred and fifty dollars, to be paid to him or his legal representatives or assigns by the said Mack, Stadler & Co., licensees, and upon the terms and conditions and payment of royalty as hereinafter set forth, hath given and granted, and by these presents doth give and grant, to the aforesaid Mack, Stadler & Co., the license and privilege of using in their said business of clothing manufacturing the aforesaid machine; and the said licensor and licensees do hereby covenant and agree to and with each other that the terms and conditions of this license shall be as follows, to wit:

"First. That the said licensor having furnished the said licensees with the aforesaid machine, the receipt of which is hereby acknowledged, they, the said licensees, shall pay the said licensor or his legal representatives or assigns the aforesaid sum of eleven hundred and fifty dollars on demand, and shall further pay or cause to be paid to the said licensor, his legal representatives or assigns, semiannually, the royalty of one hundred and fifty dollars, which semiannual royalty shall be due and payable on the ninth day of August, 1883, and on the ninth day of February, 1884, and which semiannual royalty shall continue to be due and payable on the anniversary of each of the said semiannual dates, until each of the patents herein named shall have run out.

"Second. That at all reasonable times the said machine shall be open to the inspection of said licensor or his legal representatives or assigns. In the event of said machine being worn out by legitimate use, upon its return to said licensor, or in the event of its destruction by fire, said licensor will, within a reasonable time, furnish to the licensees, upon the payment of six hundred and fifty dollars, for the construction of a new machine, of the same kind and capacity, in place of the one so worn out or destroyed; or if said licensor shall refuse to furnish such new machine, which he is at liberty to do, then said licensees may elsewhere construct or cause to be constructed such new machine in place of the one worn out or destroyed as aforesaid; but every such new machine, whether furnished by said licensor or otherwise as above provided, shall be subject to the payment of said royalty, and to all other conditions and provisions herein contained.

"Fourth. This license is personal to the said licensees, and shall not be assignable to or available by any other person or persons without the written consent of the said licensor or his legal representatives or assigns; nor shall the royalty herein set forth cease to be paid under any circumstances whatsoever, except under the conditions herein named.

"Seventh. The said licensees may terminate the payment of royalty herein mentioned upon the condition that the aforesaid machine shall be returned and delivered to said licensor by the said licensees with payment of royalty up to date of such return; and upon the further condition, and the said licensees agree, that they will not thereafter use or authorize, or allow to be used, directly or indirectly, in their business or elsewhere, any other cloth-cutting machine until all the patents herein mentioned shall have run out."

The court found, as matters of fact, that, pursuant to the contract, the machine described therein was furnished to and received by the defendants, and remained in their possession until November 20, 1886, when, by an accidental fire, happening without their fault, it was totally destroyed; that the defendants had paid all the royalties which by the terms of the contract became payable August 9, 1886, but that they did not pay any part of the royalty for the next six months, and payable February 9, 1887; that the defendants offered to return to Warth the burnt remains of the machine, if any there were, and to pay all royalties due under the contract at the date of the fire, and in other respects to perform the conditions of the sev-

enth clause of the contract; and that, after the commencement of the action, they duly tendered and paid into court the sum of \$247, as the royalty due at the date of the destruction of the machine. The court found, as legal conclusions, that, under the terms of the contract, the defendants were bailees for hire, and the contract was one of hiring; that the total destruction of the machine by fire, without fault of either party, operated as a dissolution of the contract, and caused a failure of the consideration, in the absence of any reproduction of a similar machine either by the licensor or licensees in the manner by said contract provided; and that the plaintiff was entitled to recover only the amount tendered by the defendants.

The assignments of error present the single question whether, in view of the terms of the contract, royalties were recoverable which accrued after the date of the destruction of the machine by fire.

By the contract in question, the defendants were licensed to use, during the term of several letters patent, the machine which was destroyed by fire, and, as they were not licensed to otherwise enjoy the privileges of any of the patents, the contract was essentially one for the hiring of a chattel; and we should agree with the decision of the learned judge of the court below were it not for the effect which it seems to us must be given to the special provisions of the contract. Upon principle and authority, in the absence of express stipulations to the contrary, in a contract for the hiring of a chattel, the hirer is only liable *pro tanto* for the payment of the hire if, without fault on his part, the chattel is destroyed before the expiration of the period during which he was to have the use of it. By this contract, however, the parties agreed to terms which introduced very important qualifications of the rights and obligations which would otherwise have been implied. They agreed (clause 4) that the royalty, payable semiannually, until the expiration of the term of all the patents, should be paid "under any circumstances whatsoever, except under the conditions herein named"; that (clause 7) the defendants might terminate payment of royalty by returning the machine, and paying the amount due at that date; and (clause 2) that, in the event of the destruction of the machine by fire, the defendants should pay the licensor the sum of \$650, and the latter should furnish them a new machine, of the same kind and capacity, or upon his refusal the defendants might construct one; and in either case the royalty should be payable as originally provided, and all the other conditions of the contract should remain in force. It was entirely competent for them to agree that, if the machine should be destroyed by fire, the defendants should, nevertheless, continue to pay the reserved royalty; and, if they did so agree, the defendants must fulfill, conformably with the general rule that where a party, by his own contract, creates a duty or obligation upon himself, he is bound to make it good or answer in damages, although prevented in the performance by inevitable accident. *Burrill v. Crossman*, 35 U. S. App. 608, 16 C. C. A. 381, and 69 Fed. 747; *Dermott v. Jones*, 2 Wall. 1; *Bullock v. Dommitt*, 6 Term R. 650; *Brecknock Co. v. Pritchard*, Id. 750; *Adams v. Nichols*, 19 Pick. 275; *Trustees v. Bennett*, 27 N. J. Law, 513.

Whether the covenants of the fourth and seventh clauses, independently of the second clause, would compel a construction of the contract by which the defendants should be held liable for the payment of the royalty after the destruction of the machine, is a question which we are not called upon to decide. The second clause was manifestly framed *ex industria*, to meet the precise contingency which has happened, and remove all doubt as to the rights and obligations of the parties in case of the destruction of the machine by fire. It provides that in that event the licensor shall furnish a new machine for \$650 (the price of the original machine having been \$1,150); but, if he does not, the defendants may provide themselves with one from some other source, and that in either case the subsequently accruing royalty shall be paid, and all the other conditions of the contract remain in force. This clause would be obliterated from the contract if the defendants are permitted, when the machine has been destroyed by fire, to terminate the contract, without procuring another machine, and returning it to the licensor. The seventh clause contemplates that the defendants, upon exercising the privilege of terminating the license, are to give an equivalent therefor. A machine worn out by use or ruined by fire would not be an equivalent, in any fair sense, and cannot be regarded as the one which the parties had in mind. The clause implies that they are to return a machine then in their possession, and capable of use. Read together, the clauses mean that, in case the machine be worn out by use or destroyed by fire, a new machine is to be substituted, and all the other terms of the contract are to remain in force; and, if the defendants elect to terminate the license, they are to return to the licensor the original machine, if it is not worn out or destroyed, and, if it is worn out or destroyed, a substituted machine. Upon any other construction, the licensor would get no equivalent for the privilege given to the licensee of terminating the license, and would be deprived of his option to furnish the defendants, in case of the destruction of the original machine by fire, with a new machine, and be paid \$650 for it; while the defendants would escape all obligation to pay royalties, notwithstanding the rigorous terms of the fourth clause, by going through the farce of offering to return a thing no longer in existence.

We conclude, therefore, that the defendants were not at liberty to terminate the license, by offering to return the destroyed machine; and, as they have not done this, they remain under a subsisting obligation to pay the royalties.

The judgment of the circuit court is reversed.

INTERNATIONAL BANK OF ST. LOUIS v. FABER.

(Circuit Court, E. D. New York. April 5, 1897.)

1. JURISDICTION OF FEDERAL COURTS — ACTION TO CHARGE STOCKHOLDERS IN CORPORATIONS.

An action against a director of a corporation, to charge him with liability, under section 30 of the New York stock corporation law, is a civil action, of which the federal courts have jurisdiction concurrent with the state courts.

2. CORPORATIONS—REPORTS TO STATE OFFICERS—JURAT.

When the report filed by a corporation pursuant to section 30 of the New York stock corporation law is signed by the proper officers, and the jurat shows that it was verified by their oath, the fact that the jurat itself is not signed by them does not render the report defective.

3. SAME—SIGNATURES.

When there is a vacancy in the offices of secretary and treasurer of a corporation, in consequence of the resignation of the officers, a report signed by the president and a majority of the directors, and verified by the president alone, is a sufficient compliance with section 30 of the New York stock corporation law, requiring the filing of a report signed by a majority of the directors, and verified by the oath of the president or the vice president and treasurer or secretary.

Robert D. Murray, for plaintiff.

Ferdinand A. Thomson and Benjamin F. Tracy, for defendant.

WHEELER, District Judge. The laws of New York have since 1848 required the officers of manufacturing corporations to file reports of their financial condition with the secretary of state and county clerk. The F. J. Falkenberg Company was such a corporation, organized under these laws, with F. J. Falkenberg president, and the defendant a director, secretary, and treasurer. On January 14, 1892, the law in this respect was amended so as to read:

"Sec. 30. Annual Report. Every stock corporation, except moneyed and railroad corporations, shall annually, during the month of January, or if doing business without the United States, before the first day of May, make a report as of the first day of January, which shall state: (1) The amount of its capital stock, and the proportion actually paid in. (2) In general terms the nature of its existing assets and debts. (3) The amount of its debts, or an amount which they shall not exceed. (4) The amount of its assets, or an amount which its assets shall at least equal. (5) The names of its then stockholders. Such report shall be signed by a majority of its directors, and verified by the oath of the president or the vice president and treasurer or secretary and filed in the office of the secretary of state, and in the office of the county clerk of the county where its principal business office may be located. If such report is not so made and filed, all the directors of the corporation shall jointly and severally be personally liable for all the debts of the corporation then existing, and for all contracted before such report shall be made."

In October, 1891, the defendant orally, and in writing delivered to the president, resigned as secretary and treasurer, and ceased to act as such. On January 29, 1892, reports signed by the president, as such, only, and a majority of the directors, containing the required information, were filed with the secretary of state and the county clerk, and no others were made for that month or year. On December 16, 1892, this company made one note of \$2,500; on January 12th, 16th, and 20th, three of \$2,000 each; and on January 14th one of

\$1,000,—all due in four months, and all of which were immediately discounted by the plaintiff for the benefit of the company, which had the proceeds. On January 31, 1893, reports were made and filed as required by the law. The notes have not been paid, except \$611.27 on the first, and the corporation has been dissolved on proceedings in a state court, in which suits against it were enjoined. This suit is brought upon this statute.

The point is made for the defendant that this statute is so penal that an action upon it can be brought only in the state courts, and that, therefore, this court has no jurisdiction of this suit. But these debts were contracted during the default, if there was such, when the statute annexed the liability of the defendant, if made out, to that of the corporation; and the action seems, under these circumstances, to be such a civil action for the debt as that this court may have jurisdiction of it, concurrent with that of the state courts. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224. So the merits of the case must be examined.

The jurat to one of the reports of January, 1892, was not signed by the president, but the report itself was, and the jurat showed that the report was "verified by the oath of the president." This lack of signature is relied upon as a defect in the report, but it does not seem to be a material one. Neither this statute, nor usage where the report was sworn to, seems to require such signature. The remaining defect in those reports, and the important one in the case, is that they are not verified by the oath of a secretary or treasurer. The president appears to have thought that the statute meant verification by him, or by the other officers mentioned, and that when it was by him it would be sufficient. His construction is argued now to be correct, but the statute seems rather to require verification by the secretary or treasurer in addition to that by the president or vice president,—at least, if there should be such officers. The defendant resigned, so far as by his own action he could, some time before these reports in question were made; and much longer, and so long before these debts were contracted, that his resignation cannot be supposed to have been made with any reference to either the reports or the debts. Although he was elected and accepted for a definite term, he could not be compelled to serve longer than he would, and could so resign as to avoid responsibility for the duties of the office, and leave it vacant. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. This vacancy was not filled till after these reports were made by the president, nor till after the time for making them had elapsed. By another provision of the same law a director may relieve himself of liability for failure to make report by filing a certificate that he had endeavored to have a report made, and giving the details required, so far as he can. This does not, however, seem to enlarge the liability provided for in the thirtieth section quoted, by making him liable for a defective report unless he so relieves himself, but gives this mode of relief if he would otherwise be legally liable. So the question remaining is whether the law required the report to be verified by a secretary or treasurer, when there was none in office. This is so far in nature a penal statute that strictness in its construction is required.

Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554. The law does not require performance of impossibilities. The defendant could not, after resignation, reinstate himself as secretary or treasurer, and cannot be liable for not doing that. No secretary or treasurer could verify the reports, for there was none to do it. It was verified as the law required, so far as there were officers for the law to apply to, and beyond that the law would be as well attained by the verification made as by anything further in that direction. Upon these facts, which are found, there does not appear to have been such a default as to entitle the plaintiff to recover. Judgment for defendant.

SHEAFE v. LARIMER.

(Circuit Court, N. D. Iowa, W. D. April 9, 1897.)

1. BANKS AND BANKING—ASSESSMENT ON STOCKHOLDERS.

Where, upon the petition of the receiver of a state bank, an order has been made authorizing an assessment upon the capital stock of the bank under a statute authorizing such assessment, the order is binding upon stockholders, and cannot be collaterally attacked by them, although they were nonresident, and not before the court.

2. SAME—COUNTERCLAIM.

In an action by the receiver of a bank against a stockholder under a statute imposing a liability upon stockholders for the debts of the bank, the defendant cannot plead as a counterclaim a claim for damages against the bank for false representations made at the time he bought his stock, the bank not being a party to the action.

This was an action at law brought by C. M. Sheafe, receiver of the Washington Savings Bank, against A. V. Larimer, to recover an assessment on the stock of the bank. Submitted on demurrer to answer and counterclaim.

Strong & Owen, for plaintiff.

F. McNulty, for defendant.

SHIRAS, District Judge. From the averments in the petition filed in this case it appears that the Washington Savings Bank is a banking corporation created under the provisions of the laws of the state of Washington; that in January, 1894, proceedings in liquidation were brought against the bank in the superior court of Kings county, in said state, and C. M. Sheafe was appointed receiver of the bank, with authority to collect the assets of the corporation, and apply the same in payment of the debts due therefrom; that on the 31st day of August, 1895, the superior court in said Kings county, upon the petition of the receiver, made an order authorizing an assessment upon the capital stock of said bank, in an amount equal to the face value thereof, to be payable to said receiver within 30 days from the date of the order; that the defendant herein is a stockholder in said bank, having purchased on the 1st day of October, 1891, 100 shares of stock, of the par value of \$100 per share; that the defendant refuses to pay said assessment, and therefore judgment for the sum of \$10,000 is prayed

against him. To this petition the defendant files an answer and counterclaim, averring therein that he is a resident of Iowa; that he never was in the state of Washington, and never took part in the management of the bank; that he was not a party to the proceedings in liquidation, and had no notice of the application to the court for an order authorizing the assessment upon the capital stock of the bank; that, when the bank was placed in liquidation, the assets amounted to the sum of \$233,214, and the liabilities to the sum of \$143,717; that, when the bank was first organized, it had a capital stock of \$50,000; that afterwards it was proposed to increase the capital stock to \$100,000, and that the president of the bank represented to him about October 1, 1891, that 400 shares of the proposed increase had been subscribed and paid for, at the rate of \$105 per share, and thereby the defendant was induced to purchase 100 shares, paying therefor the sum of \$10,500; that in fact only \$24,980 of such increase had been subscribed and paid for; that he (the said defendant herein) did not know or learn of the fraud thus practiced on him until some time after the receiver herein had been appointed, when he offered to return the stock to him; and he now prays judgment for the damages caused him, in the sum of \$10,500, against the receiver and the named bank. To this answer and counterclaim, the plaintiff demurs on several grounds, the first point being that the defendant cannot, in this court and in this proceeding, attack the action had in the superior court of Kings county authorizing an assessment upon the capital stock of the corporation. The position taken by defendant is that he was not within the territorial jurisdiction of the court making the order; that he was not notified of the proceeding; that it was purely *ex parte*; and that the stockholder is entitled to his day in court, or, in other words, he is not bound by the assessment order unless he had personal notice of the application therefor.

The provision of the statutes of the state of Washington creating a liability on stockholders for an amount equal to the face value of the stock held by them is identical with that found in the act of congress known as the "National Bank Act." In the case of *Wilson v. Book*, 43 Pac. 939, the supreme court of Washington held that the statutory liability thus imposed upon stockholders can be enforced by a receiver of the corporation, and it thus appears that the superior court of Kings county had the right to entertain the application of the receiver for an order directing the making of an assessment upon the shareholders of the bank. This application was made in the case pending in that court, wherein the bank was a party; and it was not necessary to give notice to the individual stockholders in order to confer jurisdiction upon the court to make the assessment order.

This exact question was before the supreme court in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, and it was therein said:

"Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between the creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against

the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far as integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member. *Sanger v. Upton*, 91 U. S. 56, in which case it is also said: 'It was not necessary that the stockholders should be before the court when it [the order] was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not in this action question the validity of the decree; and, for the same reasons, she could not draw into question the validity of the order.'

The same doctrine is announced in *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, and *Priest v. Glenn*, 2 C. C. A. 305, 51 Fed. 400.

Under the rule as given in these cases, it must be held that the stockholders in the Washington Savings Bank are bound by the assessment order granted by the superior court of Kings county, and that the validity thereof cannot be questioned in this collateral proceeding in this court, upon any of the grounds set forth in the answer of the defendant. If it be true that no real necessity for calling upon the stockholders existed, and that the assessment was improvidently made, relief must be sought in the court granting the order. In this case it must be held that it is not open to the defendant to question the validity of the assessment order, on the ground that the stockholders were not personally notified of the application for the order, or for the reason that the stockholders should not have been assessed until the other assets of the corporation had been wholly exhausted.

The next question for consideration arises upon the paragraphs of the answer setting forth that the defendant was induced to purchase the shares of stock by him held, by reason of certain false statements made to him by the president of the bank, to the effect that \$40,000 of the increased capital stock had been purchased by others, at the rate of \$105 per share, whereas in fact only \$24,980 of such increased stock had been purchased by others, and upon the portion of the answer setting up a counterclaim for damages based upon these alleged false representations. Although the defendant sets forth in the answer the facts relied upon as constituting false representations, a rescission of the contract of sale is not prayed for; nor could it be properly sought for in this action, the same being at law. The answer admits that in fact the defendant, since October 1, 1891, has been a stockholder in the bank, but avers, in substance, that he was induced to become a stockholder by means of certain false representations made to him by the president of the bank. The defendant has not sought nor secured a rescission of the contract of purchase of the stock by a decree in equity, and he therefore is yet legally a stockholder, and subject to the liabilities of a stockholder. The remedy sought in this action by the defendant is a judgment for damages, and this is sought in the form of a counterclaim against the plaintiff, and against the bank. The latter was not a party to the suit as originally brought, and has not been served with notice, nor has an appearance therefor been entered. So far as the record now shows,

the counterclaim is pending against the receiver only, and I can see no ground for holding that the counterclaim can be sustained against the rights represented by the receiver in this case. The cause of action, if any exists, does not arise out of any acts of the receiver, but came into existence when the sale of stock was made, in October, 1891. It is a claim for damages against the bank, and it is open to the defendant to sue upon the claim for damages, and, if judgment in his favor is obtained, to file the claim as a debt with the receiver; but it cannot be availed of as a counterclaim against the receiver in the present action.

The reasons why this should not be permitted are well stated in *Barton v. Barbour*, 104 U. S. 126-128, wherein it is said:

"The evident purpose of a suitor who brings his action against a receiver without leave is to obtain some advantage over the other claimants upon the assets in the receiver's hands. This judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such. * * * If he has the right, in a distinct suit, to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it. By virtue of his judgment, he could, unless restrained by injunction, seize upon the property of the trust, or attach its credits. If his judgment were obtained outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this; and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property of the trust of any attempt to enforce satisfaction of his judgment would be precisely the same as if his suit had been brought for the purpose of taking property from the possession of the receiver."

Thus, in this case, if the court should permit a judgment to be entered against the receiver upon the counterclaim, and an execution to be issued thereon, the same might be levied upon the assets of the bank in the receiver's hands, thus giving him a preference over the other creditors; and the same result follows if the court should allow the claim for damages to be set off against the sum due from the defendant on the shares of stock held by him. Thus, in *Sawyer v. Hoag*, 17 Wall. 610, it is held that a stockholder indebted to an insolvent corporation, for portions of the capital stock not paid in full, cannot set off against this trust fund, belonging to the creditors, a sum due him from the corporation. In *Scammon v. Kimball*, 92 U. S. 362, it was ruled that a claim for losses by fire due from an insurance company cannot be set off by the insured against notes given by him for the capital stock of the company. And in *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, it was held that a stockholder indebted to an insolvent corporation for unpaid shares cannot set off against this trust fund for creditors a debt due him from the corporation.

The receiver in this case is suing on behalf of creditors to recover an assessment made upon the holders of the capital stock of the insolvent bank, or, in other words, is suing to recover a trust fund belonging to the creditors; and, under the doctrine announced in the cases cited, it must be held that a claim for damages, such as is counted on by the defendant, cannot be set off in this action against the claim of the creditors represented by the receiver. In *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, the question

when a set-off is valid against a receiver of a national bank is very fully discussed. In that case the receiver, Armstrong, brought suit upon a promissory note for \$10,000, signed by Scott and the Farmers' Bank; and the latter pleaded, as a set-off, a sum standing to its credit on the books of the Fidelity Bank, of which Armstrong was receiver. The receiver demurred to the plea of set-off, and the demurrer was sustained, and judgment at law was rendered for the full sum due on the note. Thereupon a bill in equity was filed by the judgment defendants, setting forth the facts, and praying an injunction to restrain the collection of the judgment at law. Upon demurrer this bill was dismissed in the circuit court, and an appeal was taken to the court of appeals for the Sixth circuit, by which court the questions at issue were certified to the supreme court, by which it was held that the set-off was available to the defendants in equity, and should be allowed. The conclusion reached in that case was that if the Fidelity Bank had not become insolvent, and had itself demanded payment of the Farmers' Bank of the note when it came due, the latter bank would have had the right to require the application on the note of the sum held on deposit by the Fidelity Bank, and that this right of mutual set-off was not defeated or extinguished by the fact that the Fidelity Bank was placed in liquidation through the appointment of a receiver. In substance, it was held in that case that where, prior to the insolvency of the bank, the right of set-off existed by reason of the express agreement of the parties, or by reason of the nature of the dealings between the parties, this right of set-off would not be terminated because one of the contracting parties became insolvent, and a receiver thereof was appointed, it being held that the equity and right of mutual set-off were superior to the equity of the general creditors. The rule announced in this case is not, however, applicable to a suit brought by a receiver to recover an assessment made under the provisions of a statute imposing a liability upon corporate stockholders for the debts of the corporation. It is only in a very limited sense that such liability can be said to be an asset of the corporation. The unpaid portions of the capital stock subscribed for may be called in by the corporation, and may be applied, not only to the payment of the corporate debts, but also to the extension and furtherance of the corporate business; and thus such sums may be held to be an ordinary asset of the corporation, as well as a trust fund to be used for the benefit of creditors. Not so, however, with regard to the statutory liability to assessments for a sum equal to the face value of the stock. This liability can be enforced only on behalf of creditors, and when a bank, having become insolvent, is placed in the hands of a receiver, the latter can alone sue for and recover the same, it being held that in such case all the creditors are entitled to share ratably in the trust fund, and hence the suit must be in the name of the receiver, as the representative of all the creditors. *Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488.

Having regard, therefore, to the nature of the liability sought to be enforced against the defendant in this case, and the rights of

all creditors thereto, it cannot be held that there was any agreement, express or implied, existing between the corporation and the defendant, as a stockholder therein, upon which to base the right of set-off, or that there exists any equity in favor of defendant which entitles him to set off his unliquidated claim for damages against the statutory right of the creditors, sought to be enforced in this action. The demurrer to the fourth and succeeding paragraphs of the answer, including the counterclaim declared on, is sustained.

CAREY v. MAYER.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

CORPORATIONS—INSOLVENCY—CALLS ON STOCK—DISCHARGE IN BANKRUPTCY.

The obligation of a subscriber to the stock of a corporation to respond to calls becomes, upon the declared insolvency of the corporation, by the execution of a deed of trust for the benefit of creditors, a liability with a contingency, though not fixed in amount, and not payable until a call has been made; and when such subscriber has, subsequent to the execution of such a deed of trust, filed his petition in bankruptcy under the act of 1867, and been discharged, his discharge is a good defense to an action to recover the amount of his subscription, though the call on which the action is based is not made until after the discharge is granted.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Burton N. Harrison, for plaintiff.

George Zabriskie, for defendant.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Alexander J. Mayer, of the city of New York, became, prior to 1866, the holder and owner of 450 shares, of the par value of \$100 each, of the capital stock of the National Express & Transportation Company, a Virginia corporation. The statute of Virginia required that, upon every subscription for shares in a corporation of the character of the express company, there should be paid \$2 upon each share at the time of subscribing, and that the residue thereof should be paid as required by the president and directors. When Mayer became a stockholder, \$20 per share had been paid upon his stock. On September 20, 1866, the corporation assigned and transferred by deed all its property to three trustees, for the benefit of its creditors. By this assignment, that part of the assets of the corporation which consisted in unpaid subscriptions for stock passed to the trustees, but the collection of this class of the assets by actions at law could be set in motion only by a call made by the president and directors, or, failing their action, by a court of equity, at the instance of the trustees or of the creditors. Nothing was done in this respect either by the trustees or by the officers of the corporation, and on November 28, 1871, a creditors' suit, by bill in equity, was commenced in a Virginia court of competent jurisdiction, one object

of which was to compel a call for so much of the unpaid subscriptions as would suffice to pay the debts of the company. The court, on December 10, 1880, made a decree, which found the amount due to the persons named as creditors, and made a call upon the stockholders to pay 30 per cent. of the par of their stock in order to administer the trust and pay the debts. Subsequently, on March 26, 1886, a further call for 50 per cent. was made by the Virginia court. On March 29, 1868, Mayer applied to the district court for the Southern district of New York to be declared a bankrupt, was thereafter adjudged a bankrupt, and, on May 20, 1879, was discharged by said court from all debts and claims which were provable against his estate and which existed on March 29, 1868. No claim for any liability upon said stock was proved against his estate, and no portion of either of said calls has ever been paid. Upon an action at law before the circuit court for the Southern district of New York, by George G. Carey, the successor of the Virginia trustees, against Mayer, to recover the amount of the two calls, to which action the discharge in bankruptcy was pleaded in bar, the court directed a verdict for the defendant. The only question upon the writ of error is whether the discharge granted May 20, 1879, upon a petition in bankruptcy filed March 29, 1868, discharged the defendant from liability upon the two calls made in 1880 and in 1886, and that question depends upon whether the liability was or was not a provable debt.

The provisions of the bankruptcy statutes which relate to this question are contained in sections 5067 and 5068 of the Revised Statutes, and are as follows:

"Sec. 5067. All debts due and payable from the bankrupt at the time of commencement of proceedings in bankruptcy, and all debts then existing, but not payable until a future day, * * * may be proved against the estate of the bankrupt. [The remainder of the section relates to demands for damages arising out of specified torts.]

"Sec. 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and may have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend, or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the courts shall order, and he shall be allowed to prove for the amount so ascertained."

When the question has arisen as to the date at which the statute of limitations began to run against a liability to pay calls of the kind now under consideration, the supreme court has repeatedly insisted that the statute did not begin to run until the debt was ascertained; that this ascertainment was had when a call or authorized demand for payment in behalf of creditors had been made; and that no obligation rested upon "the stockholder to pay at all until some authorized demand on behalf of creditors was made for payment." *Scovill v. Thayer*, 105 U. S. 143; *Glenn v. Liggett*, 135 U. S. 542, 10 Sup. Ct. 867; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914. But we are not now called upon to determine when the obligation became a fixed debt, but to ascertain its character after the insolvency of the corporation, and before

an assessment. It is obvious that before the exact amount of a liability has become certain, or has been ascertained, it may be a debt for the purpose of attachment, or a debt which can be presented as a claim against the estate of a deceased person, the amount of the claim to be subsequently ascertained. In the case of a liability for an unpaid subscription for stock, the seed of the liability is the act of subscription, and when notorious insolvency takes place, and it becomes manifest by the act of the corporation that the subscriptions must pay the debts, the liability has also become manifest, but it requires a call or assessment to make it complete and of certain amount. It is a liability which cannot be made the subject of an action at law against the subscriber until a call has been made, but it is a liability not yet matured. Thus, Mr. Justice Bradley has said, in *Re Glen Iron Works*, 20 Fed. 674, that "the obligation to pay is founded—First, upon the subscription to the stock; secondly, upon the existence of creditors and debts of the corporation requiring the payment of the subscription to satisfy them." He further says that the condition to be performed "in order to convert the obligation of the stockholder into a perfect and complete debt" is an assessment and a call; that, if the corporation does not do its duty and make the call, a court of chancery can; and that its interposition "does not create the duty to pay; it only assesses the equitable amount to be paid by each." This, we think, is the true view to be taken of the nature of Mayer's obligation at the date of the trust deed. The execution and delivery of the deed proclaimed that the corporation was unable to pay its debts in money, and that for the benefit of its unpaid creditors its property should be turned into money by trustees specially appointed for that purpose. By the insolvency, the obligation to pay something became existing and manifest; but the amount to be paid was uncertain, and was to be made certain either by the officers of the corporation or by a court of chancery which could ascertain the proper and equal amount to be paid by each, for equality of assessment was important. *Hawkins v. Glenn*, 131 U. S. 319, 333, 9 Sup. Ct. 739.

The question still remains whether, until the amount had been ascertained, the liability was provable within the provisions of section 5068. The record in this case presents the naked question whether a stockholder's liability of this character, which had been assigned to trustees for the benefit of creditors in September, 1866, was provable by the trustees against the estate of the stockholder in bankruptcy from 1868 to 1879, no attempt having been made by the trustees to obtain a call from a proper court of chancery, and the president and directors of the corporation neglecting their duty in this regard. From other records in this court, in actions by the plaintiff or his predecessor against stockholders to recover assessments, and from the opinions of other courts in similar cases, it seems that the trustees were, upon the suit of Mayer (the present defendant), enjoined, in October, 1866, by an interlocutory order of one of the courts of the state of New York, against acting under the deed of trust in respect to the assets of the corporation,

upon the alleged ground of the invalidity of the deed; that this order was in force until 1882; that the stockholders interposed repeated hindrances against the collection of the amount due upon their unpaid subscriptions; and that the trustees did not think that this part of the assets had been assigned to them by the trust deed. It also seems that the trustees willingly yielded to this opposition upon the part of the stockholders; made and desired to make no attempt to enforce the stockholders' liability; that doubts existed until 1871 in the minds of creditors and their advisers as to the proper course of procedure; and that much litigation became necessary to settle the legal questions, which were presented in various forms. In this record the question is not incumbered by considerations in regard to an estoppel upon the defendant, or the inability of the trustees, by reason of the action of other courts, to obtain an assessment, or their lack of knowledge in regard to their title to the unpaid subscriptions. The case stands as if this class of assets came into the hands of trustees for the benefit of creditors of an insolvent corporation, who were presumably capable and willing to take, and were not hindered from taking, the requisite steps for their collection.

Section 5068 provided that the creditor could make claim for a contingent debt or contingent liability, and have his claim allowed, with the right to share in the dividends, if the contingency happened before the order for the final dividend. A contingent debt or liability is not provable when the time for its becoming a debt is uncertain and not ascertainable, or the amount is uncertain and not to be ascertained. *Riggin v. Maguire*, 15 Wall. 549; *Wolf v. Stix*, 99 U. S. 1. If we plant ourselves upon the precise language in *Scovill v. Thayer*, *supra*, and say that the stockholder was under no obligation to pay anything until the amount had been ascertained by an assessment or authorized call, it follows that the call must precede the claim, because, if the call made the debt, there was not, until such an assessment, even a contingent debt. But that language of the court must be interpreted in view of the subject under consideration, which was the relation of the statute of limitations to the debt.

It may well be assumed that, before an official act of the corporation which has proclaimed insolvency, there is no provable debt against the bankrupt estate of a stockholder. The contingency, in the case of a solvent and "going" corporation, is so remote that a claim could not with propriety be made; but when the fact of insolvency has been confessed, and an assignment for the benefit of its creditors has been made, nothing remains to be done, in order to make the liability a fixed debt, but to ascertain the amount of the assessment by the intervention either of the corporation or of a court of chancery. This intervention it was the duty of the trustees to obtain. They could not properly lie still, and permit these assets to disappear by the death or the insolvency of the stockholders; and we can now see that, if they had set proceedings in motion before a Virginia court in 1866, an assessment would have been made within a reasonable time. There

was no practical difficulty, under the facts disclosed in the record, which should have prevented the trustees from presenting their claim against the bankrupt estate, and, if the assessment should be made by the court of chancery before the final dividend, of having the claim allowed in the amount which that court should have ascertained. The remaining method of proving the claim, which is pointed out in section 5068, viz. by the valuation of the liability by the court of bankruptcy, was not in this case practicable. The difficulties in the way of reaching a result which would be anything more than a surmise, not supported by the aid of facts, are manifest. The only parties before the court would have been the trustees and the bankrupt, who could inform the court of the amount of the admitted, but not of the actual, debts. The actual amount must be obtained by a presentation of claims to a court or its master. The amount of collectible subscriptions and the amount of probable expenses would be unknown factors to a court of bankruptcy, as they proved to be to the court of chancery; but the latter court could retain, and did retain, the cause, so as to make an additional call, if necessary. In addition, no valuation by the court of bankruptcy would have the necessary requisite of equality among the stockholders.

The plaintiff relies strongly upon the English decisions in bankruptcy cases, which with great uniformity construe their bankruptcy statutes as not permitting the allowance of a claim for an unpaid subscription, unless the call preceded, or was concurrent with, the date of the bankruptcy. It is necessary to quote the important sections of the statutes in order to understand the precise point of the decisions. The fifty-sixth section of 6 Geo. IV. c. 16, is as follows:

"If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person to whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon, or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt and receive dividend with the other creditors, not disturbing any former dividends."

The important decision upon this section, and the one upon which the subsequent cases all rely, is *Railway Co. v. Burnside*, 5 Exch. 129. The calls which were in question were made after the defendant became bankrupt. Baron Parke rested his decision upon the meaning of the word "debt," and was of opinion that, when the bankruptcy occurred, no certain debt had been contracted. He said:

"Is this, then, a debt payable on a contingency under the 56th section? The contract on which the shareholder's obligation is founded is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted."

If section 5068 contained only the term "debt payable upon a contingency," Baron Parke's opinion would be of great weight; but it contains the more elastic term "liability," and the statute also implies that the liability may ripen into a debt during the settlement of the estate.

The next statute is section 75 of the "Companies Act" (chapter 89, 25 & 26 Vict.), which is as follows:

"The liability of any person to contribute to the assets of a company under this act in the event of the same being wound up shall be deemed to create a debt, accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability, and it shall be lawful, in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls, as well as calls already made."

The earlier claims of the section were apparently designed to define the liability of a contributor upon his subscription to be a debt payable when the call was made; but it has been held that the last clause of the section prevented the proving of the debt, unless the winding up had commenced by a call at or prior to the date of the bankruptcy. *Financial Corp. v. Lawrence*, L. R. 4 C. P. 731; *Hastie's Case*, L. R. 7 Eq. 3, 4 Ch. App. 274.

The decision of this case is placed upon the ground that the deed of the corporation of all its assets to trustees for the benefit of creditors, being a declaration by the corporation of its insolvency and also the commencement of the winding up, preceded the filing of the defendant's petition in bankruptcy, and that, by reason of these facts, the defendant's obligation as a stockholder became a liability with a contingency, viz. the ascertainment by a court of chancery of the amount to be paid; that this amount could have been made certain; and that it was the duty of the trustees to endeavor to make it certain before the order for a final dividend. The cases in this country, in addition to those heretofore cited, which bear upon one side or the other, to a greater or less degree, upon the provable character of the liability of the defendant, are *Irons v. Bank*, 17 Fed. 308; *Glenn v. Abell*, 39 Fed. 10; *Railroad Co. v. Clarke*, 29 Pa. St. 146; *U. S. v. Rob Roy*, Fed. Cas. No. 16,179; *Haywood v. Shreeve*, 44 N. J. Law, 101; *Glenn v. Howard*, 65 Md. 40, 3 Atl. 895; *Sayre v. Glenn*, 87 Ala. 631, 6 South. 45.

The judgment of the circuit court is affirmed, with costs.

DOWNING et al. v. OUTERBRIDGE.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. CONVERSION—MEASURE OF DAMAGES.

In an action by a dealer in flowers in Bermuda for conversion of a quantity of flowers intrusted to defendant for delivery to plaintiff's customers in New York, the measure of damages is the market value of the flowers at the time and place of conversion; but an instruction to the jury that they may give a verdict for "what the flowers were worth to the plaintiff here in the defendant's hands to go to the plaintiff's customers" is not erroneous, the jury being elsewhere charged that they

could give nothing for injury to the plaintiff's reputation with his customers, or what he might have to pay back.

2. SAME—PUNITIVE DAMAGES—INSTRUCTIONS.

It is not error, in an action for conversion, to charge the jury that, if they can say from the evidence that the defendants dishonestly overrode the rights of the plaintiff for their own purposes, knew that the goods in question were his not theirs, and, disregarding his rights, took the goods for their own uses, punitive damages may be awarded.

3. SAME—CONVERSION BY EXPRESSMAN—NEGLIGENT MARKING.

In an action against an expressman for conversion of goods intrusted to him for delivery, and which he knew belonged to the plaintiff, the fact that the plaintiff may have been negligent in marking the goods is no defense.

In Error to the Circuit Court of the United States for the Southern District of New York.

This case comes here on writ of error to review a judgment of the circuit court, Southern district of New York, entered upon a verdict for \$1,535 in favor of defendant in error, who was plaintiff below. The facts sufficiently appear in the opinion.

C. P. McClelland, for plaintiffs in error.

Edward C. Perkins, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff, in the year 1895, was a producer and shipper of lilies in the Island of Bermuda. Defendants carried on an express business between Bermuda and New York, and also sold lilies in this country. In the winter of 1895 plaintiff made contracts with tourists in the Island of Bermuda to sell them boxes of cut flowers to be delivered in various parts of the United States at Easter. The goods were to be delivered in time for Easter decorations. They were to be "delivered at the door" of the respective purchasers. Some time before Easter, defendants, by their agent in Bermuda, agreed in writing with plaintiff "to express to the United States, Canada, etc., as per schedule list, * * * boxes of cut flowers," etc. Under this contract plaintiff delivered the goods in question—210 boxes of lilies and other cut flowers—to the agent, on the morning of Thursday, April 4, 1895 (the following Sunday was the Sunday before Easter), to be shipped by the steamer Trinidad, which was to sail for New York at 12 o'clock on that day. The boxes were marked with numbers, and, after receiving them, the agent marked them with a cross, which was the shipping mark of Downing & Co. Outerbridge also gave the agent a shipping list, containing a column, the numbers corresponding to those on the boxes; against each number the name and address of the person to whom the box bearing that number was to go; and, in a separate column, the whole number of boxes to go to the person whose name was set opposite. Defendants had contracted to supply their customers with somewhere between 1,500 and 2,000 boxes. They expected to receive for this purpose, by the same steamer, between 1,800 and 2,000 boxes on their own account. The steamer brought plaintiff's 210 boxes; 610 boxes, received by defendants, as expressmen, to be shipped to various persons whose names and addresses were on the

boxes; and 711 boxes on defendants' own account,—in all 1,531. The jury found—and there was abundant evidence to sustain their finding—that defendants, knowing that the 210 boxes were plaintiffs', and not theirs, appropriated them to their own use, and sent them to their own customers in place of the boxes which they were expecting, but did not receive.

The first error assigned is that verdict should have been directed for defendants on the ground that the title had passed to the consignees, and plaintiff had no interest or possession or right of possession to support an action. No objection or exception raised this point in the circuit court, and it cannot be considered here.

The second error assigned is that the court improperly instructed the jury as to the measure of damages. The action is in tort, for conversion, and the proper measure of damage was the value of the merchandise at the time and place of conversion. Defendants duly excepted to so much of the charge as instructed the jury that they might give a verdict "for what these flowers were worth to him to send to his customers; * * * what they were worth to the plaintiff here in the defendants' hands to go to plaintiff's customers." They were worth to the plaintiff what he would have had to pay here at that time for others to replace them and send to his customers, and what he would have to pay for such flowers in this market at that time would, of course, be the market price. Standing alone, the above-quoted sentences might perhaps be understood by the jury as implying that they might give him some special damage aside from the market price; but, when the charge is considered as a whole, it is apparent that the jury could not have been misled, for the court expressly charged them that they were to give "nothing for the injury to his reputation" for failure to fulfill his contracts with his customers; that they were not to take account of "what he had to pay back, and has not paid back or has paid back, and how he has paid it back. We have nothing to do with that." There was evidence in the case of the price at which lilies sold in New York and Brooklyn at that time.

It is next assigned as error that the jury were allowed to find punitive damages. On this branch of the case the court charged:

"If you can say from the evidence in the case that the defendants dishonestly overrode the rights of the plaintiff for their own purposes; knew that these boxes of flowers were his, and not theirs; and, disregarding his right to have them go on to his customers, they took them and sent them to their own customers,—you can look at all that, and say whether you think they ought not to pay a further sum in damages; to stamp upon their conduct what you think of such things; to let the defendants know how a jury of honorable men view such things. Give such further sum as you think would be just about right to teach them and other folks how a jury look at such things; to teach them and every body else better. You will notice that you are not to go to that extent—not to allow anything for that—unless you see that the defendants are guilty of wantonly overriding the plaintiff's rights. Do not give anything unless you see that they were willfully wrong; that they knew better than to send the plaintiff's goods to their customers. You will not allow anything unless you see that. But if you do see that the defendants themselves understood this, and knew that these were not their flowers, and that they had no right, under any circumstances, to send them to their customers, if you can see that they were dishonest about it, and were not fair about it, and did not give

their customers a fair chance, and did not recognize his right, then give just as much as you think is right and proper to stamp on that conduct your condemnation. You will not allow anything unless you can see something that deserves it."

There was evidence in the case sufficient to sustain a finding that defendants knew that these boxes belonged to plaintiff, but nevertheless used them to supply the shortage on their own shipment, selling and delivering them to their own customers. If the jury found this to be the fact, and their verdict, which is for about \$1,000 in excess of the market price, proved that they did, punitive damages were properly given on the ground that defendants acted with reckless and wanton indifference to another's rights.

No error was committed in excluding evidence as to plaintiff's reputation and financial standing in Bermuda. The jury were expressly instructed that they could not give any damage for supposed injury to reputation. No evidence as to plaintiff's reputation "for truth and veracity" was excluded.

Defendants excepted to the court's refusal to charge that, "if plaintiff was negligent, in shipping the boxes of flowers, in failing to put on the names and addresses of the persons for whom they were intended, then he cannot recover." If this action were for damages for delay in delivering, or for failure to deliver, it would have been quite proper for the jury to consider how far this was due to plaintiff's own negligence; but in the case at bar no such question arises. Defendants knew plaintiff had 210 boxes on board, which he had delivered to their agent, and knew which boxes they were. The fact that he had neglected to mark the boxes otherwise than with a number, or to put the addresses on them, was no excuse for their converting to their own use merchandise which they knew belonged to another. The judgment of the circuit court is affirmed.

BOSTON & M. R. CO. v. McDUFFEY et al.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. CONFLICT OF LAWS—DEATH BY NEGLIGENCE.

A right of action given by the statutes of Canada to the widow and children of one who has been killed in that country through the negligence of another may be prosecuted to judgment by them in the courts of Vermont, though the corresponding statute of that state gives the right of action to the personal representatives of the deceased. *Dennick v. Railroad Co.*, 103 U. S. 11, followed.

2. SAME—MASTER AND SERVANT—FELLOW SERVANTS.

In an action to recover damages for death or injury resulting from defendant's negligence, the application of the rule as to the responsibility of the master for the acts of fellow servants is governed by the law of the place where the cause of action arose, not by that of the place where suit is brought, although the contract which created the relation of master and servant between the plaintiff and defendant was made in the latter place.

3. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY.

Upon an examination of the evidence, *held*, that the question of the contributory negligence of the plaintiff in this case, a locomotive engineer, in running his train, without a flagman, towards a point where he was likely to meet another train, was properly left to the jury.

4. TRIAL.—REQUESTS FOR INSTRUCTIONS.

A court is not bound to instruct the jury in the precise language of counsel's requests, if the points suggested in such requests are otherwise covered in the charge.

5. SAME.—PROVINCE OF COURT AND JURY.

It is error to submit to a jury an issue as to which there is no evidence on which to base a finding, and the submission of which is an invitation to the jury to guess without proof, especially when the jury is thereby given an opportunity to follow a possible bias against one party.

In Error to the Circuit Court of the United States for the District of Vermont.

This case comes here on writ of error to review a judgment of the circuit court, district of Vermont, rendered in favor of defendants in error, who were plaintiffs below, upon the verdict of a jury for \$5,850, damages, against plaintiff in error, defendant below. The plaintiffs are the wife and children of James B. McDuffey, a locomotive engineer in the employ of defendant, who, while on his engine, was killed by collision with another train of the defendant, at Capleton, in the Dominion of Canada. The facts pertinent to this writ of error will be found set forth in the opinion.

Stephen C. Shurtliff and John Young, for plaintiff in error.

C. A. Proutz, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The defendant, a Massachusetts corporation, operated a continuous line of railroad from White River Junction, in Vermont, to Sherbrooke, in the province of Quebec. McDuffey was a citizen of Vermont, resident at Lyndonville, in that state, where he entered into the employment of defendant, at first as fireman, afterwards as engineer. For about three years he drove the engine of a freight train between points wholly in the state of Vermont. In July, 1892, he was, at his own request, employed to drive an engine drawing a passenger train between White River Junction, Lyndonville, and Sherbrooke. It was while thus employed that he met his death, on March 12, 1894. It was contended that defendant had failed to supply reasonably safe appliances, in that a water tank on the tender was insecurely fastened, but the jury to whom special questions were submitted found against the plaintiffs on that issue. The jury further found that two of McDuffey's fellow servants, viz. Robinson, the conductor of his train, and Mower, the engineer of the colliding train, were negligent, and that such negligence caused the catastrophe.

It is contended that this action cannot be maintained by the plaintiffs, but should have been brought by the executor or administrator of the deceased. The Statutes of Vermont (section 2452) provide that such action shall be brought "in the name of the personal representative of the deceased." The Civil Code of Lower Canada (article 1056) provides as follows:

"In all cases where the person injured by the commission of an offence or a quasi offence, dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death to recover from the person who committed the offence, or quasi offence, * * * all damages occasioned by such death."

This objection seems to be disposed of by decisions of the supreme court. In *Dennick v. Railroad Co.*, 103 U. S. 11, that court says of a similar action:

"It is, indeed, a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal, and not a real, action, and is of that character which the law recognizes as transitory, and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance. Wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

Necessarily, the right of action is to be pursued by the party in whose favor it has become fixed; and in the case at bar it became fixed in favor of the "consort and relations," under the Canadian statute, by the killing of McDuffey in Canadian territory, under circumstances which made defendant civilly liable for damages to such "consort and relations." It is such right of action that plaintiffs seek to enforce, not a right of action growing out of any Vermont statute.

The case last cited was approved in *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905. In that case an injury causing death was inflicted in the state of Louisiana, upon one Cox, a freight conductor, in the employ of the railroad, the accident happening by reason of a defective roadbed. His widow brought suit in Texas, under the Louisiana statute. The court says:

"The rule [laid down in *Dennick v. Railroad Co.*, 103 U. S. 11] is generally recognized and applied where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced. The statutes of these two states are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the state of Texas."

It certainly cannot be said that the statute of Canada is "in substance inconsistent with the statute" of Vermont, which also provides that for negligence causing death the offender shall respond in damages as he would have to do had death not ensued; nor are the statutes "essentially dissimilar" when the one provides that such damages shall be collected by an executor or administrator who shall thereafter distribute the same to the persons who under the other statute may bring suit directly. To this effect is *Wooden v. Railroad Co.*, 126 N. Y. 10, 26 N. E. 1050.

It is not disputed that Robinson and Mower were fellow servants with McDuffey. Had this accident occurred in Vermont, and McDuffey survived, the fact that the negligence which caused the collision was, as the jury has found, that of a fellow servant, would have prevented recovery.

The law of Canada was proved as a fact in the circuit court. Besides article 1056, already quoted, the following articles from the Civil Code were read:

"Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

"Art. 1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control, and by things which he has under his care. * * * Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work in which they are employed."

The expert called for plaintiffs testified without contradiction that, as construed by the Canadian courts, these articles applied to corporations, and that, where an accident causing injury to a servant was the result of the negligence of a fellow servant, the employer would nevertheless be liable in damages to the injured person, and, in the event of his death within the time prescribed, to the persons to whom article 1056 gave the right of recovery. It is contended by plaintiff in error, however, that the law of Vermont is to be applied here, and that since it appears from the special verdict that the efficient cause of the accident was the negligence of a fellow servant, plaintiffs cannot recover. In other words, does the law of Canada or the law of Vermont determine the question of liability for the consequence of this accident?

This is not an action to recover upon a contract, but for damages resulting from a tort committed elsewhere than in the state where the action is brought. The right of action accrued where the tort was committed, and it is to enforce such right of action that suit is brought. It is sufficient to refer to *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978 (citing, with approval, *Herrick v. Railroad Co.*, 31 Minn. 11, 16 N. W. 413), as authority for the proposition that "in such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*." The question whether or not an injured servant shall have a right of action for damages against a negligent master, when such master's negligence has been committed through the instrumentality of another servant, is one which deals with the right of action itself, not with the remedy. In our opinion, it makes no difference that the contract by which the relation of master and servant was established was made in Vermont. Conceding that it is to be assumed that, under such contract of employment, McDuffey assumed the risks incident to the negligence of his fellow servants on so much of his run as lay within that state, where such negligence gives no right of recovery for resulting injuries or death, it does not follow that he agreed thereby to assume like risks when running his engine in Canada, where the statutes gave a right of recovery therefor. The answer to the forcible argument of counsel for plaintiff in error based upon the language of the supreme court in *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, is that in the case at bar we are dealing, not with general law, but with statutory enactments.

The next point to be considered is as to the alleged contributory negligence of McDuffey. It is conceded that the law of Canada is the same as the law of Vermont in this particular, and that, if

the accident happened by McDuffey's fault in whole or in part, plaintiffs would not be entitled to recover, unless it should appear that after such fault had placed him in a position of danger, which defendant's servants saw or should have seen, they failed to take some proper precautions, which, if taken, would have avoided the accident. The questions arising upon this branch of the case are presented—First, by exception to a refusal to direct a verdict for the defendant; second, by exception to a refusal to charge certain requests; and, third, by exceptions to portions of the charge. To a proper understanding of the points raised by these exceptions, it will be necessary to set forth the material facts in proof.

The railroad is a single-track one, with sidings at the different stations. By the use of these sidings, only, can trains pass each other. The siding at Capleton lies to the west of the main line, with which it connects by switches at the north and south ends of the yard. The north-end switch is about 650 feet north of the station. The south-end switch is about 1,213 feet south of the station. The frog of the south-end switch (which is the point of intersection of the easterly rail of the siding with the westerly rail of the main line) is 63 feet north of the switch. The place on the main line on which a train could stand with safety while another train was running from the main line onto the siding through the south-end switch lies about 40 feet further north than the frog. There were no fixed signals at Capleton. McDuffey, the deceased, was running a south-bound train, of which Robinson was the conductor, and Mower, as engineer, was running a north-bound train. Both trains were of the same class,—regular passenger trains. These trains were, under special orders in writing duly delivered to the conductors and engineers, to meet and pass at Capleton, and McDuffey's train reached that station first.

Numerous printed rules of the railroad in force at the time were read in evidence. So much of these rules as is material to the questions now to be discussed is here given:

"Rule 9. * * * Outward trains are * * * north-bound trains; inward trains are * * * south-bound trains."

"Rule 16. In the absence of special orders, regular inward trains will wait at designated meeting places indefinitely for a delayed outward train of same or superior class. No regular train will leave a terminal station, or pass a station that is a terminal for another train of same or superior class, until all such trains that are due or overdue have arrived.

"Rule 17. No train will leave a station expecting to meet or to be passed at the next station by a train having the right of track, unless it has ample time in which to make the meeting or passing point, and clear superior trains as per rules. All trains approaching stations not protected by fixed signals, where they expect to meet or pass other trains, must be under full control, so that, if signaled, they may be stopped.

"Rule 18. When trains of the same class are to meet, the inward train will take the siding unless otherwise ordered."

"Rule 43. Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their train. They must take every precaution for the protection of their trains, even if not provided for by the rules."

"Rule 71. He [referring to conductor] will have entire charge of the train while on the road, and will make its safety his first care. He is responsible

for its movements, but when there is any doubt as to the right of road, or safety of proceeding, from any cause, he will consult the enginemen, who will be equally responsible for the safety of the train."

"Rule 277. Special orders in regard to the movements of trains must be made in writing, addressed to the conductor and enginemen in charge of the same, and must be taken on manifold paper. Never take verbal orders for the movement of trains or engines."

"Orders must be made plain and explicit, and, if not fully and completely understood by the parties addressed, an explanation must be required before taking the order. After the reception of an order, it must be obeyed fully and to the letter. Conductors and enginemen must not accept an erased, altered, or interlined order. They must make sure that they are meeting the trains and engines specified in their train orders at meeting and passing points."

"Rule 350. At stations where a passenger train is expected, freight trains must stand on a side track if possible. When they cannot do so, the conductor of such trains will post a flagman a sufficient distance from his train towards the expected train to prevent the possibility of a collision. The same rule will apply at all meeting places of all trains, when one train is obliged to proceed towards the further end of the station yard for the purpose of setting off before the arrival of the other train. ["Setting off" means running from the main track, through the switch, onto the siding.] It must be remembered that the right of road at meeting places does not extend beyond the nearest switch. All trains approaching a station where they expect to meet or pass other trains must be under full control, so that they may, if necessary, be stopped before reaching the nearest switch, and will not pass the station at a greater speed than ten miles per hour."

When McDuffey's train stopped at Capleton, the conductor, Robinson, and himself, went into the station, and received a train order, which instructed them that trains "Nos. 11 & 18"—i. e. their own and Mower's—were to meet, and therefore to pass, at Capleton. After receipt of this order there was a conversation between them as to what should be done. The most natural course would have been to back up, and run onto the siding, or to "set off" through the north-end switch; but it appears that that end of the siding was blocked with freight cars, and that it would be the more convenient way to "set off" through the south-end switch. The result was that the train was moved southward beyond the station, with the intention, as the conductor testified, of operating the switch, and setting off the north-bound train onto the siding. The conductor further testified that this plan was suggested by McDuffey, but, upon the evidence, it was a fair question for the jury to say which one proposed it. At any rate, McDuffey understood that they were to move southward from the station. He went onto his engine, drew his train south on the main line, and kept it moving until collision, or until only an instant before. At that time his engine was about 10 feet north of the frog, and something over 70 feet north of the south-end switch. No one had as yet moved the switch to set off the north-bound train. No red light or signal preceded McDuffey's train, nor was any signal man posted a sufficient distance from his train towards the approaching train to prevent the possibility of collision; nor did Robinson, the conductor, take any steps to have this done. About 350 feet beyond the south-end switch the road took a sharp curve to the west, around a high knoll, which then obstructed the view of a train approaching from the south. Mower, the engineer of the north-bound train, shut off steam one-half mile south of the switch,

and before his train passed around the curve. As soon as his train rounded the curve, and came in sight of the south-bound train, he applied the air brakes, and reversed his engine. Nevertheless, his train drove on more than 70 feet beyond the switch, and collided with McDuffey's.

It will be noted that the setting off of the north-bound train, had it been accomplished, would have been in direct violation of rule 18. Robinson, the conductor, testified that "it is not considered that that rule is imperative." His theory apparently was that his train had the right to move south as far as the switch, carrying the flagman on the engine, and sending him forward after reaching the switch. It is unnecessary to enter into any discussion as to this part of the case. The jury has specifically found that Robinson was negligent, and we must accept that as an established fact, though it cannot be determined whether the jury thought that his negligence consisted in allowing the train to run south as far as it did, or in failing to keep his signal man far enough in advance to avoid collision. It is plain, however, that the question of McDuffey's negligence was one which was properly left to the jury, because, if they should find that the train might properly be moved southward from the station when effectually protected by a signal man far enough in advance (and we cannot see why that may not have been a perfectly proper course when the north end of the siding was blocked), they might also find that it was primarily the duty of the conductor (rule 350), and not of McDuffey, to send forward the flagman; and the only question would then be whether McDuffey was reasonably prudent, under all the circumstances, in relying on Robinson to attend to that, and in going forward upon the assumption that it had been done. If, therefore, the jury had found specifically that McDuffey was not guilty of any negligence which contributed to the accident, there would be no difficulty in sustaining such finding. But they have not done so. Specific questions were put to them touching the sufficiency of the fastenings of the water tank, the negligence of Robinson, and the negligence of Mower; but, most unfortunately, it does not seem to have occurred to any one to ask them specifically as to the alleged negligence of McDuffey. There are many cases in which it is eminently desirable to have the jury return special findings; but, when such cases arise, it will generally be found useful to have them return specially as to all the controlling issues of fact in the case, since it is not always certain that their general verdict will indicate the process by which it is arrived at. This review of the facts, however, shows that the exception to the refusal of the court to direct a verdict in favor of defendant on the ground of McDuffey's contributory negligence is unsound.

The defendant excepted to a refusal to charge the following requests:

"(4) That if the death was the result of the negligence of the deceased, either in whole or in part, the plaintiffs cannot recover.

"(5) That if the death was the result of the negligence of a co-employee of

the deceased, in which negligence the deceased knowingly participated, the plaintiffs cannot recover.

"(6) That if the death was caused by the negligence of Robinson in not sending a lookout ahead to signal the north-bound train, and stop it, or turn it upon the side track at the south end of the yard, and the deceased voluntarily consented to take the south-bound train to the south end of the yard, knowing that no one had been sent south to signal the approaching train coming north, that the question of the defendant's liability does not arise.

"(7) That any act which caused the death, and was voluntarily consented to or participated in by the deceased, with a full knowledge of the peril, is not a basis of recovery by the plaintiffs."

The court was under no obligation to follow the language of these requests. That every point suggested by them was fully covered, the following excerpts from the charge sufficiently show:

"Was [Robinson] in fault in going down there without a flagman ahead, and if so, did McDuffey concur in going down there without a flagman ahead? If he did, why then McDuffey would have no grounds to complain if he went down there and was hurt. * * * Look at it, and say * * * whether McDuffey concurred, agreed to it, went along understanding that there was no flagman there. If he did, there would be no grounds of recovery by the plaintiffs; but if * * * you find McDuffey did not know there was not any flagman ahead, but went on supposing there was one, and was not careless, then plaintiffs would have a right to recover."

And elsewhere the court charged that, if McDuffey's "own fault either in whole or in part [caused his death], he is not entitled to recover," with a qualification which belongs to another branch of the case, and will be subsequently considered. The exceptions to refusal to charge as requested are therefore unsound.

Defendant separately excepted to the court's instructions to the jury that "plaintiffs could recover although McDuffey drew his train south of the station to the place of accident wrongfully, and concurred in the wrongful act of drawing it there without a signal in front of it"; and that "if McDuffey was wrongfully at the place of the accident, and Mower was guilty of negligence, defendant was liable." While these exceptions do not give the precise text of the charge, they sufficiently indicate the parts objected to, and bring up the question as to Mower's negligence. As we have seen, the jury has specifically found him negligent, and there was sufficient evidence to warrant such finding. Rule 350 made the south switch the terminus of his right of way, and required him to approach the station with his train under such control that it could, if necessary, be stopped before reaching the switch. The necessity of stopping became apparent to him as soon as he rounded the curve, so as to sight the south-bound train; but he was evidently unable to stop until he had run 70 feet or more beyond the switch. He seems, from his evidence, to have supposed his right of way ran to the station. Upon the proof, the jury might fairly find that he was negligent in not approaching the station with his train sufficiently under control; that he had not reduced speed sufficiently before he came to the curve, and, rounding it, learned that it was necessary to stop short of the switch. But such negligence on his part would not deprive the defendant of whatever defense it might have arising from McDuffey's own negligence. To lose the benefit of such defense, it must appear that

a defendant has been guilty of some negligence subsequent to the time when he knew or ought to have known that the other's negligence had created a position of peril. *Coasting Co. v. Tolson*, 139 U. S. 557, 11 Sup. Ct. 653; *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679. "It is only when the negligence of one party is subsequent to that of the other that the rule can be invoked. When the negligence of the two parties is concurrent at the time of the injury, it makes no difference that one discovered the negligence of the other before the catastrophe, but too late to prevent it." 4 Am. & Eng. Enc. Law, p. 30.

The court charged the jury that one question they would have to answer was: "Supposing McDuffey's train was there wrongfully, with his concurrence, could Mower, by the exercise of the diligence required of him, have prevented running into it? * * * After he had looked or was bound to look, could he, if he had exercised ordinary prudence required under such circumstances, have prevented running into this train?" And, elsewhere, that, if the accident was in whole or in part McDuffey's fault, there could be no recovery, "unless Mower's fault did it, and did it after Mower knew of the train being in the wrong place, or might have known by observing." Upon this branch of the case the court charged at considerable length, and there are expressions used which plaintiff in error contends were calculated to lead the jury to suppose that they might find such negligence in Mower as would eliminate any possible defense of contributory negligence, if he rounded the curve at such a high rate of speed that he could not control his train after the danger was apparent, and before the switch was reached. It is not necessary to examine the language of the charge to see whether there is any force in this contention, since it is manifest that the jury were given to understand that there was evidence in the case from which they might find that Mower had been guilty of some negligence after the danger was apparent. The record submitted here, however, negatives any such hypothesis. It is expressly stated in the bill of exceptions, as certified by the judge who tried the cause, that:

"The testimony on behalf of the railroad tended to show, and was not contradicted, that the engineer, Mower, of the north-bound train, shut off the steam one-half mile south of the switch at the south end of the said yard, and before his train passed round said curve, into sight of the station at said Capleton or said south switch; and as soon as his engine came round said curve, and in sight of the south-bound train driven by said McDuffey, said Mower applied the air brakes to the wheels, and reversed his engine, and did all that could be done to stop his train. There was no evidence offered tending to show that anything more could have been done to stop the north-bound train after the south-bound train was discovered, by said engineer, Mower, or his fireman, Fowler, or that either could have discovered the south-bound train quicker than they did in fact discover it."

In view of this state of the proof, it was error to submit to the jury any question as to whether they thought Mower was negligent after he could have seen the other train, there being, so far as the record shows, not a scintilla of proof on which to base a finding that he was thus negligent. It was an invitation to the jury to guess without proof; and, in view of their usual bias in

cases of this kind, it would not be surprising if they guessed against the defendant. The case in that respect is quite similar to *Railroad Co. v. Blessing*, 14 C. C. A. 394, 67 Fed. 277, in which we pointed out the impropriety of instructing the jury upon assumed facts to which no evidence applies.

If we were able to determine in any way that the jury reached the conclusion that McDuffey was not negligent, this verdict might be sustained. Thus, if they had found Robinson free from fault, it would be manifest that they must have reached the same conclusion as to McDuffey. But they have found that Robinson was negligent, and we cannot tell whether they gave plaintiffs a verdict because they thought McDuffey did not participate in that negligence, or because, finding McDuffey negligent, they nevertheless guessed (as they were practically told they might do) that Mower might have done something to avoid the catastrophe. Under these circumstances, there seems nothing to do but reverse the judgment, and remand the cause for a new trial.

CITY OF GREAT FALLS v. THEIS et al.

(Circuit Court, D. Washington, E. D. March 29, 1897.)

1. MUNICIPAL BONDS—DELAY OF BUYER TO QUESTION VALIDITY.

Where a contract for the sale of municipal bonds provided that the city should furnish full information and copies of the record of all proceedings affecting the validity of the bonds, and that the buyers should give notice of their rejection of the bonds for illegality, prior to a specified date, otherwise they should be deemed to have accepted them, the city waived the right to enforce the time provision with strictness by its own delay in furnishing copies of its records, and by its action in submitting the records to the attorneys known to have been employed by the buyers to pass upon the validity of the bonds after the time to give notice of rejection had elapsed.

2. SALE—DOUBT AS TO VALIDITY.

A buyer of municipal bonds from the city is not liable in damages for refusing to accept them when their marketable value is destroyed or impaired by questions of legality arising from facts shown by, or omissions in, the city's own records; and it is immaterial that after his refusal, and after the bonds have been sold by the city to other parties, the state supreme court adjudges the bonds to be valid, as the purchaser then has no opportunity to accept them with the benefit of such adjudication.

Forster & Wakefield, for plaintiff.

Blake & Post, for defendants.

HANFORD, District Judge. This is an action at law by the city of Great Falls, a municipal corporation of the state of Montana, against the firm of Theis & Foster and the Washington National Bank of the City of Spokane, upon a contract and a check. The contract was entered into by Theis & Foster, whereby they agreed to purchase bonds of the city of Great Falls to the amount of \$100,000. The check was drawn by Theis & Foster upon the Washington National Bank for the sum of \$5,000, and was duly certified by the bank, and was deposited with the treasurer of the city of Great Falls as a guaranty

of good faith on the part of Theis & Foster in bidding for the purchase of said bonds, and was intended to insure performance of the contract on their part. By stipulation of parties, a jury was waived, and the case has been tried and submitted to the court for its decision upon all the questions of fact and law.

Upon consideration of the evidence, and admissions of the parties, I find the material facts to be as follows: Pursuant to a resolution of the city council of Great Falls, there was submitted to the qualified electors of said city, to be voted upon at an election held on the 11th day of April, 1892, propositions to issue bonds of the city as follows: \$40,000 to provide means for the purchase of land for a city park, \$30,000 for the purpose of funding the floating debt of the city, \$30,000 to provide means to pay for the construction of a main sewer in said city. The vote at said election was favorable to the issuance of all of the bonds proposed. Assuming to act under authority conferred by vote of the electors as aforesaid, the city officers advertised the bonds for sale, and invited bids therefor. Theis & Foster put in a bid for all of said bonds, accompanied by the \$5,000 check above mentioned. Their bid being accepted, they afterwards signed the contract above mentioned, agreeing to purchase the bonds, and pay the amount bid therefor within a specified time. In the contract it is provided that the city should furnish full information and copies of the record of all proceedings affecting the validity of the bonds, and that the buyers should give notice of their rejection of the bonds for illegality prior to a specified date, otherwise they should be deemed to have accepted them. There was delay in completing the transaction, and, after the time had passed for the buyers to give notice of rejection, a representative of the city submitted copies of the record to Messrs. Hornblower, Byrne & Taylor, attorneys at law in the city of New York, upon whose opinion as to the validity of the bonds the buyers depended, and said attorneys afterwards gave an opinion adverse to the bonds. Without receiving formal notice from the buyers of their rejection or acceptance of the bonds, the same were disposed of to other parties, and that transaction gave rise to a lawsuit in the courts of the state of Montana, which culminated in a decision of the supreme court sustaining the validity of the bonds. See *Dunn v. City of Great Falls*, 31 Pac. 1017-1020. No ordinance of the city was ever passed authorizing said propositions to be submitted to the voters at said election, nor authorizing the issuance or sale of bonds, nor authorizing the officers of the city to enter into said contract with Theis & Foster. The vote in the city council upon which the resolution authorizing the submission of the question of issuing bonds to the voters at said election was not taken by ayes and nays. There is no competent evidence in the case before me to prove that notice of the proposed sale of said bonds was advertised, as the laws of Montana prescribe that such notice shall be advertised. At an election held in the city of Great Falls on April 14, 1891, a proposition was carried to issue bonds of the city to the amount of \$50,000, and the bonds so authorized were issued and disposed of, and were outstanding on the 11th day of April, 1892.

The several provisions of the Montana statutes material to be considered are as follows: By section 325, div. 5, of the Montana Com-

piled Statutes, under which the city of Great Falls was incorporated, the city is given limited power to borrow money and issue bonds; and power is conferred upon the city council to pass ordinances for the purpose of carrying into effect the powers of the corporation. No other mode of exercising the power to borrow money or issue bonds is provided. This section also enumerates the purposes for which the city may borrow money, and the purchase of land for a city park is not among the things enumerated. Sections 326 and 334 of the same statute prescribe the style in which all ordinances must be formulated, and provides for keeping a proper record thereof. Section 337 requires that upon the passage of ordinances and resolutions by the city council the ayes and nays shall be called and recorded, and that an affirmative vote by a majority of the members shall be necessary to pass any ordinance or resolution. Section 370 gives the mayor power to sign or veto any ordinance, and no ordinance can take effect until it shall have been submitted to the mayor for his signature. Section 3 of an act dated September 14, 1887, which was in force at the time of the transactions here involved, prescribes that notice of a proposed sale of city bonds must be advertised for four weeks in a newspaper of the city, and also in a newspaper published in the city of New York. Section 2 of the statute last cited provides that an election for the purpose of authorizing the issuance of bonds by a city shall not be held oftener than once in 12 months.

Theis & Foster failed to take the bonds and pay for them, and they defend this action for the reason that they were advised by their attorneys, Messrs. Hornblower, Byrne & Taylor, that said bonds were invalid, because the city failed to conform to the laws of the state in the proceedings referred to. On the other hand, the city relies upon the decision of the supreme court of Montana in the case of *Dunn v. City of Great Falls* as a final determination by the court of highest authority, affirming the validity of the bonds, and it also maintains that Theis & Foster waived all right to reject the bonds by their failure to give notice of such rejection prior to the date fixed by the contract for giving such notice. I accept, without question, the decision of the supreme court of Montana in the case of *Dunn v. City of Great Falls* as a final adjudication of the only question which the record in that case presents; that is, whether or not the bonds were invalid, by reason of the amount thereof, when added to other indebtedness of the city, being in excess of the limitation upon the power of the city to incur indebtedness, prescribed by the constitution of the state. The report of the case shows that every other question affecting the legality of the bonds must have been excluded from the consideration of the court by the manner in which the case was made up and submitted, for it must be presumed that the court considered and passed upon all questions arising from the facts appearing by the record, and the opinion of the court certainly gives no hint of any other question in the case. Other questions of a serious nature are presented in the record before me, and must receive attention, before a decision can be rendered determining the rights of the parties in this action. I do not think that Theis & Foster should be estopped from questioning the validity of the bonds by reason of their failure to give notice of their rejection

of the bonds in time. The contract plainly shows that the parties contemplated an examination of the city records, and the buyers were of right entitled to have a reasonable time for that purpose after the copies were furnished. Therefore I hold that the plaintiff waived the right to enforce the time provision with strictness by its own delay in furnishing copies of its records, and by its action in submitting the records to the attorneys, who were known to have been employed by Theis & Foster, to pass upon the validity of the bonds, after the time for Theis & Foster to give notice of rejection had elapsed.

The question whether the bonds are actually valid or invalid, is one which affects parties who are not in this court litigating for their rights. My opinion as to the proper construction of the contract, and the law applicable thereto, enables me to reach a conclusion in this case without forming or expressing any opinion whatever upon that question. It is a matter of common knowledge that municipal bonds and such like securities are bought and sold and hypothecated as the necessities or convenience of investors may require. Investors and financial agents who handle this class of paper for large amounts are in most instances but little acquainted with the proceedings upon which the validity of such paper depends. It is therefore necessary, to give such paper commercial value, to have an examination and certificate by lawyers capable of detecting irregularities and omissions of such a nature as to raise serious questions, and whose reputation is sufficient to command confidence, and give weight to their opinions in financial centers. Theis & Foster did not propose to blindly invest over \$100,000 in obligations of the city of Great Falls merely to acquire a right of action, and take their chances of a favorable decision in the courts in case the city itself, or any of its taxpayers, should see fit, at any time, to dispute the right of the city to incur indebtedness to the amount and for the purposes mentioned. In view of these well-known facts, and in accordance with the usages of the country in such transactions, it is necessary, in order to give effect to the intentions of the parties, to read into the contract an implied condition that the buyers should not be bound to take the bonds unless the proceedings of the city government had been conducted in substantial conformity with the laws, and proper records had been made, so that competent lawyers of good reputation would be able to certify to the validity of the bonds. In every contract to sell land and give a good and sufficient deed there is an implied warranty for a marketable title, and the vendor cannot enforce the contract against his vendee, when there is an apparent flaw in his title, for in such a case the court will not hazard an opinion as to whether or not the title can be sustained, if it should become the subject of litigation. For the same reasons the courts must, in such cases as the one under consideration, refuse to adjudge a party liable to pay damages for refusing to accept municipal bonds without marketable value, where the value is destroyed or impaired by questions of legality arising from facts shown by, or omissions in, the plaintiff's own records.

The decision in the case of *Dunn v. City of Great Falls* affords no ground for fastening liability upon the defendants in this action, for the reason that that case did not originate until after the bonds had been disposed of to other parties, and the plaintiff had deprived itself of power to afford Theis & Foster an opportunity to accept the bonds, with the benefit of a decision affirming the validity thereof, by the supreme court of the state; and for the further reason that said decision does not settle the questions arising from the failure of the city government to exercise its power to borrow money by the passage of proper ordinances, as required by its charter; nor as to its power to borrow money for a purpose not authorized by any express provisions of law; nor as to the validity of a vote on the question of issuing bonds at an election held within 12 calendar months after an election authorizing bonds previously issued. For the reasons above given, I hold that no breach of the contract has been proven, and the defendants are not liable. Findings may be prepared, and a judgment in favor of the defendants entered thereon, in accordance with this opinion.

SABIN v. BARNETT et al.

(Circuit Court, D. Washington, W. D. March 10, 1897.)

1. SHERIFF'S BONDS—DEFAULTS OCCURRING BEFORE EXECUTION.

It seems that, under the Washington statutes, the sureties on a sheriff's bond assume responsibility for all the sheriff's official acts, and are liable for defaults occurring before the execution of the bond.

2. SAME—DUTIES AS TO WRITS OF EXECUTION.

Under 2 Hill's Code Wash. § 496, where a sheriff has received money upon a sale of attached property before judgment he must pay the money to the clerk forthwith, after receiving the writ of execution upon the judgment, but there must be an actual writ; and he is not in default, or liable upon his bond, for failure to pay the money over upon a simple order directing him to pay the money into court.

Wirt Minor and W. C. Sharpstein, for plaintiff.

Bogle & Richardson, Edward F. Hunter, and C. H. Forney, for defendants.

HANFORD, District Judge (orally). This is an action by R. L. Sabin against John W. Barnett and others upon an official bond given by Barnett as sheriff of Lewis county. The other defendants are sued as his sureties. The amended complaint, after alleging the election of Barnett to the office of sheriff, and the execution by him and his sureties of two separate official bonds, upon which the suit is founded, alleges as a cause of action that on the 8th day of February, 1893, the plaintiff in this case commenced an action for the recovery of money in the superior court of the state of Washington, for Lewis county, against one Richardson, and in that action there was a writ of attachment issued, which the defendant Barnett, as sheriff, levied upon certain goods, wares, and merchandise, as the property of Richardson; that afterwards, on the 17th day of May, 1893, the plaintiff obtained a judgment in that

action for the sum of \$2,015.50, together with costs and interest; that on the 19th of April, 1893, an order was made in that action by the superior court of Lewis county that the attached property be sold by the sheriff, and that pursuant to that order the sheriff did sell the property, receiving therefor the sum of \$4,500; that afterwards, in August, 1894, after notice to show cause, the superior court of Lewis county made an order directing the sheriff to pay into court the amount of money required to satisfy the judgment; that the sheriff was present when the order was made, and had knowledge of the making of the order, and consented to it. The amended complaint then charges that the sheriff did not retain the money obtained by the sale of property to answer the judgment, and that he did not apply the money to the satisfaction of the judgment, but that he converted the money to his own use, and never paid any part of the money received by him upon said judgment, and that the judgment remains wholly unpaid. That is the substantial part of the case, as set forth in the amended complaint. To this amended complaint the defendants have interposed a demurrer. As I understand it, all the defendants demur upon the ground that the facts stated in the complaint do not amount to a legal default on the part of the sheriff; that he has not made default, because the time has never come when he was legally required to pay over the money. And, in behalf of some of the sureties, another ground of demurrer is urged, that they became sureties upon the official bond after the default had actually occurred, and that they, as sureties, cannot be held for this alleged default on the part of the sheriff. I will not say anything further in regard to this second ground of demurrer than this: That it is my opinion that, under the provisions of the law in force at the time of executing the bond, the sureties voluntarily assumed responsibility for all the sheriff's official acts, and I will overrule the demurrer on that ground. But I think the demurrer must be sustained upon the first ground, because it is my opinion that the plaintiff has failed to take such proceedings as to require the sheriff to pay the money; that the action has been commenced prematurely, before the time had ever come around when the sheriff was obliged legally to pay over the money. There are several provisions of the Code in force at the time of these proceedings which are necessary to be referred to in order to determine what the duties of the sheriff were, and which, in my opinion, are prerequisite to a liability on his official bond. Section 303 of 2 Hill's Code provides for a sale of property held under attachment, to be made under an order of the court. Section 304 prescribes that money received from the sale of property held under an attachment, and sold by order of court, shall be retained by the sheriff to answer any judgment that may be recovered in the action. This section makes the sheriff the legal custodian of the money, up to a certain time, and for a certain purpose. Now, that purpose is to apply the money to satisfy a judgment. Section 464 prescribes how a judgment is to be enforced. The first part of the section is all that it is necessary to read. It provides:

"That the party in whose favor judgment has been given, or may hereafter be given or entered in any court of record in this state or the territory of Washington, may have an execution issued at any time for the collection or enforcement of the same."

Now, that describes the manner in which a judgment is to be enforced. It is by an execution, and the other sections I am going to refer to show that that means a writ, and that there can be no substitute for the process that is contemplated by this statute for enforcing a judgment. Section 465 prescribes that there shall be four kinds of executions. Section 466 prescribes which one of the four kinds of judgments shall be issued to enforce a money judgment.

It has been said in argument that the law does not prescribe any form for an execution, but counsel is in error about that, because section 467 provides:

"The writ of execution shall be issued in the name of the state of Washington, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff of the county in which the property is situated, or coroner when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the county where judgment was rendered, the names of the parties, the amount of the judgment if it be for money, and the amount actually due thereon, and shall require substantially as follows: If it be against the property of the judgment debtor it shall require the sheriff to satisfy the judgment with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found out of his real property upon which the judgment is a lien."

The other provisions it is not necessary to read.

Section 469 prescribes the duty of the sheriff upon receiving the writ, and provides:

"The sheriff shall endorse upon the writ or execution, the time when he received the same, and such execution shall be returnable within sixty days after its date to the clerk who issued the same; and no sheriff shall retain any money collected on execution more than twenty days before paying the same to the clerk of the court who issues the writ under penalty of twenty per cent. on the amount collected to be paid by the sheriff, the one half to the county commissioners of the county wherein the action was brought for the use of the school fund of said county."

Now, that is the section that fixes the time when the sheriff may become in default for nonpayment of money, which is 20 days after he has collected the money upon the execution, and until that time he cannot be charged as a defaulter, because he is authorized to hold the custody of the money that length of time, providing that the time does not run over the return day of the writ, which is 60 days after it is issued; and he is not required to pay money to satisfy a judgment, because that is not his province. It does not come within the scope of his official duties to apply the money to pay a judgment by paying it to the party in whose favor the judgment is recovered. That is the duty of the clerk, and it is provided for in the latter part of this same section (469), which requires the clerk to apply the money in satisfaction of the judgment. The sheriff has no right to make any other disposition of money recovered upon execution, except to pay it into the hands of the clerk. That is the only way he can clear himself from liability. Now, there is another section that is specific in its

application to money received upon a sale of attached property before judgment. It is section 496 of the Code, and it provides:

"When the writ of execution is against the property of the judgment debtor it shall be executed by the sheriff as follows: If property has been attached he shall endorse on the execution and pay to the clerk forthwith, the amount of the proceeds of sales of perishable property or debts due the defendant received by him sufficient to satisfy the judgment."

The word "forthwith" would perhaps make a different rule as to the time the sheriff might retain the money. Instead of retaining it 20 days, he would be required, under that section, I take it, to pay the money forthwith. But "forthwith" means after he has received the writ, and there must be an actual writ. It has been said in argument that a writ of execution would be unnecessary; that there would be no function for the writ to perform in a case where the sheriff had the money in his hands sufficient to satisfy the judgment; that a simple order of the court, directing him to pay the money into court, would take the place of an actual writ. But it will be observed, in the different sections that I have referred to of the Code, that the law specifically provides that an actual writ shall issue, and prescribes that the sheriff shall perform certain duties with reference to that writ; and the object of it is to maintain orderly proceedings, and to have a record kept. The orderly way to enforce a judgment is to have process of the court issued, and to have it delivered into the hands of the officer authorized by law to execute it, and for him to make certain indorsements upon that writ and return it. He is required to indorse the time he receives the writ, and his proceedings under it. There is no way that a sheriff could protect himself or his sureties upon his official bond for the proper application of money that comes into his official custody, except by executing legal process in the manner prescribed by law. He must conform to the requirements of the law as to the manner of executing the writ, and make the proper return upon the writ; and, if he does that, he is clear of liability, and, unless he does it, he is not clear. Now, in this case this amended complaint fails to show that any execution was ever issued, or anything equivalent, or that could take the place of an execution. The most that is claimed is that there was an order of court made, and that the sheriff had knowledge of it and consented to it; but, even if that order of court could be deemed a writ, it would have to be put in form so it could be treated as a writ, and indorsements made upon it. A certified copy, with the seal of the court and signature of the clerk, would be necessary to make it a writ upon which the sheriff could be required to act, and upon which he could make his return. As that writ has not been issued, and as the time has never yet come when the sheriff could be called upon to apply the money upon the writ, there has been no default, in my opinion, which subjects him and his sureties to liability in this suit. The demurrer is sustained and exceptions are allowed.

AMERICAN FREEHOLD LAND MORTGAGE CO. OF LONDON, Limited,
v. WOODWORTH.

(Circuit Court, N. D. New York. March 29, 1897.)

CONFLICT OF LAWS—CORPORATIONS—STOCKHOLDER'S LIABILITY—PLEADING.

Where an action at law is brought in a federal court in New York to charge a stockholder in a Kansas corporation, under the Kansas statute, to the extent of his liability, with a judgment against the corporation, it is sufficient to allege the recovery of the judgment and the return of execution unsatisfied, without averring the original debt, as the Kansas statute makes the judgment at least presumptive evidence; and it is immaterial that the New York courts in similar cases require the original debt to be recited, as the question is one of proof, and not of pleading.

The plaintiff, a foreign corporation and a judgment creditor of a Kansas farm mortgage company, brings this suit against the defendant, who is a shareholder of the latter company, to recover an amount equal to the amount of his stock, under a liability created by the constitution and laws of Kansas.

The defendant demurs upon two grounds: First, that the court has not jurisdiction of the subject of the action; and, second, that the complaint does not state facts sufficient to constitute a cause of action. The recovery of the judgment against the Kansas mortgage company with the return of the execution unsatisfied is fully alleged in the complaint, but the defendant insists that this is an insufficient allegation of indebtedness. The proposition thus presented was the one principally discussed at the argument, and will be the only one decided. There are other important questions presented by the demurrer, but as they are also involved in many similar causes which are likely to come before the court, it was suggested by the defendant's counsel that their consideration be postponed until all parties have had an opportunity to be heard. In this course the plaintiff's counsel acquiesced.

P. Tecumseh Sherman and W. Pierrepont White, for plaintiff.
William F. Cogswell and W. N. Cogswell, for defendant.

COXE, District Judge (after stating the facts as above). The fourth paragraph of the complaint alleges, succinctly, the recovery of the judgment in favor of the plaintiff and against the Kansas mortgage company for \$34,607 in the United States circuit court for the district of Kansas. The fifth paragraph alleges the return of the execution unsatisfied. The defendant insists that these averments are wholly insufficient to support the action, as the judgment is not even *prima facie* evidence of indebtedness. That this is the rule in the courts of New York can hardly be doubted. *Arms Co. v. Barlow*, 63 N. Y. 62, 72; *McMahon v. Macy*, 51 N. Y. 155; *Moss v. McCullough*, 5 Hill, 131; *Miller v. White*, 50 N. Y. 137. It should be remembered, however, that this action is brought not under the laws of this state, but to enforce a remedy given by a statute of Kansas which makes the judgment against the corporation, at least, presumptive evidence. A more rigorous and summary statute it would be difficult to imagine. It is not even necessary to recover judgment against the shareholder. If an execution against the corporation be returned unsatisfied, an execution may, by leave of the court which pronounced the judgment, issue on the same judgment against the shareholder. Instead of proceed-

ing by execution, the judgment creditor may proceed by action "to charge the stockholders with the amount of his judgment." The shareholder is made liable to pay the judgment, not the debt. The liability is the same whether created by statute or by contract. If the defendant had agreed with the plaintiff to pay, to the extent of his stock, any judgment which the latter might recover against the Kansas company, there can be no question that it would be sufficient to declare upon the judgment alone. This is the liability which the Kansas statute attempts to create. The plaintiff sues upon this statute to enforce this liability. He must stand or fall upon the cause of action thus stated. If he were suing under the laws of this state, the allegation in question would, in all probability, be held insufficient, but he is not. It would seem that an allegation reciting the original indebtedness is unnecessary when the debt has been reduced to a judgment and the suit is brought to charge the defendant with the amount of that judgment under a law which expressly provides that this may be done. The question has frequently been before the federal courts, and the following are authorities for the proposition that it is unnecessary to plead and prove the original liability: *Bank v. Francklyn*, 120 U. S. 747, 755, 7 Sup. Ct. 757; *Hawkins v. Glenn*, 131 U. S. 319, 328, 9 Sup. Ct. 739; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867; *McVickar v. Jones*, 70 Fed. 754, 759; *Rhodes v. Bank*, 13 C. C. A. 612, 66 Fed. 512; *Bank v. Rindge*, 57 Fed. 279; *Borland v. Haven*, 37 Fed. 394, 413; *Glenn v. Springs*, 26 Fed. 494.

But it is argued that this question is one of pleading, and as the courts of New York require a complaint under the New York law to allege the debt, this court, pursuant to section 914 of the United States Revised Statutes, should follow a similar course. The court cannot assent to this view. It is not a question of pleading, but of proof. The pleader need not allege more than he is required to prove. As it is unnecessary to prove the debt under the Kansas statute, it is unnecessary to allege it. Where a party is required to pay the debt of another he is absolved by showing that there is no debt, but where he is required to pay a judgment the inquiry assumes a more limited range. The judgment is sufficient evidence until it is impeached. The New York courts have established no rule of pleading in these cases. They have said that under the laws of this state it is necessary to allege certain facts. They have never attempted to lay down a rule of pleading where the cause of action is founded upon the laws of other states creating an entirely different liability.

It follows that the demurrer, so far as it relates to the question discussed, must be overruled.

UNITED STATES v. STEARNS et al.

(Circuit Court of Appeals, Second Circuit. February 1, 1897.)

CUSTOMS DUTIES—FREE LIST—QUILLS.

Quills, black and white, from turkeys' wings and tails, only changed from their original condition by cleaning, and by dyeing the black ones, were free of duty, as "quills, prepared or unprepared, but not made up into complete articles," under paragraph 689 of the act of 1890, and were not dutiable as "ornamental feathers," under paragraph 443.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal by the United States from a decision of the board of general appraisers, reversing the action of the collector of customs in respect to the classification for duty of certain merchandise imported by Stearns & Spingarn. The circuit court affirmed the decision of the board (75 Fed. 833), and the United States appealed.

Henry D. Sedgwick, for the United States.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The articles in question were quills from turkeys' wings and tails, some white and some black. They were no further advanced, and were in their original condition, except that they had been cleaned, and the black ones dyed. They were assessed for duty as "ornamental feathers," under paragraph 443, Act 1890. That paragraph provides, *inter alia*, for "colored and ornamental feathers not specifically provided for in this act." Paragraph 689 of the free list provides for "quills, prepared or unprepared, but not made up into complete articles," and does not contain the *n. o. p. f.* clause. The evidence did not establish the fact that there was any commercial designation which would take the articles out of their ordinary designation as "quills"; and we agree with the circuit court in holding that these quills are specially provided for by said paragraph of the free list, and are, therefore, not dutiable as feathers not otherwise specially provided for.

UNITED STATES v. BORGFELDT et al.

(Circuit Court of Appeals, Second Circuit. February 1, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—TOOTHPICKS.

Toothpicks were not dutiable as "quills, prepared or unprepared," under paragraph 768 of the act of March 3, 1883, but as nonenumerated articles, manufactured in part, under Rev. St. § 2516.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal from a decision of the board of general appraisers in respect to the classification of certain merchandise im-

ported by Borgfeldt & Co. The circuit court reversed the decision of the board, and the United States appealed.

Henry D. Sedgwick, for the United States.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the board of general appraisers that the importations in controversy—toothpicks—were not dutiable as “quills, prepared or unprepared,” under paragraph 768 of the tariff act of March 3, 1883, and that such provision is intended to apply to quills in their natural condition, or prepared by cleaning, bleaching, scouring, etc., and not to those which have been advanced and transformed into a new article of commerce, having a distinct name, and adapted for a new use; and that they were properly classified as unenumerated articles, manufactured in part, under section 2516, Rev. St. The decision of the circuit court is therefore reversed, and that of the board of appraisers affirmed.

JOHNSON et al. v. BAUER et al.

(Circuit Court, N. D. Illinois. November 16, 1896.)

TRADE-MARKS—INFRINGEMENT.

A trade-mark consisting of a red Greek cross is not infringed by a mark for similar goods, consisting of a Maltese cross having a red center and dark projections, the latter being placed upon packages which, by their peculiar lettering and ornamentation, are given a more distinct individuality than the packages to which the first mark is affixed.

Rowland Cox and Banning & Banning, for complainants.

Moran, Kraus & Mayer and Walter H. Chamberlain, for defendants.

GROSSCUP, District Judge (orally). The bill in this case is filed to restrain the infringement of a trade-mark. The complainants are the manufacturers and sellers of large quantities of medicinal plasters. They sell these plasters in boxes of a somewhat peculiar pattern, the colors of the boxes varying according to traditional notions of druggists respecting the character of plasters; and upon each of these boxes, both at the ends and on the sides, is stamped a red Greek cross. The defendants are the manufacturers and sellers also of medicinal plasters, and have adopted, among the other insignia of their trade-mark, a cross of the pattern of the Maltese cross, having a red center and dark projections. The sole question is whether the defendants' designs for a trade-mark are clearly and purposely within the boundaries that the complainants are entitled to reserve as exclusive to themselves. All these cases depend not so much upon general rules of law as upon the individual application of the law to the case in hand. I was impressed with the fact at the hearing, upon an exhibition of these trade-marks, both of the complainants and of the defendants, that the defendants' had a very much more striking individuality than the complainants'. I could not pick out,—and

there were a great many of the different boxes exhibited at the hearing,—I could not pick out the complainants' boxes except by the little red Greek cross. I could pick out, anywhere and everywhere, the defendants' boxes, by the peculiar lettering on the box, the nature of the background, and I suppose by a combination of features, the particulars of which could not perhaps be designated, but the unity of which mark its individuality; just as one picks out another's face, not because of the color of the eye, or the shape of the nose, or the contour of the face, but by the combined effects of all these and other features.

The conclusion that I have arrived at is that the defendants have individuality of design, and the complainants have not. The complainants' sole individuality, if they have any at all, rests on the red Greek cross. I do not think that is sufficient to give to them an exclusive right to use the Greek cross. I do not think that the defendants so nearly imitate their trade-mark, or come anything like so nearly imitating it, as to deceive the public who are looking for the complainants' goods. The bill will therefore be dismissed for want of equity.

HIRAM WALKER & SONS, Limited, v. MIKOLAS et al.

(Circuit Court, D. Minnesota, Fourth Division. April 8, 1897.)

TRADE-MARKS.

A firm engaged in the United States in bottling and selling whiskey under the name of "Canadian Rye Whiskey," in bottles and with labels, bands, and devices so nearly resembling those upon the bottles of a corporation engaged in Canada in manufacturing and selling whiskey under the name of "Canadian Club Whiskey" as to constitute unfair competition, and evidence an intent to deceive purchasers, will be restrained from the use of the words "Canadian Rye Whiskey" and of the bands and labels mentioned.

V. J. Welch and Frank Hubachek, for complainant.
Simon Meyers, for defendants.

LOCHREN, District Judge. Hearing was had at the court room in the federal building in the city of Minneapolis, in said district, on Saturday, the 19th day of December, 1896, upon the order requiring the defendants above named to show cause why they should not be restrained during the pendency of this action as prayed in the bill of complaint and set forth in the order to show cause. Both parties appeared by counsel, and were heard. From the showing presented, it appears that the complainant, since its incorporation, in 1890, and the partnership of Hiram Walker & Sons, its predecessor prior to that time, were and have been engaged in the manufacture, distilling, and sale of whiskey at Walkerville, in the province of Ontario and dominion of Canada, using the name "Canadian Club Whiskey" as the trade-mark to distinguish such whiskey from whiskey manufactured by others, and that the complainant, upon its incorporation, succeeded to and acquired the business of said former partnership, and its right to the said name and trade-mark, which name and trade-mark had never before been used; that the whiskey so manufactured, distilled,

and sold by said complainant has become favorably known, and has been introduced and sold in large quantities in the United States and elsewhere, and is only known to the trade and to the public by the said name, "Canadian Club Whiskey"; that all the allegations of said bill respecting the sale of such whiskey in bottles, and respecting such bottles and the labels used thereon, and the words and devices upon such labels, and the registration of complainant's trade-marks, and the granting of certificate of such registry, and respecting the corks and capsules of said bottles, and the letters and figures thereon, and respecting other stamps and devices upon such bottles, are true as stated in said bill; that the defendants, prior to the commencement of this suit, have at Minneapolis, in the state of Minnesota, been engaged in the business of bottling and selling whiskey under the name of "Canadian Rye Whiskey," in bottles and with labels, devices, corks, capsules, bands, lettering, words, and figures as described, stated, and alleged in complainant's bill of complaint.

The defendants have the right to use bottles of the same common kind used by the complainant. But the labels, bands, capsules, and the words, lettering, and devices thereon, are made in every respect to resemble those used upon the bottles of complainant, and are placed by the defendants upon its bottles so exactly like those upon complainant's bottles as to be likely to deceive persons intending to purchase the whiskey made by the complainant. I think that the use by the defendants of the words "Canadian Rye Whiskey," and of the crown and diamond upon the label, in such way as to so nearly resemble complainant's trade-marks, constitutes an infringement of such trade-marks; and that all the labels, bands, capsules, devices, words, and lettering upon defendants' bottles so nearly simulate those upon complainant's bottles as to constitute unfair competition, intended to deceive purchasers and appropriate the trade of complainant. *N. K. Fairbank Co. v. R. W. Bell Manuf'g Co.*, 23 C. C. A. 554, 77 Fed. 869.

This conclusion is strengthened by the fact that the statements upon defendants' labels, bands, and capsules are untrue, and intended to mislead purchasers. It is admitted that the whiskey bottled and sold by defendants as "Canadian Rye Whiskey" is not made in Canada. The statement on the labels that the whiskey is distilled and bottled by H. S. Ramsay & Sons, London, Ontario, is untrue, and no such firm is in existence. The intent of the defendants to deceive the public, and appropriate the benefits of the favorable reputation of complainant's whiskey, is further shown by the fact that defendants, before the commencement of this action, procured to be made a large quantity of labels exactly like the labels of complainant in every particular. A temporary injunction may issue, restraining the defendants from the use of the words "Canadian Rye Whiskey," and from the use of the labels and bands above referred to, during the pendency of this action.

CHICAGO SUGAR-REFINING CO. v. CHARLES POPE GLUCOSE
CO. et al.

(Circuit Court, N. D. Illinois. February 8, 1897.)

PATENTS FOR INVENTION—EXTENT OF CLAIM—CORN SEPARATOR.

Letters patent Nos. 247,152 and 247,153, issued September 20, 1881, to A. Behr, for a process of treating corn in the manufacture of starch, and for an apparatus used in such treatment, are void for want of novelty, because the improvement over the previous state of the art consists in the peculiar conformation of the tank in which the corn is treated, and in the relative proportions of corn and water used, for neither of which elements do the patents contain any claim of invention.

Suit by the Chicago Sugar-Refining Company against the Charles Pope Glucose Company and others for the alleged infringement of two patents.

Offield, Towle & Linthicum, for complainant.

Coburn & Strong, for defendants.

GROSSCUP, District Judge. The bill is to restrain infringement of two letters patent numbered, respectively, 247,152 and 247,153, issued to A. Behr, September 20, 1881, the first for a process of treating corn in the manufacture of starch, glucose, and other products therefrom, and the second for an apparatus for treating corn in the same kind of manufacture. The defendants deny the validity of the patents, and also deny infringement.

Each kernel of corn contains within itself a little germ rich in corn oil, and the object of the process and the apparatus, described in the letters patent, is to separate these germs from the balance of the kernel. The germs are used for oil products, and the remainder of the kernel for starch, glucose, and similar products. The treatment described requires that the corn should be first soaked, and then crushed while moist, resulting in the kernel's being broken up and the germs remaining intact. In this condition, the crushed corn, when intermingled with water, naturally divides into three parts: First, the germs, which, being lighter than the liquid, float on the top; second, the hulls and matter adherent thereto, which, being heavier than the liquid, tend to sink; third, the mealy parts of the corn mixed with the water, which largely constitutes the liquid, and is called "starch-milk." The liquid or starch milk contained in the tank is maintained at a density of from 10° to 12° Baumé, that density being found best adapted to the purpose that the germs should float and that the hulls should sink. When the partially crushed corn comes first into contact with the starch milk in the tank, there are many germs still adhering to the hulls, resulting in the former being drawn towards the bottom by the heavier weight of the latter. To dislodge these, so that they may rise, and the hulls may fall, the lower stratum of material in the tank is kept in a condition of agitation by means of paddles or fans. When operating with perfection, the germs floating on the surface are carried off by the over-

flow of starch milk through an aperture onto a vibrating sieve, through the meshes of which the starch milk falls, and is brought back into the tank, while the germs are carried off to a separate place, the hulls being mechanically removed through an aperture in the bottom of the tank. The process is a continuous one. The claim of the process patent is as follows:

"The process of treating corn in the manufacture of starch, glucose, and other products therefrom, herein described, which consists in mixing with corn, which has been softened and crushed, sufficient water to form a mixture of such density that the germs of the corn will tend to separate from the hulls and other heavier portions and rise to the surface of the mixture, and in mechanically stirring such mixture in a separating tank or compartment provided at the top with a suitable chute, and thereby causing the germs and pieces of germs to be carried off in a surface current caused to overflow through the chute by the influx of crushed corn and water into the separating tank, and in removing the hulls and adherent matter from the lower stratum of the mixture by mechanical means, the materials removed from the separating tank being, respectively, screened in the usual manner, and the purified mixture of the mealy parts of the corn and water being collected in a suitable reservoir."

I am convinced that this method of separating the germs from the hulls and starch milk is, in practical effectiveness, a considerable advance upon anything that preceded it. The difficulties of the complainant's case are not in any question of utilities.

The art of making the separation, to which complainant's patent relates, is not a new one. Prior to this patent the germs of corn were separated from the other parts through methods wherein the corn was first boiled and crushed, and then introduced into a separating tank, the results being brought about largely by the operation of specific gravity. In the prior art it was pointed out that the maintenance of the starch milk at 10° or 12° Baumé was essential to the best conditions, and means of agitation of the starch milk similar to complainant's patent were employed. It is clear to me that Dr. Behr's success over his predecessors is not in having pointed out any new method of treatment, but in having hit upon: first, a tank, whose peculiar conformation is best adapted to the results wished; second, the particular relative proportions employed in the introduction of the crushed corn and water. Were the conformation of the tank to be changed, or the proportion of corn to water at the instant of its introduction into the tank to be altered, the complainant's treatment could not be made continuous, nor more effective than previous methods. The difficulty with the complainant's patent is that it does not point out this peculiar conformation of tank, nor the proper relative proportions of water and crushed corn, nor does it make any claim of invention in these particulars. In the absence of such a claim, it must be held that the process in these respects is old, or has been given to the public. In this view of the case, it is not necessary to state what would have been my views had the claims of the patents specifically covered these particulars, for it follows that the art in all other respects being old, and no invention being claimed for these features which, in my judgment, constitute the improvement, the complainant's claim must fall.

The same difficulty arises in patent 247,153 for the apparatus. There is, in my judgment, no quality of invention described in claim 1:

"A separating tank or compartment provided with a stirrer, and having a chute or opening in its wall for fixing the direction of the overflow from the separating compartment, in combination with an inclined vibrating sieve for screening the germs carried off in the overflow, and a trough or reservoir for receiving the starch milk which drains through the meshes of such sieve, and means for mechanically removing from the lower stratum of the mixture in the separating tank the heavier portion of the corn, consisting of the hulls and matter adherent thereto, substantially as described."

In the absence of the assumption that the separating tank therein described, in its peculiar conformation adapted to the purpose, is new, there would be no patentable invention; but the claim as stated does not lay claim to such feature, and is therefore, under the holdings of the supreme court, to be regarded as old, or dedicated to the public. For these reasons the finding must be for the defendants.

WESTERN ELECTRIC CO. v. WESTERN TEL. CONST. CO. et al.

(Circuit Court, N. D. Illinois. April 12, 1897.)

PATENTS FOR INVENTIONS—INFRINGEMENT—TELEPHONE SWITCHES.

Letters patent No. 215,837, issued May 27, 1879, to H. L. Roosevelt, for an improvement in telephone switches, whereby the receiver is suspended by a cord attached to a spring, so that taking up the receiver changes the circuit, so as to ring the call bell at the other end of the line until the person at the other end takes up his receiver, and so that dropping the first receiver again after using the telephone automatically transfers the call bell again into the circuit, are not infringed by a device patented by T. A. Watson, in which the receiver hangs from a forked hook, to which it has to be restored after using the telephone in order to transfer the call bell again into the circuit.

Suit by the Western Electric Company against the Western Telephone Construction Company and others to restrain the alleged infringement of a patent.

Barton & Brown, for complainant.

S. S. Stout, for defendants.

GROSSCUP, District Judge. The bill is to restrain infringement of letters patent No. 215,837, dated May 27, 1879, issued to Hilburn L. Roosevelt. The defendants deny infringement, and also challenge the validity of the patent.

The patent is for an improvement in telephone switches, and its purpose is compactly stated in the following, from the specifications:

"It is a matter of considerable importance in connection with several telegraphic transmitting instruments, more especially telephones, that the operation of the transmitting instrument should automatically signal to the receiving instrument at the other end of the line the fact that a message is about to be transmitted, whereby the receiving operator is enabled to prepare himself for the reception of such message. This is especially true where the transmitting operator is not, of necessity, a skilled person in the electrical

art. An instance of this can be readily given: Supposing it is desired to transmit a message to a distant point by means of a telephone or similar transmitting instrument; it is obviously desirable that the mere fact of the preparation of such transmitting instrument or telephone for sending the signal should of itself prepare the receiving operator at the other end of the line for the reception of the message. If, for instance, a telephone were hanging in a position to be raised by the transmitter, it would be very desirable that the mere fact of raising such telephone to the lips should of itself inform the receiving operator that a message was to be transmitted. My invention is designed to accomplish this result."

The letters patent then describe a mechanism wherein the telephone, which, at that time, was both receiver and transmitter, was suspended, by means of a cord, to a switch spring. The weight of the telephone, thus acting upon the spring, kept it in contact with one point in the circuit; but the lifting of the telephone, thereby taking off the weight and allowing the spring to naturally recoil, put such spring in contact with another point in the circuit. These two points were, respectively, in the call-bell circuit and the telephone circuit; a like arrangement obtaining at the other end of the line. The effect of the whole was that, when the telephone at the caller's end was lifted from its suspension, it automatically put the call bell at the other end of the line in circuit with the signal battery, thus ringing the bell; but when, in response to such ring, the telephone at the receiver's end was lifted by the operator from its suspension, the recoil of the spring at that point automatically cut out the signal battery, and restored the telephone circuit. Prior to this invention, telephones using the call bell had been in use. In some of these they were placed in the circuit by hand-operating switches, whereby the telephone line could be transferred between the call-bell branch and the telephone branch, so that, when either one was in the circuit, the other was out. But this previous arrangement, to be entirely successful, necessitated that the person at the receiving end should always be thoughtful enough, when the interview was ended, to push back, by the use of his hand, the switch throwing the call bell into the circuit; otherwise, the call bell remaining out of the circuit, no call could thereafter be sounded at that end of the line. It was found by experience that many persons merely dropped the receiver, without readjusting, by hand, the call-bell switch, and thus effectually cut out that receiver against future calls. The invention of Roosevelt, under consideration, it will be readily seen, cured this defect, for the speaker, by the act of dropping the telephone, which was also the receiver, transferred the call bell into circuit; and his successor at the phone, by the act of raising the receiver, cut out the call bell, and restored the telephone circuit.

But while the old mechanism, necessitating the cutting in and out of the circuits by hand mechanism, was thus superseded, and went into disuse, the new mechanism, embodied in the Roosevelt patent, did not come into general use. There were probably some practical objections, concerning which it is not necessary to pause. The mechanism that came into general use, including that employed by the defendants, and charged as an infringement, employed separate receivers and transmitters, the transmitters being permanently placed

in the box of the telephone. The receivers, still fashioned after the old ones, were suspended by a cord, but this cord was no longer attached to any switch spring, nor was it in touch in any way with the cutting in and out of the circuits. A forked hook was provided, projecting from the box, and communicating by appropriate mechanism with a spring lever in touch with the respective circuits, so that, when the receiver was placed in the hook, its weight put the call bell into the circuit, but, when lifted from the hook, cut it out by the recoil of the spring. The call bell thus put in the circuit is actuated alone by a hand crank. This was embodied in the letters patent to T. A. Watson, which have been declared by this court (Judge Showalter presiding) to have been anticipated, in conception, by the patent under consideration.

I feel myself compelled, in view of the then state of the art, and of the specific difficulty that the mechanism of Roosevelt was avowedly intended to circumvent, to hold that his patent is self-limited to such mechanism as automatically cuts in and out the call bell (including the ringing of the same) by the mere act of lifting and dropping the telephone. In the defendants' telephone, the call bell is in circuit before the receiver is lifted; in the complainant's, the act of lifting puts it in circuit. In the defendants' mechanism, when the connection is closed, the receiver must be hung upon a fork,—a prescribed manual act on the part of the operator; in complainant's, it is dropped on its cord, thus avoiding this otherwise definite manual act. In the Roosevelt mechanism, the lifting of the telephone automatically actuated the circuit so as to ring the bell; in the defendants' mechanism, such actuation is only obtained by the manual turning of a crank, or pressing of a button. In all these respects the defendants' mechanism is clearly differentiated from Roosevelt's purpose, viz. an arrangement whereby conscious manipulation of the switches and of the call bell was to have been dispensed with. I recognize that the conception of changing back and forth the switches, by virtue of the resting and lifting of the telephone upon the forks, is a close copy of Roosevelt's conception, and that perhaps his claims, standing apart from his description, are broad enough to cover the incidental deviations. But, after all, the main purpose of the invention must control the scope of the claims, and such purpose certainly did not include the defendants' mechanism.

For the foregoing reasons, there may be a finding that defendants do not infringe, and for the dismissal of the bill.

COMPUTING SCALE CO. v. NATIONAL COMPUTING SCALE CO.

SAME v. HOYT et al.

(Circuit Court, N. D. Ohio, E. D. March 31, 1897.)

PATENTS—INJUNCTION.

In a suit for injunction and damages for infringement, the court will not, upon motion of defendants, enjoin complainants pendente lite from suing users of the alleged infringing machine, or from warning users by letters or advertisements, the title of defendants never having been adjudicated.

These were two suits in equity brought by the Computing Scale Company, the one against the National Computing Scale Company, and the other against Frank C. Hoyt, Charles A. Hoyt, and George B. Hoyt, partners as Hoyt & Co., for an injunction and damages for the infringement of a patent. Heard on motions by defendants for temporary injunction.

Church & Church, for complainant.

Thurston & Bates, for defendants.

SAGE, District Judge. The complainant and the defendant the National Computing Scale Company are engaged in the manufacture and sale of spring balance computing scales, each claiming to conduct the business under a patent owned and controlled by it. The defendants Hoyt & Co. are selling agents and solicitors of the National Computing Scale Company, and, as such, sell all the scales manufactured by the defendant the National Computing Scale Company directly to retailers and users, such as butchers and grocers, and not to wholesale dealers. The first ground of the motion is that the complainant, well knowing that these retailers and users are generally parties of limited capital, who cannot afford to become parties to a suit, and by the fear of being sued for an infringement of complainant's patent would be as effectually prevented from buying defendants' scales as if the defendants were restrained by an injunction, is seeking to intimidate the trade, and maliciously to injure the defendants, by sending out circulars to the trade in the territory in which the defendants operate, which circulars contain covert threats to sue mere users of said scales, and also contain "the false and misleading statements that the said complainant owns all the foundation patents on computing or price scales, and that it has important infringement suits pending in the United States courts in different parts of the country against manufacturers and users of infringing scales." The following is a copy of the circular referred to:

"Warning! Consult Your Attorneys.

"All persons are warned against using and infringement on weighing and price scales and computing and price scales. The simple using of infringing scales makes the user just as liable to prosecution as the manufacturer or selling agent.

"We own all the foundation patents on computing or price scales, and have created and established the market and demand for such scales.

"Before buying scales not made by us, you will save yourself much litigation and expense by consulting us or your attorneys respecting the question as to

ening them with suits which defendants did not intend to prosecute,—a feature not involved in *Kidd v. Horry*. He said:

"Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ."

The complainant in that case sought to restrain the defendants from making threats intended to intimidate the complainant's customers, under the pretext that complainant's goods infringed a patent owned or controlled by defendants, and from making threats that, if such customers dealt in complainant's goods, they would subject themselves to suit for such infringement; "the bill charging and the proof showing that these charges of infringement were not made in good faith, but with a malicious intent to injure and destroy the complainant's business." The proof showed that the defendants brought three suits against Emack's customers, for alleged infringements of the patent involved; that Emack assumed the defense in these cases, and, after the proofs were taken and the suits ripe for hearing, the defendants voluntarily dismissed them, the dismissals being entered under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits; that they were brought in a mere spirit of bravado or intimidation, without intent to submit the question of infringement to a judicial decision.

In *Casey v. Typographical Union* the rule that an injunction will not issue to enjoin the publication of a libel was fully recognized; but it was affirmed, and not denied, that the Typographical Union had set on foot a boycott against the complainant, as stated in the bill and in the affidavits on file. That boycott was to be enforced by threatening loss of business to those who, having no connection with the union, should continue to advertize with or in any way patronize the complainant. The attempt was by coercion to destroy all competition affecting the union. It was an organized conspiracy to force the complainant to submit himself to the control of the union, even to the extent of yielding his right to select his own workmen. The court said that, in the light of the facts and of the authorities cited, it was idle to attempt to maintain that the publications put forth by the defendant were nothing more than libels, and that the only remedy for any injury resulting was by an action at law. In *Barr v. Trades Council* the publication enjoined was a circular issued by the Trades Council, to boycott the complainant's newspaper, and to cease buying and advertising in it. In all these cases the trespass upon the right of the complainant was either admitted, or so clearly established as not to be open to question. This view puts these cases in harmony with the general rule that, in order to give a court of equity jurisdiction to enjoin trespass or torts to property or property rights, "two conditions must concur: First, the complainant's title must be admitted or established by a legal adjudication; and, second, the threatened injury must be of such a nature as will cause irreparable dam-

age, not susceptible of complete pecuniary compensation." Beach, *Inj.* § 1126, and cases cited.

Grand Rapids School Furniture Co. v. Haney School Furniture Co., 92 Mich. 558, 52 N. W. 1009, is also cited in support of the motions. In that case a manufacturer and patentee was restrained from using a decree fraudulently and collusively obtained, to the injury of the complainant, who was engaged in a like manufacturing business, and from claiming that the decree was an adjudication upon the merits as to the validity of the patent, or from using the decree in any way or form to influence any person against purchasing the articles manufactured by the complainant, who, as claimed, was infringing said patent; it being admitted that the complainant was able to establish the absolute invalidity of the patent in any court having jurisdiction of the question, and was lawfully entitled to its use. It is not necessary to point out the distinction between that case and the case at bar.

In the case now before the court the defendants' title to the property rights, which it claims was invaded, is the very question at issue in the suit pending against them. They are sued as infringers, and their title has never been adjudicated. This alone is an insuperable objection to their prayer for an injunction. The same objection applies to their contention that the injunction should be issued to prevent the multiplicity of suits. "In cases of repeated trespasses, where it is necessary to quiet a rightful, admitted, or established possession, chancery has often interposed to prevent a multiplicity of suits, although there may be a remedy at law," etc. Beach, *Inj.* § 1130. In the same section it is further stated that, "in addition to the rule mentioned, it seems to be clearly settled that, whenever the complainant's title is disputed, a court of equity will not interfere by injunction, or make perpetual an injunction already granted, on the ground of a multiplicity of suits, until he has procured his title to be established by a successful trial at law." In a footnote to the section the authorities in support of the text are cited. The passage quoted relates to the title to real estate, but is applicable because the title or the right of the defendants to manufacture and sell scales is denied by the complainant, who claims that they are infringers. The defendants' patent is, as they claim, *prima facie* evidence of their rights under it, but only *prima facie*, and, if this suit were not pending, would not entitle them to an injunction against persons making, selling, or using in alleged violation of it. Besides, with reference to a multiplicity of suits, this case differs materially from those in which a suit is brought by one for the benefit of all others in a similar condition to restrain the collection of a tax or assessment. Such a suit is a representative suit, and, if it result in a decree declaring the tax or assessment invalid, it will be effective against any other suit brought, because it disposes of the right to collect the tax or to enforce the assessment. But an adjudication upon a patent, even if it be by the supreme court of the United States, does not necessarily have that effect. When made by the supreme court of the United States, it is, of course, decisive against all other suits brought upon the same patent, and upon the same showing of anticipations or prior

uses. It not infrequently happens, however, that, after a decree sustaining a patent, additional anticipations and prior uses are brought to light; so that upon a second suit a stronger defense can be presented than was made upon the hearing of the first suit. Another consideration which ought to have weight is that in *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, the supreme court held that the statutes of limitation of the several states apply to actions at law for the infringement of letters patent. Equity, although not consenting to be bound by statutes of limitation, refers to them to determine, by analogy, the limitations which it should apply, subject to the special circumstances of the particular case. Hence a patentee ought not to be enjoined from bringing suits against those who infringe by using, as well as against those who infringe by manufacturing and selling, unless upon a very strong showing, because the bringing of the suit determines to what period, ordinarily, the accounting or claim for reparation may be carried back. The defendants say that they have offered to give a bond of indemnity, and that they are perfectly able to do so. But such bond would cover only the amount of damages actually found. It would seem therefore to be proper to allow the suits to be brought, and, if a test case be pending, to continue them from term to term until the determination of the test case. That can be done, as it is done, without injunction; and, while it saves the rights of the party complaining, it relieves those sued from expense and labor of preparation until the determination of the test case.

As to the prayer for an injunction against suing users who have purchased from defendants, the complainant's bill as framed prayed for an injunction and account of profits, as well as for damages against the defendant company. Upon the argument of the motion, the bill, not having been answered, was amended by striking out the prayer for an account of profits, leaving only the claim for damages. This brings the case directly within the rule laid down in *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244. The right of the complainant, under the authority of that case, to sue the users, is undeniable; and, if the right to sue exists, the right to warn by letters, or by circulars, or by advertisements in newspapers, exists, and cannot be enjoined. The motions are overruled.

ALBANY STEAM TRAP CO. v. WORTHINGTON et al.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

1. PATENTS—DISCLAIMERS.

A patentee cannot, by means of a disclaimer, filed after issuance, incorporate into a claim for a combination a feature not before claimed in connection with that combination, and thereby make a new combination.

2. SAME—CONSTRUCTION AND INFRINGEMENT—PUMP-REGULATING VALVES.

The Blessing patent, No. 207,485, for an improvement in pump-regulating valves, construed in connection with the disclaimer filed April 18, 1891, and held to be limited to the particular combination of parts shown or their fair equivalents, and to cover the merely described means for automatically

regulating a pump for returning to a steam boiler the water of condensation in a closed system. 73 Fed. 825, affirmed.

This is an appeal from a decree of the circuit court, Southern district of New York. The suit was for alleged infringement of United States patent No. 207,485, granted August 27, 1878, to James H. Blessing, for an improvement in pump-regulating valves. The circuit court held that defendants' structure did not infringe, and dismissed the bill.

Edward N. Dickerson, for appellant.

M. H. Phelps and M. B. Philipp, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The defendants have constructed steam-heating plants, which may be briefly described as consisting of (1) a boiler which supplies steam for an engine, and also for the heating coils, the pressure of steam for the latter being reduced (2) by a reduction valve; (3) steam coils or radiators; (4) return pipes from the radiators, which bring back the water of condensation to a closed steam-tight vessel, known as the "pump governor"; (5) a pump connected with the pump governor, which, when in action, pumps the water of condensation into the boiler; (6) a pipe connection from the boiler supplying live steam to drive the steam pump; (7) a steam valve in this pipe; (8) a device for opening and closing this valve, as the water in the pump governor rises or falls, such device being a float operating the valve by resting on the surface of the water. When the water in the pump governor rises to a predetermined height, the float rises, the valve is opened, and pumping begins. When pumping has reduced the water to a predetermined level, the float descends, the valve is closed, and pumping ceases. It is not disputed that except in one particular everything found in defendants' plant antedates the patent in suit, being found in what is known as the "Syracuse Plant." The one point of difference is that in the Syracuse Plant the pump was started and stopped by the operator, who turned the steam on or off, being apprised when to do so by a water gauge on the vessel which held the water of condensation. The steam valve of the pump, therefore, was not operated by a float or other automatic device, as it is in defendants' system. We do not understand that it is contended that in mechanical details defendants' automatic device infringes the automatic device of the patent. Certainly, if any such contention be made, it is wholly without foundation. Defendants' device, with its float moving the lever, which turns the valve, is old and simple, and in no sense the equivalent of the complicated structure of the patent. The contention of complainant seems to be that infringement may be found in "any apparatus adapted for use in a closed system [of steam heating] to regulate a pump through the action of the water supplied to the pump," wherein the rise and fall of the water causes the device to open or shut the valve. What force there is in this contention may be seen by an examination of the patent.

The specification sets forth that the patentee has invented "a new and useful improvement in pump-regulating valves"; the object of the invention being "to regulate the action of a boiler-feed pump by means of the quantity of water which is fed to such pump, so that said pump will only operate when supplied with water, and will practically cease to operate when the water supply is stopped." The invention is then described at great length with references to the drawings. The circuit court thus epitomized the description:

"It comprises two disk-shaped vessels, provided with a spring-pressed diaphragm and two concentric pipes, the inner of which is attached to said diaphragm. The return water of condensation enters the larger pipe, and, when it has filled it and the space above the diaphragm, the weight thereof depresses the diaphragm and smaller pipe and a valve rod governing a pump regulating steam valve attached to said pipe, which causes said valve to close, and prevents the steam from operating the pump. Thereafter, the water, continuing to flow, passes into said smaller pipe, and also below said diaphragm, until its upward pressure, plus that of the spring, floats the diaphragm, elevates said smaller pipe, opens the valve, and admits the steam to the pump, which pumps water back to the boiler, and automatically stops when the supply thereof is exhausted."

We do not find that the specific device above described for automatically regulating a steam valve is anticipated. For aught that appears, it was a patentable novelty. The specification states that the invention is particularly useful in feeding pumps, which return to steam boilers the water of condensation from heating coils in buildings, dispensing with the attendance of a controlling engineer, and rendering the apparatus entirely automatic. Automatic regulation of a steam pump for returning water to the boilers was old in the steam-heating art, where the so-called "open system" was employed, and also generally in the art of forcing water into boilers by means of a feed pump which drew its water from a source of supply, whose increase or decrease supplied the means of automatic regulation. The patentee's specific contrivance for securing such automatic action, however, was new.

After describing the details of the invention, the specification proceeds:

"It will now be seen that, by means of this apparatus, the water supplied to a pump regulates exactly its action; so that, if more water be supplied, the pump will operate faster; if less water is supplied, the pump will operate slower; and, if no water be returned, the pump will stop entirely, unless it is desired to keep it in slow operation."

The claims relied on are:

"(1) An apparatus constructed substantially as described, whereby the amount of water supplied to a pump regulates the operation of said pump.

"(2) A pump-regulating apparatus constructed substantially as described, and placed intermediate between the water and the pump, whereby the water passing to such regulating apparatus opens the steam valve of the pump, which valve is closed on the cessation of the water supply."

It is apparent that what the patentee described as his invention, and undertook to claim, was an "improvement in pump-regulating valves," irrespective of the kind of steam plant to which they were applied. Systems for heating buildings with steam coils are referred to, but only as an illustration of one of the uses to which

the invention may be put, and where it would be particularly useful. In this respect it closely resembles the naphthol-black patent which we recently had occasion to consider in *Matheson v. Campbell*, 78 Fed. 910. The device of the patent is one to be "placed intermediate the water [to be fed to the boiler] and the pump," whether such water be the product of condensation or an original supply. What he had devised, as he says in the specification, was an improvement in pump-regulating valves in connection with pumps which fed water into a steam boiler, and he claimed just what he had devised. From what has been already stated as to the state of the art, it is apparent that, under these claims, the patentee could not cover any and every form of regulating device operating automatically upon the increase or diminution of the water supply, for other devices thus operating were well known; but he could cover any form of device which effected such operation by the particular combination of parts which he devised, or their fair equivalents, for, so far as the record shows, such combination was ingenious and novel. Defendants' device has no such combination, and, as the patent stands, it would not infringe. Complainant, apparently appreciating this situation, at about the time this suit was begun, filed a disclaimer, in which, after reciting that it "has reason to believe that through inadvertence the claims * * * are too broad," it "disclaims any apparatus, as included in the claims of said patent, which is not directly connected with the return pipe, H, under the pressure of the return from the heating system, without escape to the atmosphere."

It now insists that the claim relied on is for a combination of three elements: (1) A pump, (2) a regulating device, (3) a pipe directly connected to return coils in a closed system of steam heating. And it finds patentability of such combination no longer in the specific combination of concentric pipes, diaphragm, etc., but in the fact that in such closed system of steam heating any regulating device operating automatically with the rise and fall of the water in the supply tank is used, such automatic regulation not having theretofore been used in such a system. It was old in the open system, but by using it, as the patentee does, in the closed system, economy is promoted, since the water of condensation is returned to the boiler without loss of heat. The difficulty with this contention is that it substitutes a different invention from that described and claimed in the patent. It is not a narrower claim, but a different one. It is, as defendants suggest, "an attempt to incorporate into a claim for a combination a feature which had not been claimed in connection with that combination before, and thereby make a new combination." If one particular branch of the art of working in wood—cabinet making, for example—had never used circular saws, because they were supposed to be impracticable or useless or not economical, although such saws were used in other branches of the art, it might be invention to introduce them in cabinet making; and the individual who showed that they were useful, practicable, and economical in that branch of the art

might be entitled to a patent for a circular saw in combination with the other parts of an old machine. But his specification and claim would be expected to indicate just what it was he had invented and what he claimed. An individual who had invented some specific improvement in circular saws generally—something novel and useful and applicable to those tools in every branch of the wood-working art—might also obtain a patent, with a claim covering all circular saws, which would be good to restrain infringement of his particular improvement. But it would be a startling proposition that he could, 13 years afterwards, file a disclaimer of any combination containing circular saws, except such as might be used in cabinet-making machinery, and then insist that he was entitled to sustain his claim to cover all circular saws so used (with his improvement or without), on the theory that no one had used them in that branch of the art before.

We do not understand that the statutory provisions allowing a disclaimer to be filed can be thus availed of to change the invention claimed in a patent, and we are referred to no authorities which sustain complainant's contention. The object of a disclaimer is well expressed in *Chemical Works v. Lauer*, 5 Fish. Pat. Cas. 615, Fed. Cas. No. 12,135:

"It is designed to allow a patentee to recover on one claim of his patent, notwithstanding other claims in it are void for want of novelty. But it requires that the parts claimed without right, and the parts rightfully claimed, shall be definitely distinguishable, as matter of fact, on the face of the claims; that is, be definitely distinguished from each other in the claims."

The decree of the circuit court is affirmed, with costs.

GILCHRIST v. GODMAN et al.

(District Court, N. D. Illinois. April 5, 1897.)

1. SALVAGE—WRECKERS HIRED TO RAISE VESSEL ARE NOT SALVORS—RIGHT TO COMPENSATION.

Wreckers employed by the master of a wrecked vessel to raise the wreck, not being salvors, are entitled to wages for their labor, reasonably and faithfully performed, whether it is successful or not.

2. MARINE INSURANCE—LIABILITY OF UNDERWRITERS FOR SERVICES IN RAISING WRECK.

Insurers of a wrecked vessel, who send an agent to superintend the master's efforts to raise the wreck, become jointly liable with the owner for the pay of wreckers employed by the master.

3. SAME—EFFECT OF ABANDONMENT ON OWNER'S LIABILITY.

An abandonment of a wrecked vessel by the owner, after an attempt to raise it has proved unavailing, does not relieve the owner from liability to pay men employed in such attempt.

4. ADMIRALTY—JURISDICTION OF ACTION FOR WRECKER'S WAGES—MARITIME CONTRACT.

A contract to raise a wrecked vessel is sufficiently maritime in its nature to give a court of admiralty jurisdiction of a suit to recover wages due under it.

Libel by Frank W. Gilchrist against Annetta S. Godman and others.

Robert Rae, for libelant.

John C. Richberg and Schuyler & Kremer, for respondents.

GROSSCUP, District Judge (orally). The libel is for services in connection with an attempt to save the schooner American Union, stranded about May 6, 1894, at Thompson's Harbor, on Lake Huron. The vessel was at the time of the stranding owned by the respondent Annetta S. Godman, and insured for about two-thirds its value in the respondent insurance companies. The master of the vessel at the time was James P. Godman. When the vessel stranded, her master employed the libelants to come to her assistance with tugs, pumps, hawsers, lights, and other wrecking appliances calculated to take her off the beach. The libelants entered upon this undertaking, and continued therein until about the 18th of May, when it was supposed that the vessel had been saved. On the 19th a fresh wind came up, which had the effect of pounding her to pieces upon the shore, leaving no salvage, except a few chains and other like things, not amounting to over \$300 in value. While the libelants were engaged in their work, under employment of the master, an agent of the underwriters was sent on their behalf to assist in the work. He came on the 13th of May, and remained for several days thereafter, participating actively in the superintendence of the work, giving directions, and approving what the master had already done. After the 19th of May, and when it was known that the vessel was totally lost, the owner served upon the underwriters notice of her total abandonment of the vessel.

It will be observed that the relation of the libelants to the vessel in distress was not that of salvors at large. They did not offer their help or impose their services. They were called from a distant port by the master, and entered upon their work in pursuance of that call. Their claim for services, had the vessel been saved, could not, under the terms of the employment and the customs on Lake Michigan, have been based upon any idea of a proportionate interest in the value of the vessel, growing out of their having been her salvors. Their relation was not that of men coming at a venture to a vessel in distress, but of regular wreckers and tug men, who were employed at a customary compensation to give assistance. In my judgment, no feature of salvors at large enters into this case, but it brings, rather, the claim of a class of men who work for certain customary wages; and this, independently of the success or failure of their efforts. It is plain, then, that the men employed under such circumstances are entitled to wages from their employer independently of the outcome of their labor, such labor having been reasonably and faithfully performed in pursuance of the engagement.

Who were their employers? Undeniably the master of the vessel was one, who also by that act, as between her and the employed, bound the owner. I am of the opinion, also, that the underwriters, in view of their large interest in the work of the libelants, and by sending Capt. Sinclair to the scene of the work to participate, and, to some extent, superintend the same, intended to avail themselves of this employment. Their acts in this connection were, in effect, an adoption or ratification of the master's engagement with these libelants. Indeed, it is inconceivable that, if the master had not already engaged these men, the underwriters, through their agents, would not

have done so. They undoubtedly intended to join with the master in these efforts to save the vessel; their pecuniary interests and their conduct were all in that direction. I hold, therefore, that the libelants were the employés jointly of the owner and the underwriters, in this effort to save their common property.

I hold also that the so-called abandonment of the vessel, after she was already lost, does not have the effect of exempting the owner from her just share of liability for this employment. A proceeding so completely after the fact cannot affect the relative liabilities of the parties with relation to an effort intended to avoid that fact. Had the vessel been saved, or partially saved, there would, of course, have been no attempt at abandonment. To allow it now, as against these libelants, would be giving the owner the unfair option of choosing to pay her proportionate share if the services were successful, and escaping when she found they were unsuccessful.

The limitation act is not, in my judgment, in question in this case. Vessel owners and underwriters, employing men to save their vessels in extremity, make themselves, by such act of employment, liable to the extent of the contract price; and I think the contract sufficiently maritime in its nature, aided, as it is, by the statutes of the state wherein the services were rendered, to create a maritime action that would bring it within the jurisdiction of a court of admiralty. A decree may be entered finding for the libelants, and against the libelees, one-third of the liability against the owner, the other two-thirds against the underwriters, in proportion to their interests in the vessel.

THE PENINSULAR.

FOLEY v. THE PENINSULAR.

(District Court, E. D. New York. April 19, 1897.)

SHIPPING—PERSONAL INJURIES—FELLOW SERVANTS.

A winchman, by whose negligence a piece of cargo falls upon a man working in the hold, is the latter's fellow servant, so that the ship is not liable.

This was a libel by Patrick Foley against the steamship Peninsular to recover damages for personal injuries.

Charles J. Patterson, for libellant.

Convers & Kirlin, for claimant.

BENEDICT, District Judge. This is an action for personal injuries caused by the falling of a tub of salt upon a man in the hold of the steamship Peninsular. Upon the evidence it is impossible to conclude that the accident was caused by any neglect on the part of the shipowners. It was caused by the negligence of the winchman. The winchman, however, was a fellow servant with the libellant, and therefore his negligence entails no liability upon the owners of the ship. Libel dismissed, with costs.

THE ALVENA.

WELSH et al. v. THE ALVENA.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

SHIPPING—SEAWORTHINESS—SUGAR CARGO—INSUFFICIENT INSPECTION.

Sugar in the hold of an iron steamship was damaged by water coming in through a small hole made by corrosion of the acid of sugar drainage and sea water, which reached the plate through cracks in the lining of Portland cement. The evidence was insufficient to show that the cracks were caused by any accident after sailing. Respondents relied on an exception to the bill of lading of damage from unseaworthiness, provided "all reasonable means have been taken" to make the ship seaworthy, and also on the Harter act, which exempts the carrier if he has exercised "due diligence" to make the ship seaworthy, etc. *Held* that, in the inspection prior to the voyage, a failure to take up one of four ceiling boards in a passageway over the limber spaces, underneath which the leak occurred, in order to examine the cement, was a lack of "due diligence" and "reasonable means" to make the ship seaworthy, and the carrier was not exempted either under the statute or bill of lading. 74 Fed. 252, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal from a decree of the district court, Southern district of New York, in favor of the libelants and against the steamship *Alvena* for \$2,904.73, for loss and damage to sugar shipped at Savannah La Mar, in Jamaica, and consigned to the port of New York. The sugar was stowed in No. 3 hold, aft of the engine-room bulkhead. The facts are sufficiently set forth in the following excerpt from the opinion of the district judge:

The steamship left Kingston, Jamaica, for New York, on April 3d. At about 1 a. m. of April 8th, water was found rushing into No. 3 hold, coming through a hole in the B strake, the second strake from the keel, on the starboard side of the bottom of the ship, immediately beneath the vertical manhole entrance to the tunnel. The pumps were not, at first, able to cope with the influx of water; but after the water from No. 3 was let into the engine room, and some jettison of cargo was made, they were able to do so. The vessel put into Norfolk, which she reached about 11 p. m. of the 9th. Temporary repairs were made there, and the vessel reached New York in April. A portion of defendant's sugar was damaged by the influx of water. It does not distinctly appear whether any of the plaintiff's sugar was jettisoned or not. The evidence leaves no doubt that the hole in the bottom of the steamer was caused by the corrosive action of the sugar drainage upon the iron plate of the steamer. This corrosive action is well understood. To prevent it, iron steamers intending to carry sugar cargoes have, as the *Alvena* in this case had, a layer of Portland cement, from five to six inches thick, covering the entire bottom where sugar is expected to be stowed. It is necessary that this layer of cement be kept solid and free from cracks. The explanation of this accident accepted by both sides is that some crack or break in the cement permitted the sugar drainage to work through it so as to corrode the plate beneath. Examination of the hole showed that the cement was gone in an oval space of about five inches by three at the bottom, and sloping upward and outward at an angle of about 60°. The hole in the iron plate was of irregular, ovate shape, nearly 2½ inches long, and nearly 1½ inches wide in the widest part. Around the margin of the hole the iron was eaten down to a very thin edge, and the corrosion extended in a less degree all around about ¾ of an inch back from the edge of the hole, at which distance from the edge the plate was again of the normal thickness of about half an inch. The sugar acid, therefore, had eaten out a saucer-like excavation in the plate over an extent of nearly 5 inches in length by about 3 inches in breadth at the

widest part. Except in the small space about the hole where the cement was gone, the cement was found to be in good condition. No radiating cracks were observed. The theory of the libellant is that the cement over the hole had become cracked or broken, from some cause, before the voyage began, and that the ship was not properly inspected in that regard, and was insufficient for the voyage. The theory of the defendant is that the crack was caused by a blow during the voyage on the outside of the iron plate underneath the place of the hole, and that the blow was of sufficient violence to break or crack the cement so as to admit the sugar acid.

Everett P. Wheeler, for appellants.

Lawrence Kneeland, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The bill of lading exempted the carrier from liability for loss or damage arising from "unseaworthiness of the ship, provided all reasonable means have been taken to make her seaworthy." The Harter act of February 13, 1893, which is also relied upon, provides that:

"If the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned," etc., "* * * neither the vessel, her owner," etc., "shall become or be held responsible for damage or loss resulting from fault or errors in navigation or in the management of said vessel."

Manifestly, neither the clause in the bill of lading, nor that in the Harter act can be availed of by the ship unless it is shown that "all reasonable means have been taken," or "due diligence exercised," to make her seaworthy; and the two phrases here quoted have the same meaning. When the cement was so cracked as to allow the corrosive sugar acid to come in contact with the iron, she was not in all respects seaworthy to carry such a cargo. And it is also quite clear that "reasonable means" or "due diligence" would call for some sort of an examination of the cement before sailing with such a cargo, to see if it was free from cracks. Much testimony was taken, and both briefs devote much space to argument touching claimant's theory that the crack was caused after sailing, by collision with the bottom or with some floating substance. We are unable to reach any definite conclusion on this branch of the case. It would be mere guesswork to express an opinion either way. All that can be said is that it does not appear what caused the crack. Of course, if it were shown satisfactorily that it was caused as defendant contends, the ship would not be held liable, although it might appear that there had never been any examination or inspection at all before sailing; for such examination, however minute, would not have revealed the particular form of unseaworthiness not then existing, but from which alone damage resulted. Inasmuch, however, as there is not sufficient evidence to show that the crack was caused by some accident after sailing, it becomes necessary for the ship to show such an inspection before sailing as would comply with the requirement that "reasonable means" or "due diligence" be taken or exercised. Upon this branch of the case we are inclined to concur with the district judge that the proof of inspection of the cement bottom was not sufficient to meet this requirement. We do not mean to hold that all the ceiling

boards ought to be taken up before each voyage,—an operation which would take several days, and would require repeated renewals of the ceiling, broken by being torn up when bolted down. It does appear, however, that it is usual to lay such ceilings with a number of boards (one of claimant's witnesses says every third board) loose, and provided with means for readily lifting them. When such a loose board is lifted, it is, of course, practicable to examine the cement under it, and also under the boards adjoining on each side. Quite possibly, such an inspection would not be as thorough as one made after removal of the entire ceiling; but, upon the evidence, it would seem to be all that reasonable prudence or "due diligence" would require, in advance of each voyage with such a cargo, supplemented by more thorough surveys at longer intervals. Before the voyage in question the lifting boards on this ship, or at least those of them that covered the limber spaces running fore and aft, were raised, and the limbers cleaned out, in the course of which operation the cement in the vicinity was sufficiently examined. Had there been lifting boards over the limbers in this part of the ship, it would seem that this crack, if it then existed, would have been discovered by such inspection. But the difficulty with the case is that in that part of the ceiling which forms the floor of a passageway between the tunnel shaft and an adjoining water tank, for a considerable distance, there are no lifting boards at all. The passageway has a width equivalent to that of about four boards, but each line of boards in it was so securely fastened that they could be torn up only at the risk of breaking them. It would seem to be a reasonable requirement that the usual facilities for inspection should have been provided in this part of the ship as well as elsewhere. Had they been provided and availed of, the inspection, no doubt, would have met the requirements of the bill of lading or the Harter act. But, not being provided, and no inspection being had at all of the cement in this part of the ship, such requirements would seem not to have been complied with, especially in view of the evidence that it was comparatively easy to get below the ceiling of this passageway by entering the tunnel shaft through a man-hole, the tunnel shaft having no ceiling. It was in this way that the leak was discovered by the engineer. It appears, then, that it is usual to have lifting boards over the limber spaces, and usual to lift them before sailing, in order to clear out the limbers so far as they run fore and aft; that, had boards been lifted for the full run of the limbers, the place where this leak developed would have come within the range of inspection; that no boards were lifted from so much of the limbers as lay below the passageway, in consequence of which the place where this leak developed did not come within the range of inspection, as it otherwise would have done. We concur, therefore, with the district judge in the conclusion that libelants were entitled to a decree for the damage sustained. The decree of the district court is affirmed, with interest and costs.

THE ALENE.

HALL et al. v. THE ALENE.

(Circuit Court of Appeals, Second Circuit. April 8, 1897.)

COLLISION—STEAMER AND SAIL—CHANGE OF COURSE.

Where a steamer and schooner, in the open sea, on first perceiving each other through a fog, were on courses which, if maintained, would have made collision impossible, and a change by either was denied by witnesses who were on board, *held*, under the circumstances, including especially the angle of collision, and the apparent impossibility of the steamer's making the necessary curve, that the schooner must have changed her course, perhaps unknown to her helmsman by reason of the baffling winds, and, the steamer having reversed promptly, the schooner alone must be *held in fault*. 74 Fed. 208, affirmed.

Appeal from the District Court of the United States for the Eastern District of New York.

Geo. Bethune Adams, for libelants.

Everett P. Wheeler, for claimant.

Before L'ACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from the decree of the district court for the Eastern district of New York, which dismissed a libel to recover the damages to the libelants occasioned by a collision at sea. The facts in the case up to the time just before the collision are clearly stated by Judge Brown as follows:

"The above libel was filed by the owners of the three-masted schooner John W. Hall against the steamship Alene to recover the damages for the loss of the schooner through a collision with the Alene at about 2 p. m. of May 5, 1895, at sea, about 140 miles west of Cape Henry. The schooner sank a few minutes after the collision, and became a total loss. The steamer was an iron screw propeller, about 320 feet long, bound from New York for the West Indies, and until a few moments before the collision was upon a course heading south. The schooner was bound for New York, and was sailing close-hauled on the starboard tack, with the wind from the northeast, and heading about north by west. There was some fog during the half hour before the collision; and the steamer sounded her fog whistles regularly. On hearing these whistles, the schooner gave a fog signal of a single blast, indicating, under the international rules, that she was on the starboard tack. Her whistle was heard and located by those on the steamer as a little upon their port bow. A second signal, heard afterwards, seemed somewhat broader off the port bow, and thereupon the master, who had just come upon the bridge, ordered the helm of the steamer to be ported. Very soon afterwards, and, as it is claimed, before the port wheel had turned the steamer's head to starboard, the schooner came in sight, apparently about 1,500 feet distant, and from half a point to a point on the steamer's port bow; and she was seen to be on the starboard tack, crossing the steamer's course. The helm was immediately ordered and put hard a-starboard, the steamer's bow swung to port, and she would have passed well clear of the schooner to the eastward, as her officers claim, had not the schooner, when from 500 to 800 feet distant, luffed, on seeing which the steamer reversed full speed, but too late to avoid collision. The two vessels came together, as all agree, at a very considerable angle, viz. from 5 to 8 points, between their bows. The steamer's bow ran about half way through the schooner, held her fast for a few minutes, after which the schooner dropped away and sank. Her crew was saved. The full speed of the steamer was 12 knots, but under reduced steam, according to her officers' tes-

timony, she was making only about 9 knots per hour until the fog signal of the schooner was heard, when she was put at half speed, bringing her speed down to 5 or 5½ knots, until her engines were reversed, probably about a minute and a half before collision. The men on board the schooner strenuously deny any change of course, and aver that the steamer, when first seen, was about a point on the schooner's starboard bow, and heading for the schooner's starboard bow; that she then seemed to change her course somewhat to the westward across the schooner's course, but that all at once she seemed to whirl around to port, and head directly for the schooner, and kept so until collision. The wind was light from the northeast, and, according to the schooner's testimony, she was sailing about north by west, and making only about two knots an hour."

The libelants rely upon alleged acts of omission or of commission on the part of the steamer prior to her final change of course, which they think contributed to the disaster. It is said that her speed in a fog was excessive, that she did not stop as soon as she heard the schooner's signal, and that the first order of her captain to port her wheel was erroneous. But it is apparent that just before the collision the vessels were in safety with respect to each other; that, if no change of either had taken place, they would have passed each other without harm; and that the accident was caused by a final and useless change of course on the part of one of the vessels. The unnecessary character of this change, by whomsoever it was entered upon, creates the perplexing difficulty in this case, for, in addition to the ordinary contradictions of the witnesses, there is the fact that each party attributes the collision to an act of the other which was apparently without reason. The district judge thought that the change of course was by the schooner. He reaches this conclusion from the story which is told by the angle of collision, and by a plot of the navigation of the vessels backward from the time of collision, upon the theory that the schooner kept her course. We think that the conclusions of the district judge are verified by the proved circumstances of the case, among which the angle of collision is prominent. The concurrent testimony of the witnesses on both vessels is that, as they were first visible to each other, if both had kept their courses and their speeds, they would have collided. The steamer was heading south, and was nearly north of the schooner, which was heading about north by west; and the steamer was about a point on her starboard bow, and was coming directly towards her bow. It is conceded by the steamer that when her captain first came on deck, after he had heard the schooner's signal, and before he saw her, he ordered the helm of the steamer to be ported, and that the helmsman began to obey this order, and that when the schooner came in sight, and was seen to be on the starboard tack, the steamer's wheel was put hard a-starboard. The schooner's witnesses think that the first order was carried into effect, and that the steamer, under the influence of a port wheel, headed somewhat to the westward. The steamer's witnesses say that the order was so quickly countermanded that she could not have perceptibly turned to the starboard. We are inclined to the opinion that the change under the first order to port must have been slight, but, be that as it may, the steamer's wheel was subsequently and immediately put hard a-starboard, and she

swung to port. The theory of the schooner is that she did not change her course, but that, after the steamer had ported, and went away to leeward, in the language of the schooner's mate, "she whirled right around, and headed directly for us again." The steamer's bow struck the schooner on her port bow forward of her fore rigging, at an angle of at least six points. If the schooner was on her former course, it would seem almost impossible of belief that the steamer could make the curve which it was necessary for her to make in order to strike the schooner nearly at right angles on her port bow, in the time and with the speed which she had. When the steamer slowed, the vessels were about 1,500 feet apart, and she was slowing for 4 minutes, and she reversed for $1\frac{1}{2}$ minutes. In order to strike the schooner at an angle of six points on her port side, it would require more time and greater speed to make the necessary semicircular curve, and run the necessary distance. Furthermore, if the steamer's helm was starboarded when the schooner came into view (and it must be taken as proved that this was done), and the schooner had kept her course, the steamer would have been, in the time which she had for forward movement, so far eastward as to be away from the course of the schooner, without probability of collision. The libellants urge strenuously that the first order to port was wrong, and that the collision happened because the steamer, having changed her course to starboard, and crossed the course of the schooner, unsuccessfully tried to recross it. Assuming that this order was improper, it was not, we think, the cause of the collision, because, as has just been said, the steamer would have been out of the way of the schooner if, for some unknown reason, the schooner had not changed her course, which brought about the unfortunate result. The reason for the schooner's luffing is well-nigh inexplicable. The helmsman was not steering by the compass, but by the wind, which was baffling, and the most probable explanation is that there might have been a change of the wind, which, unconsciously to those on board, who were watching the steamer, caused a change of course. The decree of the district court is affirmed, with costs.

WILHELMSSEN v. LUDLOW.

(District Court, D. Washington, N. D. March 13, 1897.)

1 COLLISION—VESSEL AT ANCHOR—UNMANAGEABLE STEAMER.

A steamer which steers badly is in fault for approaching so near to an anchored vessel that a collision occurs through her failure to answer her helm.

2. SAME—IMPROPER ANCHORAGE—HARBOR REGULATIONS.

The fact that a vessel has come to anchor without obtaining the permit from the harbor master required by the port regulations does not place her in fault where another vessel runs into her in clear daylight.

Gorham & Gorham, for libellant.

F. C. Robertson, Asst. U. S. Atty., for respondent.

HANFORD, District Judge. The Monterey, a public war vessel of the United States, while lying at anchor in the harbor of Seattle, distant about 500 feet from the outward end of Arlington dock, on the afternoon of a clear day, was run into by the steamer Transit, a Norwegian vessel owned by the libellant. The Transit was entering the harbor, and intending to make a starboard landing on the north side of Arlington dock, and, to reach her berth at the dock, it was necessary for her to pass the Monterey to the northward. There was nothing to prevent her officers from seeing the Monterey, and making out her position accurately, and in fact they did see the Monterey in ample time to have avoided coming in collision with her. If the Transit had steered a proper course towards her landing, she would have passed the Monterey on her starboard side; and the force of the wind and tide had a tendency to carry her northward, and from the Monterey, rather than to exert any influence in bringing the vessels together. The libel alleges that, as the Transit entered the harbor with the object of making a landing as aforesaid, she "was headed for the stern of the Monterey; and, when within five or six cables' length of the cruiser (being as soon as it was considered safe by those in command of the Transit), the engines of the Transit were brought to a dead stop, and helm ordered to starboard, for the purpose of passing the stern, and to the northward of said cruiser about a ship's length, which order was promptly obeyed. After a reasonable time had elapsed, the said ship not answering her helm, a sudden and heavy squall then blowing and striking her on the starboard quarter, the order was given 'Hard a-starboard!' which order was promptly obeyed, and directly after, seeing that said vessel did not respond, the engines were ordered full speed astern, which order was promptly obeyed, and the anchor let go." The Transit, however, did not respond to her helm, nor stop her headway until she had struck the Monterey with great force, doing considerable damage. The amended libel shows affirmatively that the Transit was in fault, for she failed to obey her helm, which fact proves that she was an unmanageable vessel, and her officers should have kept at a safe distance from other vessels, or else they should have proceeded so cautiously that by use of her machinery the

Transit could have stopped and reversed in time to have avoided the collision. This fault on the part of the Transit, as shown by the amended libel, is sufficient in itself to account for the collision. It is not pretended that the Monterey did anything whatever to cause the collision, except to remain stationary in the way of the Transit. The libel, however, seeks to throw the blame upon her commander, by alleging that she was anchored at an improper place, and that a city ordinance of the city of Seattle was violated by anchoring the vessel in the harbor without a permit from the harbor master, and without being assigned to a place for anchoring. The authorities cited by the libellant's proctor do not sustain the position he has taken. I will refer to them briefly: *The Clara*, 102 U. S. 200-203: In this case, a small schooner, having no watch on deck, was lying at anchor inside the Delaware breakwater, on a very dark night, when vessels were constantly arriving, for shelter from an approaching storm, one of which, in proceeding to a proper anchorage, without any fault on her part, collided with and sunk the schooner. If a sufficient watch had been kept on deck of the latter, the collision might have been avoided. It was held that the vessel at anchor was wholly in fault. It appears by the opinion of the court that there was an entire failure to show that the other vessel was guilty of any fault of omission or commission, and, so far from deciding that being anchored at an improper place was the controlling fact in fixing the liability, it is given as the conclusion of the court that "the failure to keep a proper watch on deck of the *Julia Newell* was the cause of the collision." *The North Star*, 106 U. S. 17-29, 1 Sup. Ct. 41, was a case of collision between two vessels under way at sea, off the Jersey shore, south of Sandy Hook. There is nothing in the facts of the case calling for a decision which in the remotest degree bears upon the question of fault on the part of a vessel lying at anchor. The case appears to have been cited by counsel for the sake of a reference therein to the rules of Oleron and the laws of Wisbuy, giving the rule for division of damages in the supposed case of a ship coming into port negligently, and striking a vessel at anchor in an improper position, so that both are in fault, and both damaged. There is nothing in this to establish liability upon a vessel at anchor, if struck by another vessel, if her position was known to those in charge of the incoming vessel in time for them to have avoided the collision. *The Manitoba*, 122 U. S. 97-111, 7 Sup. Ct. 1158, was a case of a collision between two vessels under way on Lake Superior. There is nothing in the facts of the case, nor in the rules of law discussed in the opinion of the court, having any bearing on the question at issue here. The case appears to have been cited as an authority to sustain the proposition that in cases of mutual fault the damages shall be divided. *The Armonia*, 67 Fed. 362-365: This was a case of a collision between two vessels, one of which was at anchor in Delaware Bay. The collision occurred in the nighttime, and the pleadings raised an issue as to whether the vessel at anchor was in a proper place, exhibited a proper light, and maintained a watch.

Judge Butler held that the burden of proof was cast upon the vessel at anchor to establish all of these facts. But the rule is different in a case of collision on a clear afternoon, the vessel at anchor being plainly visible, and her position known to those in charge of navigating the incoming vessels in time for them to have avoided the collision. In this case there is no issue raised as to fault on the part of the Monterey, by failure to maintain a watch or give timely notice of her position.

The position of the Monterey, and failure on the part of her commander to comply with the city ordinance with reference to obtaining a permit from the harbor master, are matters of no importance. A mere failure to comply with prescribed rules of navigation or harbor regulations does not render a vessel liable for damage caused by a collision, unless the neglect or wrongful act is shown to be the proximate cause of the collision. *Railroad Co. v. Killien*, 14 C. C. A. 418, 67 Fed. 365-368.

A visible stationary object in any position cannot be regarded as the cause of an injury to a person who, with full knowledge of its existence, unnecessarily comes in collision with it. The law does not authorize the application of destructive force against a wrongdoer when the wrong consists of a mere intrusion, without license, or a trespass upon uninclosed grounds or highways, whether public or private. I cannot regard the possession by Capt. Ludlow of a permit from the harbor master, or the want of it, as a circumstance having any influence whatever to cause or prevent the collision. I should be reluctant to hold the commander of a national ship to be an intruder in any port of the United States in which he should choose to cast anchor without permission previously obtained from the harbor master. But it is unnecessary for me to pass upon the validity of the city ordinance pleaded as a restriction upon the freedom of a commanding officer to choose for himself a place to anchor a public vessel of the United States. The most that could be claimed under the ordinance would be the right to have an intruding vessel removed to a place assigned to her by the harbor master, or to collect from the offending captain the penalty for violation prescribed by the ordinance. The principle involved is the same as in the case of *The Blue Jacket*, 144 U. S. 371-394, 12 Sup. Ct. 711, in which the supreme court of the United States decided that failure on the part of a steam tug to have on board a licensed mate, and to maintain a proper lookout while under way with a vessel in tow, in the nighttime, in the Straits of Juan de Fuca, did not render the steam tug liable for damages caused by a collision, although the failure in the particulars mentioned was a flagrant violation of the positive requirements of United States statutes, the reason for the decision being that the violation of law was not the cause of the collision.

In view of all the facts alleged, it is my conclusion that no actionable wrong on the part of the defendant is shown. Therefore the libel will be dismissed, with costs.

THE CITY OF PUEBLA.

PUGET SOUND TUGBOAT CO. v. THE CITY OF PUEBLA.

(District Court, D. Washington, N. D. April 3, 1897.)

SALVAGE SERVICES—COMPENSATION.

Services of a tug in going to the rescue of a disabled passenger and freight steamer, drifting, in stormy weather, with the wind and current, towards dangerous rocks, and towing her into port, *held* a salvage service, for which there should be awarded to owners, master, and crew of the tug \$13,500 on a total valuation of \$343,000, it appearing that the service lasted 30 hours, and involved considerable danger and risk, as shown by the breaking and loss of a large steel hawser.

In Admiralty. Libel in rem against the steamship City of Puebla by the Puget Sound Tugboat Company, a corporation, owner of the steam tug Wanderer, for itself and in behalf of the officers and crew of said steam tug, for salvage. Findings and decree for libellant.

Struve, Allen, Hughes & McMicken, for libellant.
A. F. Burleigh and S. H. Piles, for claimant.

HANFORD, District Judge. In the month of March, 1894, the steamship City of Puebla, while on a voyage with passengers and cargo of general merchandise from the ports of Puget Sound and Victoria to San Francisco, at a place on the Pacific Ocean, about 50 miles from the entrance to the Straits of Juan de Fuca, and about 20 miles southwest of Destruction Island, suffered a mishap by the breaking of a crank pin, depriving her of the use of her propelling machinery. The weather was stormy and threatening, and the vessel, thus disabled, was unable to proceed on her voyage, or to keep steerageway on any course, but drifted, with the wind and current, northward towards Flattery Rocks. With the utmost skill of her able commander and officers, with such sails as they were able to use, nothing could be done for the safety of the vessel, except by putting out a drag to lessen the rapidity with which she otherwise would have drifted into extreme danger. When in this situation, the first officer, with a boat's crew, volunteered to go in a small boat to the telegraph station on Tatoosh Island, with a message for assistance. On account of the heavy sea and the surf beating upon the island, the boat was unable to effect a landing. The men had become nearly exhausted from hard work and exposure, when, on the next day, the boat was picked up by the steam tug Wanderer, while towing a vessel outward. After running into Neah Bay for the purpose of telegraphing for assistance, the Wanderer proceeded to the relief of the disabled ship, and on the way she was met by the steamship Costa Rica, which gave the approximate position of the Puebla at the time. At this time the weather was squally and thick, snow was falling, and the sea was running high. To reach the ship by the most direct course, the Wanderer had to run head to the sea, and plow the waves, which

continually broke over her, flooding her decks, thereby exposing her crew to hardships and peril. It was about 4 o'clock in the afternoon when she reached the City of Puebla, and then a new 11-inch manilla hawser with a 4½-inch steel wire pennant was quickly sent on board, and made fast. When the tugboat commenced to draw on her hawser, the high-rolling billows intervening between her and the City of Puebla caused such tremendous strain upon the hawser that it parted near the rail of the tugboat, and, owing to a misunderstanding on the part of the officers of the Puebla, it was cast loose from the steamship, and lost. In a short time the tug succeeded in sending another hawser aboard the ship, and also in taking a hawser from the ship, shackled to one of her anchor chains, and by means of the double lines thus made fast from one vessel to the other the tug was able to pull the ship around, and tow her into the Straits. The tug Tacoma, which had been dispatched by the libellant, in response to the telegram sent from Neah Bay, met the vessels in the Straits, and sent a hawser on board the Puebla, and assisted the Wanderer in towing her to Port Townsend.

It is maintained on the part of the claimant that the City of Puebla was not in a situation of imminent peril, and that the tugboats, in towing her to Port Townsend, performed only the usual services in which they are ordinarily employed, and for which they are constantly open to contract. But I must regard the situation of a large passenger steamer, so disabled as to have no use of her propelling machinery, and without motive power sufficient to maintain steerageway, so near to a rocky coast, with wind and current setting on, and in the most stormy season of the year, as being in a situation of extreme peril; and, in view of all the undisputed facts, it is my opinion that if the Wanderer had not reached the City of Puebla in time to render assistance before dark that day it is probable, if not inevitable, that in spite of all efforts to save her on the part of her own officers and crew, and the attempts of other vessels, she would have drifted upon the rocks, and become a total wreck, before daylight the next morning. It is true that the Wanderer and the Tacoma are built and equipped for towing large vessels in and out of the Straits of Juan de Fuca, and their business is to perform such services under contract; nevertheless the rescue of the City of Puebla was a salvage service, rendered with promptness and skill, and in the case of the Wanderer more than ordinary dangers were braved by her officers and crew, which, in my judgment, entitle them to share in the compensation to be awarded. The time from the commencement of the service until the disabled ship was moored at Port Townsend was about 30 hours. The value of the Wanderer at that time was \$65,000, and she lost a new hawser, worth \$550. The value of the City of Puebla was at that time \$275,000, and the value of her cargo and freight was about \$68,000. Taking into account all the circumstances showing merit on the part of the salvors and benefit to the claimant, I consider the following sums to be just and reason-

able compensation: To the libellant, for all services rendered by its tugboats, and losses sustained, \$13,500. To Charles T. Bailey, master of the Wanderer, \$1,000. To Charles T. Manter, mate, and E. W. Deickhoff, chief engineer, each \$600. To R. H. Ellis, assistant engineer, \$400. To the cabin boy, \$50. And to each of the other eight employes on board the Wanderer, \$100. Let there be a decree directing payment of the above sums, with interest thereon at the rate of 7 per cent. per annum from the date of filing the libel, and costs.

THOMPSON NAV. CO. v. CITY OF CHICAGO.

(District Court, N. D. Illinois. April 5, 1897.)

COLLISION—LIABILITY OF CITY FOR NEGLIGENCE OF ITS FIRE TUG.

A city is liable in personam for a collision between its fire tug and another vessel, caused by the negligence of the tug. The Fidelity, Fed. Cas. No. 4,758, 16 Blatchf. 569, disapproved.

In Admiralty. Libel by the Thompson Navigation Company against the city of Chicago.

John C. Richberg, for libellant.

William G. Beale and B. Boyden, for defendant.

GROSSCUP, District Judge. This is a libel in personam against the city of Chicago, growing out of a collision between the fire tug Yo Semite, owned by that city, and the propeller City of Berlin, owned by the libellant. The collision occurred in the Chicago river, near the point where it branches into its south and north forks. At the time of the collision, the City of Berlin was lying in winter quarters. The circumstances of the collision were such that had the tug been owned by private owners, and engaged in a private enterprise, there could be no doubt of her liability for the injury done. In saying this, I keep fully in view the fact that fire tugs are expected by the nature of their duties to make haste. The haste in this case was blind and thoughtless, resulting in a delay to the tug, as well as injury to the City of Berlin. Indeed, counsel for the city do not seriously contest the fact of negligence. But the fire tug was at the time of the collision owned by the city of Chicago, and actually engaged in one of the public duties that Chicago, as a part of the government, undertakes. Do these facts, or either of them, exempt her, or the city, responding in her behalf, from what would otherwise be her clear liability?

At common law, one injured either in his property or person looks for compensation to the person or persons causing the injury, or to the master or principals of such persons, where the injury was done within the scope of their agency or service. In admiralty the rule is this: The vessel committing the unlawful injury is considered the offender, and the owner is mulcted to the extent of his interest in the vessel; not because he stands in the relation of principal or master to the crew, but alone because of the fact of

ownership. Thus, under laws preventive of piracy or smuggling, the vessel may be seized, condemned, and sold, notwithstanding the crew committing the unlawful acts were engaged by the owner for a lawful enterprise only, and were, in the commission of the unlawful acts, wholly outside the scope of their engagement. *U. S. v. The Malek Adhel*, 2 How. 209. Commenting upon this apparent anomaly of maritime jurisprudence, and showing that the doctrines advanced in the case then under consideration were not different from those prevailing generally in maritime law, Mr. Justice Story, at page 234, speaks as follows:

"The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

It is thus apparent that the liability of the owner, to the extent of his vessel, for injuries caused in a collision by negligence or misconduct, is not dependent upon the relation of master and servant, or principal and agent, existing between him and the crew manning the vessel, but rests solely upon the fact of ownership. The ship, which, in contemplation of maritime law, is not the hulk and machinery only, but includes the crew as well, is, as such, the offender, and the ensuing losses reach the owner simply because of his relationship to the offender. In Rome, it is said that, when the owner of slaves was assassinated, every slave belonging to him, however otherwise innocent, was put to death. The penalty came not as the result of participation, but as the result of relationship. The maritime law, for justifiable public purposes, inverts this mandate, putting every owner, by virtue of such relation, to the duty of compensation for losses inflicted by his ship property, to the extent, at least, of the value of such property. Nor is this liability of the owner indirect alone, for the admiralty rules of the supreme court provide (rule 15) "that, in all suits for damage by collision, the libellant may proceed against either the ship and master, or against the owner alone in personam." The method of procedure chosen does not change the substantive right or liability. In either case the ship is the offender. If the procedure be against the ship alone, resulting in seizure and sale, the owner is only indirectly reached; but, if it be against the owner in personam, the remedy against him is direct. The substantive right is compensation for the injury, and can be either by way of the ship or from the owner directly.

A firm grasp of this principle of maritime law clears this case of its difficulties. At common law the city is not liable for the negligent acts of its fire department, for the reason that the members of the fire department are not the servants of the city in its corporate capacity. The negligence of the firemen, therefore, is not attributable to the city. But in the case under consideration the injury done by the vessel, including its crew, to the libellant, is chargeable to the

owner, by virtue of the mere fact of ownership, and can be collected, directly, by seizure of the vessel, or, indirectly, by a suit in personam. In either case the liability rests, not in the relation of principal and agent, or master and servant, but in the bare fact of ownership.

But, though such liability exists, reasons of public policy may, in some cases, exempt the owner from suit. The government, as sovereign, for instance, declines to be made compulsorily amenable to the courts upon even its just obligations. This exemption, however, is founded entirely in public policy (*The Siren*, 7 Wall. 152), and ought not to be extended to cases where such considerations do not intervene. In England, I think, they do better. In claims arising against public vessels, the apparently conflicting right of the sovereign to exemption from suit, and her duty to respond to just claims, are both maintained by a procedure, effective, though somewhat fictitious. A petition of right is addressed by the aggrieved person to the lords in admiralty, representing the crown, who, in turn, direct their proctor to appear and answer a suit to be commenced in the admiralty court. This is equivalent to a waiver by the crown of its privilege as a sovereign, and to a consent that the rights of the parties be tried and determined in the suit as between subject and subject. There appears, however, to be no way of making the government of the United States, or of a state, parties to such a proceeding, because no procedure has been invented here whereby the right of immunity from suit is waived. But the city of Chicago is, by law, amenable to suit and judgment upon all just claims that may be brought against it. The doctrine of public policy, therefore, under which this exemption is accorded to sovereigns, stops short of city government. The law by making such cities suable abolishes the doctrine in what might otherwise be its application to city governments. The legislative will has, in effect, decreed that there is no public policy excepting cities from suit. The city is suable, and may be decreed to pay as a private owner where a case is proved. This clearly differentiates this case from *The Siren*, supra.

One other consideration alone remains: I have held, on the strength of *The Fidelity*, 16 Blatchf. 569, Fed. Cas. No. 4,758, decided by Chief Justice Waite on the circuit, that an action in rem cannot lie against this fire boat. Will that prevent a decree in personam against its owner? The difference between mere procedure and substantive right must be steadily borne in mind. The latter alone determines the right of some judgment or redress. The former only fixes the method of reaching it. A seizure of the vessel is only a species of execution in advance of judgment. It is usually permissible in admiralty, because, under ordinary circumstances, most effective and equitable. But public policy prevents its application to such instrumentalities of emergency as a fire tug. A city cannot be left to burn while a contest over a few dollars of damage is going on. The law, therefore, out of considerations of public policy, forbids such seizure, or any process that would disarm the city, even temporarily, of its equipment to put down fires or like dangers. But exemption of the owner of the boat from one of the ordinary processes of the

court is not, either in logic or law, a grant of immunity against liability, through some other procedure, not subject to such objections. The consideration of public policy extends only to the mischief to be averted. To give it a wider application would make it an instrument of injustice. An apt illustration of this limitation on procedure only is seen in the law which exempts cities, in the common-law court, from seizure of their property upon execution. But it has never been urged that, because of that, they were not suable at all, or that judgments entered against them were in no way enforceable.

My conclusion is that the city of Chicago, as owner, at the time of the collision, of the fire boat, is responsible to the libellant in an action in personam to the extent of the value of such fire boat for the injuries caused. I recognize that in this conclusion I depart from the case of *The Fidelity*, supra, but believe myself to be in consonance with the doctrine laid down in *The Siren*, supra, and *The Malek Adhel*, supra. A decree may be entered accordingly.

THE E. A. SHORES, JR.

MANEGOLD et al. v. THE E. A. SHORES, JR.

(District Court, E. D. Wisconsin. April 12, 1897.)

1. COSTS IN ADMIRALTY—DISCRETION OF COURT.

In admiralty, as in equity, the prevailing party is generally entitled to costs, but they do not necessarily follow the decree, and are always, in the exercise of a sound discretion, to be allowed, withheld, or divided according to the equities.

2. SAME.

Where a libel was not sustained on the primary issue, but was retained on a further issue, including a claim for general average, which was afterwards conceded and arranged by the claimants, *held*, that the cause was one for an apportionment of the costs, in the court's discretion.

This was a libel in admiralty by Charles Manegold, Jr., and others against the propeller *E. A. Shores, Jr.*, to recover for loss of cargo by stranding.

Van Dyke, Van Dyke & Carter, for libellants.

M. C. Krause, for claimant.

SEAMAN, District Judge. The hearing upon this libel resulted in a decision that the stranding of the vessel was not due to want of diligence in respect of seaworthiness or equipment, and that the shipper was barred from a general recovery for loss of cargo by the act of February 13, 1893, called the "Harter Act," but the questions of liability for refusal to deliver the wheat at Racine and of allowance in general average were reserved for further hearing. *The E. A. Shores, Jr.*, 73 Fed. 342. After the taking of considerable testimony before a commissioner, these matters were adjusted by agreement of the parties, the claimants paying the stipulated amount and certain expenses incurred therein, leaving open

the question of allowance of costs on the libel now presented to the court for determination. In admiralty, as in equity, the prevailing party is generally entitled to costs; but they do not necessarily follow the decree, and are always, within the sound discretion of the court, to be allowed, withheld, or divided according to the equities of the case. The claimants assert their right to full costs under the general rule, because the libel was not sustained upon the primary issue. If recovery by the libelants had depended solely upon the question of liability for the general loss on the cargo, due proximately to the stranding of the vessel, the libel would have been dismissed; and clearly the claimants would have been the prevailing party. Even in such case the allowance of costs would not conclusively follow, as there are equitable considerations which should be taken into account. *The Sapphire*, 18 Wall. 51, 57. The libelants had suffered loss upon their cargo, whereof safe delivery was promised by the contract of affreightment, and for which there was prima facie liability against the carrier, unless the cause of the stranding came within the exemptions specified in the contract, or was limited by the Harter act. This could be determined only upon hearing the proofs, which were mainly, if not wholly, within the cognizance of the carrier. The circumstances of the stranding (upon a well-known reef, without stress of weather or fog) are such that there was at least some justification for filing the libel, and it is not clear that a dismissal would operate to condemn the libelant for all costs. *The Rapid Transit*, 52 Fed. 320; *The Olympia*, Id. 985. Without passing upon that question, it is sufficient here that the libel was retained because of a further issue, including an allowance for general average which has since been conceded and arranged, and a case is presented which calls for just discretion as to the costs. Each party will bear the expenses for the witnesses attending on its behalf, and each must pay one-half of the costs for clerk, marshal, and stenographer, no proctor's fees being allowed. It is so ordered.

MEMORANDUM DECISIONS.

THE ADVANCE. ATLANTIC TRUST CO. v. PROCEEDS OF THE ADVANCE et al. (Circuit Court of Appeals, Second Circuit. May 12, 1896.) No. 707. Appeal from the District Court of the United States for the Southern District of New York. Cary & Whibridge, for appellants. Carter & Ledyard, for appellee. Discontinued by consent.

THE ADVANCE. HARD et al. v. PROCEEDS OF THE ADVANCE. (Circuit Court of Appeals, Second Circuit. May 12, 1896.) No. 710. Appeal from the District Court of the United States for the Southern District of New York. Cary & Whibridge, for appellants. Carter & Ledyard, for appellee. Discontinued by consent.

THE ALLIANCA. COMMERCIAL UNION ASSUR. CO. v. THE ALLIANCA et al. (Circuit Court of Appeals, Second Circuit. December 19, 1895.) No. 516. Appeal from the District Court of the United States for the Southern District of New York. Butler, Stillman & Hubbard, for appellant. Carter & Ledyard, for appellees. No opinion. Decree affirmed, with costs, on opinion of the district judge. See 64 Fed. 871.

THE ALLIANCA. LONDON ASSUR. CORP. v. THE ALLIANCA et al. (Circuit Court of Appeals, Second Circuit. March 19, 1896.) No. 621. Appeal from the District Court of the United States for the Southern District of New York. Willard Parker Butler, for appellant. Carter & Ledyard, for appellees. Discontinued.

AMERICAN BUTTONHOLE, OVERSEAMING & SEWING MACHINE CO. v. BABCOCK. (Circuit Court of Appeals, Sixth Circuit. October 19, 1896.) No. 421. Submitted on briefs from the circuit court of the United States for the Eastern district of Michigan. George W. Radford, for appellant. Bowen, Douglas & Whiting, for appellee. No opinion. Judgment affirmed.

AMERICAN GROCERY CO. v. GODILLOT. (Circuit Court of Appeals, Third Circuit. February 22, 1897.) Appeal from the Circuit Court of the United States for the District of New Jersey. J. C. Clayton, for appellant. H. Aplington, for appellee. Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

PER CURIAM. The judges by whom this case was heard, including the late Judge WALES, had, some time previous to his death, all agreed upon the disposition to be made of it. The survivors of those who then constituted the court do not deem it necessary, under the circumstances, to do more than announce the judgment which had thus been unanimously determined upon. In accordance therewith the decree of the court below is affirmed.

ANDERSON v. MACKAY. (Circuit Court of Appeals, Second Circuit. November 11, 1895.) No. 630. Error from the Circuit Court of the United States for the Southern District of New York. George Putnam Smith, for plaintiff in error. Robert H. Griffin, for defendant in error. Dismissed on motion.

ASPINWALL v. GLENN. (Circuit Court of Appeals, Second Circuit. October 15, 1891.) No. 313. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, for appellee. No opinion. Decree affirmed, with costs.

THE BEACONSFIELD. SANBERN v. THE BEACONSFIELD et al. (Circuit Court of Appeals, Second Circuit. June 19, 1895.) No. 432. Appeal from the Circuit Court of the United States for the Southern District of New York. J. Parker Kirlin, for William Libbey. George A. Black, for claimant Elizabeth Cleugh. Sidney Chubb, for libelants. Dismissed by consent.

BRANCHI v. GLENN. (Circuit Court of Appeals, Second Circuit.) No. 314. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, Charles Marshall, and A. H. Masten, for appellee. No opinion. Decree affirmed, with costs, on opinion in *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

BROWN et al. v. PRINCE STEAM SHIPPING CO., Limited. HARTMAN v. SAME.¹ (Circuit Court of Appeals, Fifth Circuit. December 1, 1896.) No. 497. Appeal from the District Court of the United States for the Eastern District of Louisiana. Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

PER CURIAM. The appeals in the above-entitled consolidated cause were heard shortly prior to the close of the last term, but, owing to the voluminous record and briefs and sickness among the judges, were not then decided. The controlling question is whether the supplies furnished by W. H. Brown Sons to the steamship *Moorish Prince*, and services rendered by Charles Hartman to the steamship *British Prince*, were supplies furnished and services rendered respectively on the credit of the ships, or upon contracts with, and on the credit of, the charterers, the Metropolitan Trading Association, Limited, of London. After a careful consideration of the conflicting evidence and of the able briefs and oral arguments submitted, we reach the conclusion that the decrees of the district court dismissing the appellant's libels are in accordance with the preponderance of evidence, and therefore said decrees are affirmed.

BRYSON et al. v. KOONS. (Circuit Court of Appeals, Fourth Circuit. February 12, 1897.) No. 213. Error to the Circuit Court of the United States for the Western District of North Carolina. Moore & Moore, for defendant in error. No opinion. Cause docketed and dismissed on certificate of clerk, pursuant to sixteenth rule; plaintiffs in error having failed to file record by return day of the writ of error.

¹ Rehearing denied January 26, 1897.

BUFFALO BILL'S WILD WEST CO. v. ROSER. (Circuit Court of Appeals, Second Circuit. March 11, 1896.) No. 591. In Error to the Circuit Court of the United States for the Southern District of New York. S. L. Samuels, for plaintiff in error. R. H. Landale, for defendant in error. No opinion. Reversed in open court.

BURT v. GLENN. (Circuit Court of Appeals, Second Circuit.) No. 315. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, Charles Marshall, and A. H. Masten, for appellee. No opinion. Decree affirmed, with costs, on opinion in *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

CANADA SHIPPING CO. v. HASKELL. (Circuit Court of Appeals, First Circuit. November 28, 1896.) No. 133. Appeal from the District Court of the United States for the District of Massachusetts. Edward S. Dodge, for appellant. Frederic Cunningham, for appellee. Dismissed pursuant to stipulation of counsel, without costs to either party.

CENTRAL R. CO. OF NEW JERSEY v. WIEGAND et al.

WIEGAND et al. v. CENTRAL R. CO. OF NEW JERSEY.

(Circuit Court of Appeals, Third Circuit. February 22, 1897.)

CARRIERS OF PASSENGERS—LIABILITY AS TO BAGGAGE.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion, see 75 Fed. 370.

Samuel Dickson, for Central R. Co. of New Jersey.

Webster A. Melcher, for Wiegand.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **WALES**, District Judge.

PER CURIAM. The judges by whom this case was heard, including the late Judge **WALES**, had, some time previous to his death, all agreed upon the disposition to be made of it. The survivors of those who then constituted the court do not deem it necessary, under the circumstances, to do more than announce the judgment which had thus been unanimously determined upon. In accordance therewith the judgment of the court below is affirmed.

CHASE v. CATLIN. (Circuit Court of Appeals, Second Circuit. December 20, 1895.) No. 526. Appeal from the Circuit Court of the United States for the Southern District of New York. W. P. Preble, Jr., for appellant. Knevals & Perry, for appellee. No opinion. Ordered dismissed.

Ex Parte CITIZENS' NAT. BANK OF DES MOINES, IOWA. SPARKS v. NATIONAL MASONIC ACC. ASS'N OF DES MOINES, IOWA. (Circuit Court of Appeals, Eighth Circuit. December 8, 1896.) No. 7, original. Peti-

tion in the alternative for writ of mandamus to compel the allowance of a writ of error and supersedeas by the circuit court of the United States for the Southern district of Iowa, or for the allowance of a writ of error and supersedeas by the circuit court of appeals. Clark Varnum, for petitioner. No opinion. Denied.

CITY OF HASTINGS, NEB., v. THOMAS. (Circuit Court of Appeals, Eighth Circuit. January 18, 1897.) No. 825. Error to the Circuit Court of the United States for the District of Nebraska. Harry S. Dungan, for plaintiff in error. Lionel C. Burr and Charles L. Burr, for defendant in error. No opinion. Affirmed, with costs.

CITY OF HUMBOLDT v. JACKSON et al. (Circuit Court of Appeals, Eighth Circuit. December 9, 1896.) No. 665. Error to the Circuit Court of the United States for the District of Kansas. L. W. Keplinger, for plaintiff in error. C. E. Epler, B. P. Waggener, David Martin, James W. Orr, W. O. Perry, and John H. Crain, for defendants in error. Dismissed, with costs, pursuant to stipulation of the parties.

CITY OF OMAHA et al. v. NEW ENGLAND LOAN & TRUST CO. (Circuit Court of Appeals, Eighth Circuit. May 13, 1896.) No. 746. Appeal from the Circuit Court of the United States for the District of Nebraska. W. J. Connell, for appellants. E. D. Samson, for appellee. No opinion. Dismissed, with costs, pursuant to twenty-third rule, for failure to print record, on motion of appellee.

COCKRILL v. WOODSON et al. (Circuit Court of Appeals, Eighth Circuit. December 8, 1896.) No. 883. Error to the Circuit Court of the United States for the Western District of Missouri. Ben. J. Woodson, for defendants in error. No opinion. Docketed and dismissed, with costs, pursuant to the sixteenth rule, on motion of counsel for defendants in error.

CROSSLEY v. DUGGAN.

(Circuit Court of Appeals, Third Circuit. February 22, 1897.)

PATENTS—APPARATUS FOR MOLDING EARTHENWARE.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion, see 71 Fed. 967.

Francis T. Chambers and F. C. Lowthrop, for appellant.

James Buchanan, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

PER CURIAM. The judges by whom this case was heard, including the late Judge WALES, had, some time previous to his death, all agreed upon the disposition to be made of it. The survivors of those who then constituted the court do not deem it necessary, under the circumstances, to do more than announce the judgment which had thus been unanimously determined upon. In accordance therewith the decree of the court below is affirmed.

DANIEL v. BROWN et al. (Circuit Court of Appeals, Eighth Circuit. December 9, 1896.) No. 733. Appeal from the Circuit Court of the United States for the District of Colorado. Charles J. Hughes, Jr., for appellant. C. S. Thomas, Wm. H. Bryant, and H. H. Lee, for appellees. No opinion. Dismissed, with costs, pursuant to the twenty-third rule, for failure to print the record, on motion of counsel for appellees.

DAVIS v. CORNWALL. (Circuit Court of Appeals, Second Circuit. May 28, 1895.) No. 207. Appeal from the Circuit Court of the United States for the Southern District of New York. W. S. Logan, for appellant. A. B. Maltby, for appellee. No opinion. Judgment affirmed.

DAVIS v. WAKELEE. (Circuit Court of Appeals, Second Circuit. May 28, 1895.) No. 206. Appeal from the Circuit Court of the United States for the Southern District of New York. W. S. Logan, for appellant. A. B. Maltby, for appellee. No opinion. Judgment affirmed.

EAUCABERT v. APPLETON. (Circuit Court of Appeals, Second Circuit. November 8, 1895.) No. 479. Appeal from the Circuit Court of the United States for the Southern District of New York. Francis Forbes, for appellant. R. B. McMaster, for appellee. No opinion. Ordered dismissed, with costs.

EBNER v. JUNEAU MIN. & MANUF'G CO. et al. (Circuit Court of Appeals, Ninth Circuit. February 4, 1897.) No. 331. Appeal from the District Court of the United States for the District of Alaska. William Hoff Cook, for appellant. Lorenzo S. B. Sawyer, for appellees. No opinion. Appeal dismissed on motion of Lorenzo S. B. Sawyer.

ECLIPSE MANUF'G CO. v. STANDARD RADIATOR CO. (Circuit Court of Appeals, Second Circuit. December 18, 1895.) No. 520. Appeal from the Circuit Court of the United States for the Northern District of New York. Smith & Denison and Dyrenforth & Dyrenforth, for appellant. E. S. Jenney and George H. Lothrop, for appellee. No opinion. Decree affirmed, with costs, on opinion of court below. See 62 Fed. 465.

EDDY v. GLENN. (Circuit Court of Appeals, Second Circuit.) No. 317. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, Charles Marshall, and A. H. Masten, for appellee. No opinion. Decree affirmed, with costs, on opinion in *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

EDISON ELECTRIC LIGHT CO. v. STAFFORD et al. (Circuit Court of Appeals, Second Circuit. July 28, 1895.) No. 466. Appeal from the Circuit Court of the United States for the Southern District of New York. E. H. Lewis and Dyer & Seely, for appellant. Hobbs & Gifford, for appellees. Dismissed by consent.

EXCELSIOR PEBBLE PHOSPHATE CO. et al. v. BROWN et al. (Circuit Court of Appeals, Fourth Circuit. November 11, 1896.) No. 169. Appeal from the Circuit Court of the United States for the District of West Virginia. W. E. Chilton, for appellants. J. S. Sanderson, for appellees. No opinion. Cause dismissed, pursuant to twenty-third rule, for failure to file printed records.

FARMERS' LOAN & TRUST CO. et al. v. FARMERS' LOAN & TRUST CO. (BILL, Intervener). (Circuit Court of Appeals, Eighth Circuit. November 9, 1896.) No. 776. Appeal from the Circuit Court of the United States for the District of North Dakota. D. A. Lindsay and F. W. M. Cutcheon, for appellants. Samuel L. Glaspell, for Bill, intervener. Dismissed on motion of appellants.

FARMERS' LOAN & TRUST CO. et al. v. FARMERS' LOAN & TRUST CO. (COMASKY, Intervener). (Circuit Court of Appeals, Eighth Circuit. November 9, 1896.) No. 775. Appeal from the Circuit Court of the United States for the District of North Dakota. D. A. Lindsay and F. W. M. Cutcheon, for appellants. Taylor Crum, for Comasky, intervener. Dismissed on motion of appellants.

FARMERS' LOAN & TRUST CO. et al. v. FARMERS' LOAN & TRUST CO. (CONATY et al., Interveners). (Circuit Court of Appeals, Eighth Circuit. November 16, 1896.) No. 777. Appeal from the Circuit Court of the United States for the District of North Dakota. D. A. Lindsay and F. W. M. Cutcheon, for appellants. Samuel L. Glaspell, for Conaty and others, interveners. Dismissed on motion of appellants.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. et al. v. VIRGINIA & T. COAL & IRON CO. (Circuit Court of Appeals, Fourth Circuit. February 13, 1897.) No. 177. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. Wm. W. Old and Richard C. Dale, for appellants. Daniel Trigg, for appellee. No opinion. Cause settled and dismissed, pursuant to the twentieth rule.

FOPPES et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 2, 1895.) No. 680. Appeal from the Circuit Court of the United States for the Southern District of New York. Stanley, Clark & Smith, for appellants. Wallace Macfarlane, U. S. Atty. No opinion. Appeal dismissed.

FOPPES et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. May 27, 1896.) No. 725. Appeal from the Circuit Court of the United States for the Southern District of New York. Stanley, Clark & Smith, for appellants. Wallace Macfarlane, U. S. Atty. Dismissed on consent.

FOPPES et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 23, 1895.) No. 397. Appeal from the Circuit Court of the United States for the Southern District of New York. Edwin V. Smith, for appellants. Henry C. Platt, Asst. U. S. Atty. No opinion. Decree affirmed.

FOWLER MANUF'G CO. v. PIERPONT BOILER CO. (Circuit Court of Appeals, Sixth Circuit. July 8, 1896.) No. 436. Appeal from the Circuit Court of the United States for the Northern District of Ohio, Eastern Division. Lawrence Maxwell, Jr., and Ephraim Banning, for appellant. Thomas W. Bakewell, for appellee. No opinion. Judgment affirmed.

FRANKEL et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. March 9, 1896.) No. 588. Appeal from the Circuit Court of the United States for the Southern District of New York. Currie, Smith & Mackie, for appellants. Wallace Macfarlane, U. S. Atty. No opinion. Affirmed in open court.

GARNER v. SECOND NAT. BANK OF PROVIDENCE, R. I. (Circuit Court of Appeals, Second Circuit. March 2, 1896.) No. 681. In error to the Circuit Court of the United States for the Southern District of New York. Aleck Thain, for plaintiff in error. J. Langdon Ward, for defendant in error. No opinion. Dismissed, pursuant to the sixteenth rule.

THE GEORGE S. HOMER. HARRIS v. THE GEORGE S. HOMER et al. (Circuit Court of Appeals, Second Circuit. December 19, 1894.) No. 404. Appeal from the District Court of the United States for the Eastern District of New York. J. A. Hyland, for appellants. E. L. Owen, for appellee. No opinion. Affirmed in open court.

GOUGAR v. MORSE. (Circuit Court of Appeals, First Circuit. November 10, 1896.) No. 178. Error to the Circuit Court of the United States for the District of Massachusetts. Harvey N. Shepard, for plaintiff in error. Henry F. Bushnell, for defendant in error. No opinion. Dismissed for failure to print record.

GRAHAM v. MACDONELD. (Circuit Court of Appeals, Fifth Circuit. November 24, 1896.) No. 513. Error to the Circuit Court of the United States for the Western District of Texas. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. In this case a jury was waived by stipulation in writing. The record does not show that any exception was taken to

the trial judge's rulings, in the progress of the trial, on demurrers or exceptions to the pleadings or the admission or rejection of evidence. The finding of the judge was general, and to the effect that the court "is of opinion that plaintiff has proven no cause of action." The assignment of error is substantially that "the court erred in rendering judgment against plaintiff." It thus clearly appears that the record presents no matter which can be reviewed on writ of error. *City of Key West v. Baer*, 13 C. C. A. 572-577, 66 Fed. 440-445, and cases there cited. The judgment of the circuit court is therefore affirmed.

GRAVES v. STEWART et al. (Circuit Court of Appeals, Second Circuit. April 20, 1896.) No. 633. Error from the Circuit Court of the United States for the Northern District of New York. George L. Lewis, for plaintiff in error. John G. Milburn, for defendants in error. No opinion. Judgment of circuit court affirmed, with interest and costs.

HARVEY v. WINNEY. (Circuit Court of Appeals, Sixth Circuit. April 24, 1896.) No. 405. Appeal from the District Court of the United States for the Eastern District of Michigan. H. C. Wisner and Fred C. Harvey, for appellant. John C. Shaw, for appellee. No opinion. Judgment of district court affirmed.

HAYDEN v. BROWN. (Circuit Court of Appeals, Second Circuit. February 3, 1896.) No. 607. Appeal from the Circuit Court of the United States for the District of Vermont. W. L. Burnap and T. G. Strong, for appellant. George W. Ellis, for appellee. No opinion. Order entered on consent reversing judgment.

HOSTETTER CO. v. BECKER. (Circuit Court of Appeals, Second Circuit. January 13, 1897.) Appeal from the Circuit Court of the United States for the Southern District of New York. Charles Putzel, for appellant. Albert H. Clarke, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. Decree affirmed, with costs, on opinion of circuit court. See 73 Fed. 297.

HUBBARD v. TOD et al. (Circuit Court of Appeals, Eighth Circuit. April 13, 1896.) No. 641. Appeal from the Circuit Court of the United States for the Northern District of Iowa. John C. Coombs and Henry J. Taylor, for appellant. Francis B. Daniels, D. B. Henderson, Louis G. Hurd, George W. Wickersham, and George W. Kiesel, for appellees. No opinion. Affirmed by a divided court, and costs equally divided.

JOHNSON v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 19, 1895.) No. 532. Appeal from the Circuit Court of the United States for the Southern District of New York. Stanley, Clarke & Smith, for appellant. Wallace Macfarlane, U. S. Atty. No opinion. Affirmed on opinion of court below. See 66 Fed. 725.

JONES v. MEEHAN et al. (Circuit Court of Appeals, Eighth Circuit. May 28, 1896.) No. 771. Appeal from the Circuit Court of the United States for the District of Minnesota. James A. Kellogg, for appellant. Orville Rinehart, C. D. O'Brien, and Thomas D. O'Brien, for appellees. No opinion. Dismissed, with costs, for want of jurisdiction, on motion of appellees.

KELLEY-GOODFELLOW SHOE CO. et al. v. SCALES et al. (Circuit Court of Appeals, Eighth Circuit. December 8, 1896.) No. 640. Error to the United States Court for the Northern District of Indian Territory. Harrison O. Shepard and Joseph M. Hill, for plaintiffs in error. William T. Hutchings, for defendants in error. No opinion. Dismissed, with costs, pursuant to the twenty-second rule, for want of prosecution.

KING et al. v. LEWIS. (Circuit Court of Appeals, Sixth Circuit. October 26, 1896.) No. 444. Appeal from the Circuit Court of the United States for the Northern District of Ohio, Eastern Division. J. W. Jenner, for plaintiffs. Darius Dirlam, for defendant. No opinion. Judgment affirmed.

KINGMAN et al. v. WESTERN MANUF'G CO.¹ (Circuit Court of Appeals, Eighth Circuit. May 21, 1896.) No. 763. Error to the Circuit Court of the United States for the District of Nebraska. James H. McIntosh, for plaintiffs in error. G. M. Lambertson and Walter J. Lamb, for defendant in error. No opinion. Dismissed, with costs, for want of jurisdiction, on motion of defendant in error.

KINNEY et al. v. CUNNINGHAM et al. (Circuit Court of Appeals, Eighth Circuit. December 18, 1896.) No. 798. Appeal from the Circuit Court of the United States for the District of Nebraska. Carroll S. Montgomery and Matthew A. Hall, for appellants. D. W. Merrow, for appellees. Dismissed, at costs of appellants, without attorney fee in the court of appeals or the circuit court, pursuant to stipulation of the parties.

LIVE STOCK CAR-EQUIPMENT CO. v. MAY et al. (Circuit Court of Appeals, Second Circuit. December 18, 1895.) No. 478. Appeal from the Circuit Court of the United States for the Eastern District of New York. W. E. Simmonds and Chas. M. Stafford, for appellant. Ira Leo Bamberger and Cowan, Dickerson & Brown, for appellees. No opinion. Decree affirmed, with costs, on opinion of court below.

MAGNA CHARTA SILVER MINING & TUNNEL CO. et al. v. HOLE. (Circuit Court of Appeals, Eighth Circuit. June 29, 1896.) No. 822. Appeal from the Circuit Court of the United States for the District of Colorado. E. Sowers, for appellee. No opinion. Docketed and dismissed, with costs, pursuant to the sixteenth rule, on motion of appellee.

* Rehearing denied September 21, 1896.

THE MARACAIBO.

HEALEY v. THE MARACAIBO et al.

(Circuit Court of Appeals, Second Circuit.)

SEAMEN'S WAGES—SET-OFF—SETTLEMENT.

This is an appeal from a decree of the district court, Southern district of New York, in favor of libellant, for seaman's wages and penalty on discharge in a foreign port, with interest and costs. See 79 Fed. 809.

Joseph Kling, for appellants.

James Forester, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Upon the record as it stands we are inclined to agree with the district judge as to what took place before the consul, whose deposition seems not to have been taken. The facts being thus found against the claimants, it is unnecessary to discuss any of the propositions of law advanced upon the argument. The decree of the district court is affirmed, with interest and costs.

THE MARY L. PETERS. HOWELL v. THE MARY L. PETERS et al. (Circuit Court of Appeals, Second Circuit. April 20, 1896.) No. 634. Appeal from the District Court of the United States for the Southern District of New York. Goodrich, Deady & Goodrich, for appellant. George A. Black, for appellees. No opinion. Decree of district court affirmed, with interest and costs. See 68 Fed. 919.

MAYER v. GLENN. (Circuit Court of Appeals, Second Circuit.) No. 321. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, Charles Marshall, and A. H. Masten, for appellee. No opinion. Decree affirmed, with costs, on opinion in *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

MILLER v. CHOCTAW, O. & G. RY. CO. (Circuit Court of Appeals, Eighth Circuit. September 15, 1896.) No. 654. No opinion. Judgment of dismissal vacated and set aside, and cause restored to the docket.

MISSOURI PAC. RY. CO. v. SIDELL. (Circuit Court of Appeals, Second Circuit. February 20, 1896.) No. 636. Appeal from the Circuit Court of the United States for the Southern District of New York. W. S. Pierce, for appellant. C. D. Ingersoll, for appellee. No opinion. Affirmed in open court.

MOORE v. CLARK et al. (Circuit Court of Appeals, Second Circuit. January 23, 1896.) No. 564. Appeal from the Circuit Court of the United States for the Southern District of New York. Frank J. Mather, for appellants. W. P. Preble, Jr., for appellee. No opinion. Appeal dismissed.

MORRIS et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 23, 1896.) No. 536. Appeal from the Circuit Court of the United States for the Southern District of New York. Comstock & Brown, for appellants. Wallace Macfarlane, U. S. Atty. No opinion. Affirmed in open court.

MULCAHEY v. LAKE ERIE & W. RY. CO. (Circuit Court of Appeals, Sixth Circuit. December 9, 1896.) No. 384. Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio. Orville S. Brumback and Chas. A. Thatcher, for plaintiff in error. J. B. Cockrum, for defendant in error. No opinion. Case reversed and remanded, with directions to remand to state court. See 69 Fed. 172.

MUNROE et al. v. PHILADELPHIA WAREHOUSE CO.

(Circuit Court of Appeals, Third Circuit. January 15, 1897.)

No. 29.

ASSIGNABILITY OF BILL OF LADING.

Error to the Circuit Court of the United States for Eastern District of Pennsylvania.

For opinion, see 75 Fed. 545.

A. H. Wintersteen, for plaintiff in error.

Joseph de F. Junkin, for defendant in error.

It is hereby agreed that the writ of error in the above-entitled cause shall be dismissed, and the clerk of the court is directed to dismiss the same. The costs and fees of the clerk are to be paid by the plaintiff. All other costs and fees due to either of the parties are hereby waived and remitted.

Ex parte NATIONAL MASONIC ACC. ASS'N OF DES MOINES, IOWA. SPARKS v. NATIONAL MASONIC ACC. ASS'N OF DES MOINES, IOWA. (Circuit Court of Appeals, Eighth Circuit. December 8, 1896.) No. 6, original. Petition in the alternative for writ of mandamus to compel the allowance of a writ of error and supersedeas by the circuit court of the United States for the Southern district of Iowa, or for the allowance of a writ of error and supersedeas by the circuit court of appeals. Clark Varnum, for petitioner. No opinion. Denied.

NEWKIRK v. MCCOOK et al. (Circuit Court of Appeals, Eighth Circuit. December 21, 1896.) No. 807. Error to the Circuit Court of the United States, for the District of Kansas. John W. Deford, for plaintiff in error. A. A. Hurd and W. Littlefield, for defendants in error. No opinion. Affirmed, with costs.

THE NORMA. SULLIVAN v. THE NORMA et al. (Circuit Court of Appeals, Second Circuit. April 22, 1896.) No. 652. Appeal from the District Court of the United States for the Southern District of New York. H. W. Bates, for appellant. Wing, Putnam & Burlingham, for appellees. No opinion. Affirmed in open court.

NORTHERN PAC. RY. CO. v. DE LACEY. (Circuit Court of Appeals, Ninth Circuit. February 8, 1897.) No. 339. Error to the Circuit Court of the United States for the District of Washington, Western Division. D. J. Crowley, B. S. Grosscup, and F. M. Dudley, for plaintiff in error. A. W. Ballard, for defendant in error. No opinion. Motion to dismiss denied, and judgment of the circuit court affirmed, with costs.

OLSON v. SNYDER. (Circuit Court of Appeals, Eighth Circuit. December 8, 1896.) No. 735. Appeal from the Circuit Court of the United States for the District of Nebraska. Richard H. Manning, for appellant. John G. Manahan, for appellee. No opinion. Dismissed, with costs, pursuant to twenty-third rule, for failure to print record, on motion of counsel for appellee.

OREGON SHORT LINE & U. N. RY. CO. v. AMERICAN LOAN & TRUST CO. (Circuit Court of Appeals, Ninth Circuit. November 16, 1896.) No. 239. Appeal from the Circuit Court of the United States for the District of Oregon. R. S. Hall and Zera Snow, for appellant. J. N. Dolph, for appellee. Dismissed, pursuant to stipulation.

OREGON SHORT LINE & U. N. RY. CO. v. AMERICAN LOAN & TRUST CO. (Circuit Court of Appeals, Ninth Circuit. November 16, 1896.) No. 282. Appeal from the Circuit Court of the United States for the District of Oregon. R. S. Hall and Zera Snow, for appellant. Dismissed, pursuant to stipulation.

OREGON SHORT LINE & U. N. RY. CO. v. AMERICAN LOAN & TRUST CO. (Circuit Court of Appeals, Ninth Circuit. November 16, 1896.) No. 286. Appeal from the Circuit Court of the United States for the District of Oregon. R. S. Hall and Zera Snow, for appellant. Sanderson Reed and H. W. Gogue, for appellee. Dismissed, pursuant to stipulation.

OREGON SHORT LINE & U. N. RY. CO. v. AMERICAN LOAN & TRUST CO. (Circuit Court of Appeals, Eighth Circuit. November 23, 1896.) No. 878. Appeal from the Circuit Court of the United States for the District of Wyoming. R. S. Hall, for appellant. Zera Snow, for appellee. Dismissed, pursuant to stipulation of the parties.

PHILADELPHIA TRACTION CO. v. PALMER. (Circuit Court of Appeals, Third Circuit. February 22, 1897.) In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. J. Howard Gendell, for plaintiff in error. Ellery P. Ingham, for defendant in error. Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

PER CURIAM. The judges by whom this case was heard, including the late Judge WALES, had, some time previous to his death, all agreed upon the disposition to be made of it. The survivors of those who then constituted

the court do not deem it necessary, under the circumstances, to do more than announce the judgment which had thus been unanimously determined upon. In accordance therewith the judgment of the court below is affirmed.

POMEROY v. GLENN. (Circuit Court of Appeals, Second Circuit.) No. 319. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, Charles Marshall, and A. H. Masten, for appellee. No opinion. Decree affirmed, with costs, on opinion in *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

POPE MANUF'G CO. v. KIRKPATRICK. (Circuit Court of Appeals, Second Circuit. December 2, 1895.) In Error to the Circuit Court of the United States for the District of Connecticut. W. A. Redding, for plaintiff in error. Curr & Curtis, for defendant in error. No opinion. Dismissed, pursuant to the twentieth rule.

RANDALL v. GLENN. (Circuit Court of Appeals, Second Circuit.) No. 320. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, Charles Marshall, and A. H. Masten, for appellee. No opinion. Decree affirmed, with costs, on opinion in *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

In re RICKS. (Circuit Court of Appeals, Fifth Circuit. April 28, 1896.) No. 495. Petition for mandamus requiring the judges of the circuit court for the Eastern district of Louisiana to grant an appeal in the cause of Charles Hoppe & Son Malting Co. against the New Orleans Brewing Association. W. D. Hart, for petitioner. No opinion. Petition refused.

ROTH v. AMERICAN LOAN & TRUST CO. et al. (Circuit Court of Appeals, Ninth Circuit. February 1, 1897.) No. 351. Appeal from the Circuit Court of the United States for the District of Washington, Eastern Division. Wallace McCamant, for appellees. No opinion. Appeal dismissed, with costs, on motion of counsel for appellees.

RUSS v. TELFENER.¹ (Circuit Court of Appeals, Fifth Circuit. November 24, 1896.) No. 537. In Error to the Circuit Court of the United States for the Western District of Texas. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. When this case was last before the supreme court of the United States (16 Sup. Ct. 695), the contract upon which the plaintiff in error sues was fully examined, considered, and construed, leaving, in our opinion, no ground upon which Russ, plaintiff below, plaintiff in error here, can maintain a suit thereon. The judgment of the circuit court was to this effect, and is affirmed.

¹ Rehearing denied, January 26, 1897.

THE SAGINAW VALLEY. CALVIN et al v. ESCANABA TOWING & WRECKING CO. (Circuit Court of Appeals, Sixth Circuit. October 14, 1896.) No. 423. Appeal from the District Court of the United States for the Western District of Michigan, Northern Division. F. Howard Mason, for appellants. John C. Richberg, for appellee. No opinion. Judgment affirmed.

THE SEGURANCA. BROWN et al. v. PROCEEDS OF THE SEGURANCA. (Circuit Court of Appeals, Second Circuit. May 12, 1896.) No. 709. Appeal from the District Court of the United States for the Southern District of New York. Cary & Whibridge, for appellants. Carter & Ledyard, for appellee. Discontinued by consent.

SEVERS et al. v. BULL. (Circuit Court of Appeals, Eighth Circuit. June 6, 1896.) No. 812. In Error to the United States Court of Appeals of Indian Territory. P. L. Soper and Thomas A. Sanson, Jr., for defendant in error. No opinion. Docketed and dismissed, pursuant to sixteenth rule, on motion of defendant in error.

SEVERS et al. v. NORTHERN TRUST CO. (Circuit Court of Appeals, Eighth Circuit. June 6, 1896.) No. 811. In Error to the United States Court of Appeals of Indian Territory. P. L. Soper and Thomas A. Sanson, Jr., for defendant in error. No opinion. Docketed and dismissed, pursuant to sixteenth rule, on motion of defendant in error.

THE SINTRAN. MOSLE v. THE SINTRAN et al. (Circuit Court of Appeals, Second Circuit. February 7, 1896.) No. 574. Appeal from the District Court of the United States for the Southern District of New York. George A. Black, for appellant. Wing, Shoudy & Putnam, for appellees. No opinion. Affirmed in open court.

SIOUX CITY, O'N. & W. R. CO. v. MANHATTAN TRUST CO. (Circuit Court of Appeals, Eighth Circuit. June 22, 1896.) No. 505. Appeal from the Circuit Court of the United States for the District of Nebraska. Henry J. Taylor, for appellant. John L. Webster, for appellee. No opinion. Decree of affirmance vacated, and case restored to docket. Affirmed by a divided court, and costs equally divided.

SIOUX CITY, O'N. & W. R. CO. et al. v. MANHATTAN TRUST CO. (Circuit Court of Appeals, Eighth Circuit. June 22, 1896.) No. 661. Appeal from the Circuit Court of the United States for the District of Nebraska. John C. Coombs and Henry J. Taylor, for appellants. John L. Webster, for appellee. No opinion. Decree of affirmance vacated, and case restored to docket. Affirmed by divided court, and costs equally divided.

SPENCER et al. v. USELTON. (Circuit Court of Appeals, Fifth Circuit. May 5, 1896.) No. 463. Appeal from the Circuit Court of the United States for the Northern District of Georgia. Dorsey, Bruce & Howell, for appellants. Reuben R. Arnold, for appellee. Cause dismissed on agreement of counsel.

STABERG v. OLIVER MIN. CO. (Circuit Court of Appeals, Eighth Circuit. December 23, 1896.) No. 815. In Error to the Circuit Court of the United States for the District of Minnesota. John Rustgard, for plaintiff in error. William W. Billson, Chester A. Congdon, and Daniel A. Dickinson, for defendant in error. No opinion. Affirmed, with costs.

STAHL v. WILLIAMS. (Circuit Court of Appeals, Second Circuit. December 3, 1895.) No. 567. Appeal from the Circuit Court of the United States for the District of Connecticut. Mitchell, Hungerford & Bartlett, for appellant. Newell & Jennings, for appellee. Dismissed by consent, without costs.

STEINER et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 23, 1895.) No. 398. Appeal from the Circuit Court of the United States for the Southern District of New York. E. B. Smith, for appellants. Henry C. Platt, Asst. U. S. Atty. No opinion. Decree affirmed in open court.

TOD et al. v. HUBBARD. (Circuit Court of Appeals, Eighth Circuit. April 13, 1896.) No. 704. Appeal from the Circuit Court of the United States for the Northern District of Iowa. George W. Wickersham, Daniel B. Henderson, Louis G. Hurd, Francis B. Daniels, and George W. Kiesel, for appellants. John C. Coombs and Henry J. Taylor, for appellee. No opinion. Affirmed by a divided court, and costs equally divided.

TOWN OF CRIPPLE CREEK et al. v. MICHIGAN PIPE CO. (Circuit Court of Appeals, Eighth Circuit. January 4, 1897.) No. 890. Appeal from the Circuit Court of the United States for the District of Colorado. Charles M. Brown, for appellee. No opinion. Docketed and dismissed, with costs, pursuant to the sixteenth rule, on motion of counsel for appellee.

TOWN OF PHELPS v. BRIGGS. (Circuit Court of Appeals, Second Circuit. July 29, 1896.) No. 748. In Error to the Circuit Court of the United States for the Northern District of New York. S. D. Bentley, for plaintiff in error. No opinion. Dismissed, pursuant to the sixteenth rule.

UNION SWITCH & SIGNAL CO. et al. v. PHILADELPHIA & R. R. CO. et al. SAME v. ATLANTIC CITY R. CO. et al. (Circuit Court of Appeals, Third Circuit. January 27, 1897.) Nos. 37, 38. Appeals from the Circuit Court of the United States for the Eastern District of Pennsylvania. George H. Christy, for appellants. Wm. Houston Kenyon, for appellees. Dismissed per stipulation of parties. See 75 Fed. 1004.

UNITED STATES v. BURR et al. (Circuit Court of Appeals, Second Circuit. November 12, 1895.) No. 490. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Currie, Smith & Mackie, for appellees. No opinion. Reversed. See 66 Fed. 742.

UNITED STATES v. ELEVEN HUNDRED HEAD OF CATTLE. (Circuit Court of Appeals, Fifth Circuit. January 6, 1896.) Error to the District Court of the United States for the Western District of Texas. F. B. Earhart, for the United States. A. J. Evans, for defendant in error. Dismissed on motion of plaintiff in error.

UNITED STATES v. GODWIN et al. (Circuit Court of Appeals, Second Circuit. December 19, 1895.) No. 551. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. S. G. Clarke, for appellees. No opinion. Affirmed in open court.

UNITED STATES v. GODWIN et al. (Circuit Court of Appeals, Second Circuit. December 20, 1895.) No. 558. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. S. G. Clarke, for appellees. No opinion. Affirmed in open court.

UNITED STATES v. HILL. (Circuit Court of Appeals, Eighth Circuit. December 7, 1896.) No. 751. Error to the Circuit Court of the United States for the District of Colorado. Henry V. Johnson, for plaintiff in error. H. W. Hobson, for defendant in error. Dismissed pursuant to stipulation of the parties, without costs to either party.

UNITED STATES v. HUNTINGTON. (Circuit Court of Appeals, Second Circuit. December 30, 1892.) No. 115. Appeal from the Circuit Court of the United States for the Southern District of New York. Application of collector of customs for review of decision of board of appraisers as to rate of duty on 17 packages of theatrical effects. Edward Mitchell, U. S. Atty. Dittenhoefer & Gerber, for appellee. No opinion. Order affirmed.

UNITED STATES v. LANDNER. (Circuit Court of Appeals, Second Circuit. December 13, 1894.) No. 384. Appeal from the Circuit Court of the United States for the Southern District of New York. Henry C. Platt, Asst. U. S. Atty. S. G. Clarke, for appellee. No opinion. Decree affirmed in open court.

UNITED STATES v. LAWS. (Circuit Court of Appeals, Sixth Circuit. June 22, 1896.) No. 10. In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio. John W. Herron and Harlan Cleveland, for the United States. Lawrence Maxwell, Jr., for defendant in error. No opinion. Judgment of circuit court affirmed.

UNITED STATES v. McCANN. (Circuit Court of Appeals, Second Circuit. December 13, 1895.) No. 525. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Hartley & Coleman, for appellee. Reversed on stipulation that this cause abide event of U. S. v. Burr, 79 Fed. 1004.

UNITED STATES v. NORDLINGER. (Circuit Court of Appeals, Second Circuit. October 21, 1895.) No. 580. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Comstock & Brown, for appellee. No opinion. Appeal dismissed.

UNITED STATES v. PASSAVANT et al. (Circuit Court of Appeals, Second Circuit. December 11, 1895.) No. 545. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. S. G. Clarke, for appellees. Reversed on stipulation that this cause abide event of U. S. v. Burr, 79 Fed. 1004.

UNITED STATES v. VAUTINE et al. (Circuit Court of Appeals, Second Circuit. December 17, 1896.) No. 524. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. W. B. Coughtry, for appellees. No opinion. Affirmed in open court.

UNITED STATES v. ZEIMER et al. (Circuit Court of Appeals, Second Circuit. January 11, 1896.) No. 565. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Comstock & Brown, for appellees. Dismissed on consent.

THE VALENCIA et al. v. ZEIGLER et al. (Circuit Court of Appeals, Second Circuit.) Appeal from the District Court of the United States. F. R. Coudert and Jos. Kling, for appellants. W. W. Goodrich and J. A. Deady, for appellees. Certified to supreme court. See 17 Sup. Ct. 323.

WAPLES-PLATTER CO. et al. v. TURNER. (Circuit Court of Appeals, Eighth Circuit. September 15, 1896.) No. 643. No opinion. Judgment of dismissal vacated and set aside, and cause restored to the docket.

WEATHERBY v. ST. LOUIS & S. F. RY. CO. (Circuit Court of Appeals, Eighth Circuit. May 23, 1896.) No. 805. Error to the Circuit Court of the United States for the District of Kansas. L. F. Parker, for defendant in error. No opinion. Docketed and dismissed, pursuant to sixteenth rule, on motion of counsel for defendant in error.

WILLIAMS et al. v. AMERICAN NAT. BANK OF KANSAS CITY, MO. (Circuit Court of Appeals, Eighth Circuit. May 25, 1896.) No. 726. Error to the Circuit Court of the United States for the Western District of Missouri. John R. Walker, James R. Vaughan, and W. M. Williams, for plaintiffs in error. O. H. Dean, R. L. Goode, and J. C. Cravens, for defendant in error. Dismissed, without costs to either party in this court, per stipulation of counsel.

WILLIAMS v. GLENN. (Circuit Court of Appeals, Second Circuit.) No. 322. Appeal from the Circuit Court of the United States for the Southern District of New York. George Zabriskie, for appellant. B. N. Harrison, Charles Marshall, and A. H. Masten, for appellee. No opinion. Decree affirmed, with costs, on opinion in *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49.

WOERISHOEFFER et al. v. SMITH et al. (Circuit Court of Appeals, Fifth Circuit. January 6, 1897.) No. 514. Appeal from the Circuit Court of the United States for the Eastern District of Texas. S. R. Jones, for appellants. J. V. Lea, for appellees. Dismissed on stipulation.

WOODFIN v. HAMPTON & O. P. RY. CO. et al. (Circuit Court of Appeals, Fourth Circuit. February 8, 1897.) No. 207. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. Robert M. Hughes, for appellant. Arthur S. Segar and Thomas Tabb, for appellees. No opinion. Upon suggestion of the appellant that the case involves the question whether an act of the legislature of Virginia is in conflict with the constitution of the United States, and that this court has no jurisdiction, appeal is dismissed, without prejudice.

ZIMMERMAN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 11, 1896.) No. 679. Appeal from the Circuit Court of the United States for the Southern District of New York. Hess, Townsend & McClelland, for appellant. Wallace Macfarlane, U. S. Atty. Dismissed on consent.

CARTER-CRUME CO. v. JONAP et al.

(Circuit Court, S. D. New York. May 12, 1897.)

PATENTS—INFRINGEMENT—GOOD FAITH.

In Equity. Bill brought by Carter-Crume Company against Samuel R. Jonap and Arthur B. Levy for infringement of reissue letters patent No. 10,359, issued July 24, 1883, for improvement in manifold copying books. The defenses were (1) noninfringement; (2) good faith of the defendants. On motion for preliminary injunction. Granted.

Charles H. Duell, for complainant.

Greenhall & Levy, for defendants.

LACOMBE, Circuit Judge. The defendants seem to have been very careful in their inquiries as to the right to use the infringing books, and to have acted in entire good faith. It is unfortunate that they have been deceived by the representations of the person from whom they bought; but that is no reason for refusing to complainant the relief to which it is entitled. An order for preliminary injunction may be taken; injunction not to issue for 10 days, so as to give defendants opportunity to provide themselves with other books.

END OF CASES IN VOL. 79.